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"Active Efforts" for Equal Education: Reforming Title VI to Further the Purposes of Title VI

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by

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INTRODUCTION

Title VI of the Civil Rights Act of 1964 made important first steps towards addressing and eliminating discrimination in public schools and programs. While a noble, successful endeavor in 1964, the current language and processes of the statute lack important, proactive elements and create conflicts of interest by requiring districts—the entity under investigation—to self-report. Now, more than fifty years later, it is time for a reformation of Title VI. Title VI must be reformed to require active efforts to reduce discriminatory disparate impacts and to further the goals of Title VI and the Civil Rights Act. Modern applications of Title VI undermine school districts and students and fail to effectively end discrimination in public schools because of the emphasis on self-reporting, the sole focus on reactive rather than proactive ways to address discrimination, and the absence of requirements to reduce disparate impacts.

The purpose of this paper is to propose new Title VI language and enforcement practices in order to refocus Title VI on its intended goal of ensuring that public funds do not perpetuate discrimination.[1] To do this, the Title VI focus must shift from punishing school districts to assisting districts, parents, teachers, and community members in collaborating to achieve the end goal of equality in education. This shift is a two-fold process that may be accomplished through new Title VI language requiring active efforts to combat discrimination and with an additional level of district cohort "peer" review in the reporting process.[2]

Section I introduces the proposed language to update Title VI. However, a full discussion of the reasons and implementation of the new requirements occurs later in the paper.[3] Section II provides an overview of Title VI including why Title VI was so important at the time it was

[1] *See Overview of Title VI of the Civil Rights Act of 1964*, DEP'T. OF JUST. (Jan. 22, 2016), http://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-2000d-et-seq [hereinafter *Overview of Title VI*].
[2] *See* discussion *infra* Section IV.
[3] *See* discussion *infra* Section IV(A).

passed and what Title VI looks like today. In order to highlight some of the issues with the current implementation of Title VI, Section III lays out the Title VI process and details how Title VI, as it is currently, fails to fulfill the statute's purposes. Section IV returns to the proposed language and details the reasons for applying the active efforts requirement from the Indian Child Welfare Act (ICWA) to Title VI. Section IV also considers some of the practical aspects of implementing and enforcing the proposed Title VI language.

I. PROPOSED STATUTE UPDATES

"Though we have come far, the unfortunate reality is that discrimination remains prevalent."
Assistant Secretary Catherine E. Lhamon.[4]

In order to provide a groundwork for the rest of the paper, it is valuable to introduce the suggested language here. Title VI (with the proposed new language in italics) would read:

> No 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.
>
> *School districts and other educational programs receiving Federal financial assistance shall make active efforts to reduce discriminatory disparate impacts linked to race, color, or national origin. Active efforts shall further the goal of Title VI: to ensure federal funds are not spent in any fashion which encourages, entrenches, subsidizes or results in race, color, or national origin discrimination.*[5]

Section IV(A) discusses the proposed changes in more detail. Section IV(A)(1) includes a more thorough discussion of active efforts through the lens of ICWA. Section IV(B) provides some practical suggestions for how active efforts might best be employed through district cohort requirements. The general motivation behind all of these suggested changes is to reduce the discriminatory disparate impact of current educational practices as seen through the 2014 OCR

[4] PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 4 (Apr. 2015), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf [hereinafter 2014 OCR REPORT].

[5] The specific goal of Title VI, that federal funds are not "spent in any fashion which encourages, entrenches, subsidizes or results in" race, color or national origin discrimination comes from a quote by President John F. Kennedy when he was promoting the passage of the Civil Rights Act. *Overview of Title VI*, *supra* note 1.

Report and to further the initial goals of Title VI. Rather than conditioning federal funding solely on whether school districts *do not intentionally* discriminate, federal funding should be based on districts' active efforts to incorporate different voices into the curriculum and to reduce discrimination and its effects in the classroom.

II. TITLE VI OVERVIEW

"[T]he goal of antidiscrimination law is to reduce racial inequity, segregation, or barriers."
Derek W. Black[6]

Before delving into an analysis of the new language, the meaning of "active efforts," and the implications of a cohort requirement, the topic first requires a general groundwork of Title VI: its introduction, goals, and why its current operation is problematic.

Title VI is one portion of the landmark Civil Rights Act of 1964.[7] Title VI states,

> No 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.[8]

In advocating for the passage of Title VI, President John F. Kennedy stated, "'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[9] This goal, to ensure "that the funds of the United States are not used to support racial discrimination,"[10] permeated the early enforcement of Title VI.

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[6] Derek W. Black, *Defining Discrimination: Intent, Impact, and the Future of Title VI of the Civil Rights Act of 1964 in* THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND 157 (Kristi L. Bowman ed., 2014).
[7] *See Overview of Title VI*, *supra* note 1.
[8] Title VI, 42 U.S.C. § 2000d, Pub. L. 88-352, § 601 (1964).
[9] *Overview of Title VI*, *supra* note 1.
[10] 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

A. Before Title VI

Before Title VI, the Supreme Court attempted educational equality through *Brown v. Board of Education* by declaring school segregation unconstitutional.[11] However, "nine years after *Brown* . . . 99% of the black students in the South were still in 100% black schools."[12] Despite the holding of *Brown v. Board of Education* "no significant school desegregation occurred prior to the Act. In fact, a mere 2% of African American children in the South attended schools with white majorities in 1964."[13] It was during this deadlock that President John F. Kennedy called for a major, reformative civil rights act in 1963.[14]

B. The Initial Introduction of Title VI: Goals and Impact

The Civil Rights Act was "designed to ban discrimination and equalize opportunity for African-American citizens."[15] Title VI, and its attachment of anti-discrimination conditions to federal funds, combined with the 1965 Elementary and Secondary Education Act (ESEA) proved particularly powerful.[16] Through the 1965 ESEA, "[m]any Southern school districts received a 20-25% supplement to their budget because ESEA was focused on high poverty schools."[17] However, the school districts' receipt of these necessary funds was "contingent on seriously starting to desegregate."[18]

[11] Black, *supra* note 6, at 143.
[12] Gary Orfield, *Education and Civil Rights: Lessons of Six Decades and Challenges of a Changed Society in* THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND 407 (Kristi L. Bowman ed., 2014).
[13] Black, *supra* note 6, at 143.
[14] *See* Orfield, *supra* note 12, at 407.
[15] Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and A New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1707 (2011) (internal citations omitted).
[16] *See* Orfield, *supra* note 12, at 407.
[17] *Id.*
[18] *Id.* at 408.

While the language of Title VI did not clearly distinguish between "intent- and effects-style discrimination,"[19] the Department of Education interpreted "discrimination" to "expressly prohibit[] not only intentional discrimination, but also use of the money in a way that had the *effect* of discriminating on the basis of race, color, or national origin."[20] Early applications of Title VI and 1965 ESEA funding were rigorous and powerful with serious follow-through. The Johnson Administration "established the school desegregation guidelines and when more than 100 districts in the South did not comply with the guidelines, the federal government cut off their funding."[21] The consequences did not end with the loss of federal funding. "When funding was lost because of lack of compliance, the Justice Department sued the school districts under the power granted to it via the Civil Rights Act—and it won all of these cases."[22] Throughout it all, the federal government gave schools extremely compelling reasons to comply and eliminate discrimination in public schools.

C. Alexander v. Sandoval

The effectiveness and power of Title VI was sharply curtailed in 2001 with the Supreme Court's holding in *Alexander v. Sandoval*.[23] In order for a claim to be successful, "[i]t is now clear from the Supreme Court's decision in *Alexander v. Sandoval* that a private right of action under Title VI must establish intentional discrimination."[24] The effects of *Sandoval* have been widely discussed by various academic articles,[25] and the Title VI language proposed here would

[19] Best, *supra* note 15, at 1707 (internal citations omitted).
[20] *Id.*
[21] Orfield, *supra* note 12, at 408.
[22] *Id.*
[23] *See* Alexander v. Sandoval, 532 U.S. 275 (2001).
[24] 1 Education Law § 5:4 (Mar. 2016) (internal citations omitted).
[25] *See, e.g.*, Sarah Albertson, *The Achievement Gap and Disparate Impact Discrimination in Washington Schools*, 36 SEATTLE U. L. REV. 1919, 1937-1940 (2013) (arguing that before *Sandoval* "the Court interpreted Title VI to proscribe disparate impact discrimination," and that the *Sandoval* decision "overturned thirty years of precedent"); Adele P. Kimmel et. al., *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FLA. B.J. 24 (Jan. 2002) (criticizing the *Sandoval* decision and stating "the U.S. Supreme Court significantly curtailed the

overturn *Sandoval* and reinstate a private right of action to enforce disparate action regulations. However, the purpose of this paper is not to further discuss why *Sandoval* should be overturned or the best way to overturn that case. We only address *Sandoval* as it is necessary to show a need for updated Title VI language to best meet the original goals of Title VI.

The Court's interpretation in *Alexander v. Sandoval* pointed out a hole in Title VI: the lack of statutory authority to enforce disparate impact regulations in a still flawed educational system. In *Alexander v. Sandoval*, the Supreme Court determined "that there was no private right of action to enforce disparate impact regulations promulgated under Title VI."[26] The Court held that Title VI "prohibits only intentional discrimination."[27] In short, while federal agencies could adopt regulations to prohibit disparate impact discrimination, "the Court held . . . that private parties may not sue to enforce these regulations."[28]

In effect, *Sandoval* means that "[e]xtreme racial imbalances in school and classroom assignments . . . continue[largely] unchallenged"[29] absent a showing of intentional discrimination. Despite rampant "racial disparities in discipline, special education, [and] student achievement, . . . litigants have almost stopped bringing litigation challenges."[30] "[P]resenting [implicit] bias in a way that meets the intentional discrimination standard—or convinces courts that the standard is met"[31] has proved unduly burdensome. *Sandoval* turned Title VI from a progressive statute to a lifeless puppet.

Ultimately, the Supreme Court's interpretation of Title VI demonstrates the need for language and practices that more clearly express the goals behind Title VI. Although the

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scope of one of our nation's most important civil rights laws and eliminated a long-standing weapon for battling discrimination").

[26] MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 449 (Mark Kerr et al. eds., 5th ed. 2012).

[27] Alexander v. Sandoval, 532 U.S. at 275.

[28] Kimmel, *supra* note 25, at 24 *referencing* Alexander v. Sandoval, 532 U.S. at 292-93.

[29] Black, *supra* note 6, at 144.

[30] *Id.*

[31] *Id.*

Supreme Court's interpretation of Title VI may have been a reasonable reading of the statute's plain language,[32] the Court's conclusion that Congress did not intend private rights of action to enforce disparate impact regulations[33] is incorrect. *Sandoval* undermines the goals of Title VI.

The proposed language is vital in order to address the current issues of discrimination in public education and further the initial goals of Title VI. The point of Title VI—as its early applications demonstrated—was to ensure "that public funds . . . not be spent in any fashion which encourages, entrenches, subsidizes or *results* in racial [color or national origin] discrimination."[34] The disparate impacts of the modern public education system in the United States do *result* in racial discrimination[35] and public funds are used to support these racially disparate outcomes. Title VI should be amended to allow a private right of action to enforce regulations aimed at curbing disparate impacts.

D. Title VI and Inequality in Education Today

Title VI and the changes it muscled has done more for educational equality than any other piece of legislation.[36] However, more than fifty years later, racial inequalities and the widespread consequences of these inequalities still run rampant in public education. In FY 2013-2014 alone, the Office for Civil Rights (OCR) received 186 Title VI complaints and conducted 22 compliance reviews.[37] During that year, Title VI complaints made up 14.5% of the total number of complaints and compliance reviews the OCR conducted across all U.S. states, districts, and territories.[38]

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[32] *See* Alexander v. Sandoval, 532 U.S. at 280-81 (holding "no party disagrees—that § 601 prohibits only intentional discrimination . . . . [T]he Court made clear under *Bakke* only intentional discrimination was forbidden by § 601").
[33] *Id.* at 276.
[34] *Overview of Title VI*, *supra* note 1 (emphasis added).
[35] *See* discussion *infra* Section II(D).
[36] *See generally* Black, *supra* note 6, at 143.
[37] *Appendix*, 2014 OCR REPORT, *supra* note 4, at 44.
[38] *Id.*

Title VI was enacted "to make sure that the funds of the United States are not used to support racial discrimination."[39] *Alexander v. Sandoval* made it impossible for individuals to enforce disparate impact regulations under Title VI.[40] Yet, the results of public education in the United States do indicate disparate impacts based on race, color, and national origin.[41] The Assistant Secretary for Civil Rights' 2014 report (2014 OCR Report or Report) highlighted some of the most egregious education disparities based on race, color, and national origin.[42]

The comprehensive 2014 OCR Report "released data from [the] first universal Civil Rights Data Collection since 2000."[43] The Report "cover[ed] approximately 97,000 public schools and about 49 million students nationwide."[44] Unfortunately, the Report revealed numerous "injustices . . . . [and] distressing facts . . . illustrat[ing] precisely why" Title VI and the OCR remain critical today.[45] The forty-eight page document details numerous areas of concern. Some important highlights from the Report include:

> Teacher Equity
> - "Black, Latino, and American Indian and Native Alaskan students attend schools with higher concentrations of first-year teachers at a higher rate (3% to 4%) than white students (1%)."[46]
> - "Nearly one in four districts with two or more high schools report a teacher salary gap of more than $5,000 or more between high schools with the highest and high schools with the lowest black and Latino student enrollments."[47]
> - "Nearly 7% of the nation's black students . . . attend schools where 80% or fewer teachers meet state certification and licensure requirements."[48]

[39] 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).
[40] *See* discussion *supra* Section II(C).
[41] *See generally*, 2014 OCR REPORT, *supra* note 4.
[42] *Id.*
[43] *Id.* at 4.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 17.
[47] *Id.*
[48] *Id.*

Discipline

- "Black children represent 18% of preschool enrollment, but 42% of preschool children suspended once."[49]
- "On average, 5% of white students are suspended, compared to 16% of black students."[50]
- American Indian and Native Alaskan students represent "less than 1% of the student population but 2% of out-of-school suspensions and 3% of expulsions."[51]
- "Although black students represent 16% of student enrollment, they represent 27% of students referred to law enforcement and 31% of students subject to a school-related arrest. In comparison, white students represent 51% of student enrollment but 41% of students referred to law enforcement."[52]

Access to Higher Level Courses

- "Black, Latino, American Indian, and Alaska Native students have . . . less access to high-level courses. A quarter of high schools with the highest percentage of black and Latino students do not offer Algebra II; a third of these schools do not offer chemistry."[53]
- 40% of black and Latino students are enrolled in schools that offer gifted and talented programs.[54] Of that 40%, black and Latino students only "represent 26% of the students enrolled in gifted and talented education programs."[55]
- On the other hand, 55% of white and Asian-American students are enrolled in schools that offer gifted and talented programs.[56] From that 55%, "[w]hite and Asian-American students make up 70% of the students enrolled in gifted and talented education programs."[57]

These statistics led the Huffington Post to conclude that "American schools are still racist."[58] The ACLU responded that "Black students are punished more harshly and more frequently than white students for the same offenses."[59] Secretary of Education Arne Duncan in a U.S. Department of Education news release entitled *Expansive Survey of America's Public*

[49] *Id.* at 15.
[50] *Id.* at 14.
[51] *Id.*
[52] *Id.* at 15.
[53] *Id.* at 16.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Joy Resmovits, *American Schools Are STILL Racist, Government Report Finds*, THE HUFFINGTON POST (Mar. 21, 2014, 12:01 AM), http://www.huffingtonpost.com/2014/03/21/schools-discrimination_n_5002954.html. *See also* Joy Resmovits, *Yes, Schools Do Discriminate Against Students of Color—Reports*, THE HUFFINGTON POST (Mar. 13, 2014, 6:09 AM), http://www.huffingtonpost.com/2014/03/13/school-discipline-race_n_4952322.html.
[59] Deborah J. Vagins, *Is Race Discrimination in School Discipline a Real Problem?*, ACLU (Jan. 8, 2014, 4:04 PM), https://www.aclu.org/blog/race-discrimination-school-discipline-real-problem.

Schools Reveals Troubling Racial Disparities stated, "it is clear that the United States has a great distance to go to meet our goal of providing opportunities for every student to succeed."[60] Ultimately, the overall take away from the Report is, "it [is] a serious rights problem when under-achieving students mirror structural inequalities."[61]

III. THE TITLE VI PROCESS AND ITS IMPACTS

"'Every data point represents a life impacted and a future potentially diverted or derailed.'"
Former Attorney General Eric Holder.[62]

In order for an entity to be subject to Title VI, it must be the recipient of federal funds and must be on notice that such acceptance "exposes itself to liability."[63] "[A] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract."[64] Public school districts unquestionably fall into this category. Once a district has received federal funding, it is subject to Title VI.

When there is an allegation of Title VI violations, the Education division of the OCR handles the matter. However, due to the overwhelming number of allegations,[65] the OCR often delegates the reporting process to the districts themselves.[66] The OCR website explains,

> OCR is unable to investigate and review the policies and practices of all institutions receiving ED financial assistance. Therefore, through a program of technical assistance, OCR provides guidance and support to recipient institutions

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[60] *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEP'T. OF ED. (Mar. 21, 2014), http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities.

[61] Ann Quennerstedt, *The Political Construction of Children's Rights in Education – A Comparative Analysis of Sweden and New Zealand*, 2 EDUC. INQUIRY 453, 460 (2011).

[62] *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, *supra* note 60.

[63] Barnes v. Gorman, 536 U.S. 181, 187 (2002).

[64] *Id.*

[65] The 2014 OCR Report states, "In FY 2013, OCR received 9,950 complaints, initiated 30 compliance reviews and directed inquiries, and resolved 10,128 cases overall. In FY 2014, OCR received a record-high 9,989 complaints, initiated 38 compliance reviews and directed inquiries, and resolved 9,407 cases total." 2014 OCR REPORT, *supra* note 4, at 5. It is important to note that these numbers encompass all OCR complaints and not just Title VI complaints.

[66] *Education and Title VI*, U.S. DEP'T. OF ED. (Oct. 14, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html.

> to assist them in voluntarily complying with the law. OCR also informs beneficiaries, such as students and applicants for admission to academic programs, of their rights under Title VI.[67]

Such a process of self-reporting begs the question of how the very district under review can provide a fair and unbiased report of its own practices. Title VI reforms must include administrative changes aimed at reducing the implicit bias in self-reporting without shifting a greater burden to the OCR or individuals.[68]

A. Administrative Process for Allegations of Discrimination

The following is a brief overview of the process when an individual files a Title VI complaint. The main point of this section is to illustrate the current process and demonstrate the current harms and conflicts of district self-reporting.

1. Filing a Claim

To file a Title VI complaint and begin the arduous process, complainants must follow the requirements of 34 C.F.R. § 100.7:

> Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.[69]

For purposes of Title VI, a complaint may be filed by a victim or by a person or organization "on behalf of another person or group"[70] or by "[a]nyone who believes that an education institution that receives federal financial aid has discriminated against someone on the basis of race, color, [or] national origin."[71]

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[67] *Id.*
[68] The suggestion here is to add a mid, peer level of review through district cohorts. This idea will be discussed in greater detail later in the paper. *See* discussion *infra* Sections III(A)(3), IV(B).
[69] 34 C.F.R. § 100.7.
[70] *Education and Title VI*, *supra* note 66.
[71] *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP'T. OF ED. (Oct. 16, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt [hereinafter *How to File a Complaint*].

The OCR provides instructions on how to file a discrimination complaint including what must be filed and how the materials should be presented.[72] The filer must send the complaint "to the OCR regional office that serves the state in which the alleged discrimination occurred" within the 180 days required by § 100.7.[73] These letters filed with the regional OCR office should include the following information:

> [W]ho was discriminated against; in what way; by whom or by what institution or agency; when the discrimination took place; who was harmed; who can be contacted for further information; the name, address and telephone number of the complainat(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s).[74]

Complaints can be filed by mail, email, or online.[75]

2. Office for Civil Rights: Evaluating Compliance

After receiving notice of a Title VI violation report, 34 C.F.R. § 100.7 outlines the requirements for an appropriate investigation into the matter. The OCR regional office is required to make a prompt investigation and include "a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part."[76] The *Title VI Legal Manual*,[77] published by the Civil Rights Division of the Department of Justice also addresses how initial complaints should be handled.[78] In the initial investigation of a complaint,

> If an investigation indicates there has been a violation of Title VI, OCR attempts to obtain voluntary compliance. If it cannot obtain voluntary compliance, OCR will initiate enforcement action, either by referring the case to the Department of Justice for court action, or by initiating proceedings, before an administrative law

[72] *Education and Title VI*, *supra* note 66.
[73] *Education and Title VI*, *supra* note 66.
[74] *Id.*
[75] *How to File a Complaint*, *supra* note 71.
[76] 34 C.F.R. § 100.7.
[77] *Title VI Legal Manual*, DEP'T. OF JUST. (Aug. 6, 2015), https://www.justice.gov/crt/title-vi-legal-manual.
[78] *Id.*

> judge, to terminate Federal funding to the recipient's program or activity in which the prohibited discrimination occurred.[79]

Most school districts take the "voluntary compliance" route. It is through the voluntary compliance option that school districts self-report. After these procedures, "If the agency finds no violation after an investigation, it must notify, in writing, the recipient and the complainant, of this decision."[80]

3. District Self-Reporting

One of the most necessary changes to the current administrative process of Title VI regards district self-reporting. If schools were self-reporting and discrimination and desegregation were becoming a thing of the past, then perhaps we could overlook the inherent bias of self-reporting. Unfortunately, such is not the case. School district self-reporting has the potential to trap the reporting school district between the consequences of financial retaliation and the desired acknowledgement of weak areas. Self-reporting has the potential to leave individuals defenseless against the very institutions they claim to be harmed by.

In July 2012, the Office for Civil Rights published a report on enforcement highlights.[81] This report stated, "In the last three fiscal years, OCR received nearly 5,500 Title VI-related complaints—more than ever before in a three-year period—and launched over 55 systemic, proactive investigations."[82]

Self-reporting aims to condense the staggering work left for the OCR and saves money that the federal government would otherwise have to spend to send investigators out to every school facing discrimination allegations. Self-reporting may make sense for districts because districts are more aware of their circumstances, processes, and system. Additionally, self-

[79] *Education and Title VI*, *supra* note 66.
[80] *Title VI Legal Manual*, *supra* note 77.
[81] *Title VI Enforcement Highlights: Office for Civil Rights*, DEP'T. OF ED. (July 2012), https://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf.
[82] *Id.* at 2-3.

reporting may allow districts to take control of the process and acknowledge the need for reformation.

However, more often than not, self-reporting likely creates more problems than it solves. One state report, *Physical Education Title VI Compliance in California Public Schools*, highlights the ineffectiveness of school districts self-reporting.[83]

> [S]chools and districts commonly self-report compliance with no effective checks and balances. The potential for, and reality of, misrepresentation is documented in the peer reviewed study in the San Francisco Unified School District . . . . While 83% of elementary schools reported that they met the minute requirements, an analysis of teachers' schedules showed that just 20% of schools were actually in compliance, and on site monitoring proved that just 5% were in compliance.[84]

In criticizing district self-reporting, the focus is not to paint school districts or the OCR in a negative light. It is fair to assume that complying with Title VI is an important goal for most districts and most administrators. No one group is necessarily to blame for an underfunded system that relies on biased reporting. Instead, the goal is to point out the serious and legitimate conflicts that arise when a district must self-report on matters that could cost them federal funding, and with that understanding introduce a solution through district cohorts.

4. The Effects of Self-Reporting

Self-reporting perpetuates the emphasis on intent rather than impact.[85] It also opens reports up to potential bias since even the best-intentioned districts naturally operate under a predisposition to report as favorably as possible for the district. A student facing the implications of inequity in education based on "race, color, or national origin" deserves an impartial report "without prejudice to the substantial rights of the party challenging."[86]

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[83] *Physical Education and Physical Fitness Title VI Compliance in California Public Schools*, CAHPERD (Aug. 13, 2015), https://www.cityprojectca.org/blog/wp-content/uploads/2015/08/Physical-Education-Letter-US-DOE-201508013-final-corrected.pdf [hereinafter *Title VI Compliance in California Public Schools*].
[84] *Id.* at 10 (internal citations omitted).
[85] *See* Black, *supra* note 6, at 156.
[86] *Bias*, THE LAW DICTIONARY, http://thelawdictionary.org/bias/ (last visited Apr. 25, 2016).

While the main focus of this paper is to introduce district cohorts to the review process,[87] more comprehensive reports from complainants could serve as another way of balancing the scales. If the OCR were to find that the best approach were for school districts to continue to self-report, a similar method of submitting a comprehensive report should be provided to the complainant. Recall, that while the school district has the opportunity and requirement to file a comprehensive analysis and report of the situation across the district, the complainant only files a letter with the OCR with the most basic information.[88] The OCR would need to establish necessary provisions and frameworks to provide complainants the same access to information and, at least, an increased amount of support in order to file a complete report of "the other side."

Obviously providing complainants with the same opportunity and resources to file a comprehensive report of the situation could overwhelm the small town parent filing a discrimination claim on behalf of her child. Encouraging comprehensive reports from complainants (without providing a framework of support) unduly shifts the burden to the individual.

As it stands now, the OCR is like the judge that receives a full brief from one party and only a letter from the other. Such an approach undermines students, schools, and the ability of the OCR to come to a fair and accurate conclusion. Reform is necessary because the current approach focuses more on retaining funding and punishing wrong-doing than on establishing a system that "determines the ends that the law should produce and then shapes standards of legal

[87] *See* discussion *infra* Section IV(B).

[88] *Education and Title VI*, *supra* note 66 (including "who was discriminated against; in what way; by whom or by what institution or agency; when the discrimination took place; who was harmed; who can be contacted for further information; the name, address and telephone number of the complainat(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s)").

liability to achieve them."[89] The end goal is to eliminate discrimination and inequity in public schools.

B. Current Educational Practices: A Title VI Failure

Sandoval took away the private right of action to enforce disparate impact regulations.[90] However, as shown by the 2014 OCR Report, discrimination and its impacts remains a major issue in U.S. public education. The *Sandoval* decision to not allow private rights of action to enforce disparate impact regulations undermined the initial goals of Title VI. Discrimination and its impacts remains a major issue in U.S. public education.[91]

Taken together, the *Sandoval* decision and the 2014 OCR Report demonstrate a Title VI failure. Current practices in United States' public education still employ public funds to support racial discrimination results. Whether these results are intentional or not seems highly irrelevant when the discriminatory impact is so clearly laid out before us.[92] The current application of Title VI fails to fulfil the goal "that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination."[93]

In addition to the 2014 OCR Report, the Civil Rights Data Collection (CRDC) also provides information necessary to highlight the racial disparities in public education. "Federal collection of civil rights-related data in education has expanded to include unprecedented levels

[89] Black, *supra* note 6, at 157.
[90] *See* Alexander v. Sandoval, 532 U.S. 275 (2001).
[91] *See* discussion *supra* Section II(D).
[92] *Id.*
[93] *Overview of Title VI*, *supra* note 1.

of data and information."[94] The result has "electrified advocacy efforts to bring equity to students of color, student with disabilities, students who were limited English proficient, and others."[95]

In short, we stand in the middle of a perfect storm ready for necessary reform to continue the progress our country made fifty-two years ago.

IV. REFORMING TITLE VI

"[W]here a line is drawn can turn something unfair into something unconstitutional overnight."
Dean Kristi L. Bowman[96]

The inherently biased practice of self-reporting should alone be enough for a need for change. However, the need for change is also shown in the current state of desegregation, the lack of active efforts to combat bias and discrimination, and the shortage of access to equal education in the United States. "We are far past the peak of desegregation in this country, which came in the late 1980s for African Americans, and has been going continuously backward for a quarter century."[97] The effects of discrimination in education are far reaching: students are "more likely to drop out,"[98] less likely to have access or take advanced placement courses, "and to have much less information from their peer group about college possibilities."[99] The current practices and results in U.S. public education fail to support that goal that "that the funds of the United States are not used to support racial discrimination."[100]

A. Proposed Language

The language proposed here does not change the current language of Title VI. The Title VI language was an important first step in combating discrimination in the United States. While

[94] Allison R. Brown, *Equity in Education: The Present and Future of the Civil Rights Act of 1964 in* THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND 127, 132 (Kristi L. Bowman ed., 2014).
[95] *Id.*
[96] Kristi L. Bowman, *Introduction*, THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND 157 (Kristi L. Bowman ed., 2014).
[97] Orfield, *supra* note 12, at 406.
[98] *Id.*
[99] *Id.*
[100] 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

the current language does not adequately address modern issues, an absolute prohibition of discrimination based on race, color, or national origin remains important. The proposal is to add a second paragraph, so that Title VI includes directions on what *not to do* and what *to do* in order to receive federal funding. Title VI, in its entirety would read:

> No 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.
>
> School districts and other educational programs receiving Federal financial assistance shall make active efforts to reduce discriminatory disparate impacts linked to race, color, or national origin. Active efforts shall further the goal of Title VI: to ensure federal funds are not spent in any fashion which encourages, entrenches, subsidizes or results in race, color, or national origin discrimination.[101]

This proposed language—and the accompanying changes with the district cohorts to self-reporting and active efforts—further the introductory goals of Title VI. By allowing private rights of action to enforce disparate impact regulations and by requiring districts to actively address race, color, and national origin discrimination and its effects, the original intent of Title VI is furthered.[102] Public funds will then be used to *end* racial discrimination rather than merely *not used* to support racial discrimination. After all, "'[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[103]

1. "Active Efforts" and the Indian Child Welfare Act

ICWA is a 1978 federal law that applies whenever Indian children become involved in any state child custody proceedings.[104] The goal in passing ICWA was to "protect the best

[101] *See supra* 5 and accompanying text.
[102] *See supra* p. 3.
[103] *Overview of Title VI*, *supra* note 1.
[104] *See* 25 U.S.C. §§ 1901-63. *See also Frequently Asked Questions About ICWA*, NICWA, http://www.nicwa.org/Indian_Child_Welfare_Act/faq/ (last visited May 4, 2016).

interests of Indian children and to promote the stability and security of Indian tribes and families."[105] This need for added efforts and protection arose due "to the alarmingly high number of Indian children being removed from their homes by both public and private agencies."[106]

To further prevent this recognized social and judicial harm, ICWA provides, "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family . . . ."[107] The National Indian Child Welfare Association (NICWA) explains that "the state can only remove a child from her parents after [the state] has made active efforts to help the family remedy the problems that make the home unsafe for the child and these efforts have failed."[108] Although ICWA itself provides minimal direction on what constitutes active efforts, the 2015 ICWA Guidelines shed further light on the requirement.

First, "'active efforts' require a level of effort beyond 'reasonable efforts.'"[109] Active efforts are not simply considered after there appears to be a chance of discrimination against the Indian family; instead, "active efforts must begin from the moment" the state child custody proceeding suggest any possibility that the child may be removed.[110] In effect, every situation involving removal of an Indian child is treated as an area of historical discrimination. The process does not require a showing of intentional discrimination.

Active efforts to prevent the break-up of the Indian family apply to all aspects of the relevant state child custody proceedings and must be applied throughout the entire process—

[105] 25 U.S.C. § 1902.
[106] *Frequently Asked Questions About ICWA*, *supra* note 104.
[107] 25 U.S.C. § 1912(d) (emphasis added).
[108] *ICWA Active Efforts as Best Practice*, NICWA, http://www.nicwa.org/pathways/ICWA-Active-Efforts-Best-Practice.asp (last visited May 4, 2016) (emphasis removed).
[109] Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015) [hereinafter 2015 ICWA Guidelines].
[110] *Id.* at 10,148.

from the moment a possibility of removal arises until the state child custody proceeding ends.[111] The Guidelines also require detailed "documentation of what 'active efforts' were made."[112] Documentation "should involve and use the available resources of the extended family, the child's Indian tribe, Indian social service agencies and individual Indian care givers."[113] "Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts."[114] Among other things, ICWA active efforts may include:

> (1) Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);
> . . . .
> (3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
> (4) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;
> . . . .
> (6) Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;
> (7) Offering and employing all available and culturally appropriate family preservation strategies;
> (8) Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
> (9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
> . . . .
> (11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
> (12) Monitoring progress and participation in services;
> (13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;

[111] *Id.* at 10,149, 10,152.
[112] *Id.* at 10,149.
[113] *Id.* at 10,156.
[114] *Id.* at 10,151.

(14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
(15) Providing post-reunification services and monitoring.[115]

Ultimately, the active efforts requirement aims to correct the social wrong of the "alarmingly high percentage of Indian families . . . broken up"[116] and establishe "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes."[117]

2. "Active Efforts" and Title VI

Like ICWA, Title VI was passed in order to address grave social disparities and results.[118] The goal in passing ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families"[119] amidst racial discrimination that resulted in the extreme break-up of the Indian family. The goal of Title VI is to protect the educational interests of students that have historically been excluded from access to equal education and to ensure that public funds are not used to perpetuate racial discrimination.[120] Both ICWA and Title VI aim to reduce "alarmingly high" instances of inequality linked to race, color, and national origin. Applying ICWA's active efforts requirement to Title VI would direct school districts in an effort to stem educational inequalities and disparate impacts tied to race, color, and national origin.

Once active efforts are introduced in the proposed Title VI language, the next step is defining what active efforts entail in the Title VI context. Similar to ICWA, active efforts will "require a level of effort beyond 'reasonable efforts.'"[121] Additionally, active efforts to reduce

[115] *Id.* at 10,150.
[116] 25 U.S.C. § 1901(4).
[117] 25 U.S.C. § 1902.
[118] *See supra* p. 4.
[119] 25 U.S.C. § 1902.
[120] *See supra* notes 1, 10 and accompanying text.
[121] 2015 ICWA Guidelines, *supra* note 109, at 10,147.

the results of education that disparately impacts minority groups will be required at all times. Suggestions for how this may be accomplished are further discussed in Section IV(B). As with ICWA, Title VI active efforts will be a proactive approach to solving a recognized social ill. Unlike the current language of Title VI which merely prohibits certain conduct, the addition of active efforts changes Title VI from a prohibitory, reactive statute to a proactive law.

In practice, district cohorts would outline which specific active efforts the cohort needed to implement in order to address local concerns, situations, and cultures. School districts would then be required to provide detailed documentation of the agreed upon active efforts to the entire cohort. District cohorts would submit annual reports of the specific active efforts taken by each district within the cohort. Like ICWA, documentation and implementation of active efforts should involve communities and families. The goal of active efforts under Title VI would be to address the disparities in education related to race, color, and national origin, and to continue the goals of Title VI to ensure "that the funds of the United States are not used to support racial discrimination."[122]

Each OCR regional office and each district cohort would have the opportunity to individualize and adopt agreed upon active efforts. Title VI active efforts could include:

1. Engaging students, parents, extended family members, and communities in the educational process and in the discussion surrounding educational inequalities.
2. Identifying additional community services to support minority or at-risk students and their parents in order to overcome barriers to equal education.
3. Actively train teachers to avoid implicit racial bias and recognize how privilege in the classroom negatively impacts minority groups
4. Taking into account local social and cultural conditions and customs for discipline, teacher training, curriculum, and testing.
5. Requesting assistance from local social and cultural leaders during curriculum planning.

[122] 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

6. Completing a comprehensive assessment of the circumstances of local students with a focus on how these circumstances impact the student's ability to learn and participate in the classroom.
7. Notifying and consulting with family and community members to provide family structure and support in eradicating explicit and implicit racial biases resulting in intentional discrimination and/or the disparate impacts.
8. Hosting teacher trainings and community forums on discrimination and privilege in the classroom.[123]
9. Monitoring progress and participation.
10. Providing consideration of alternative ways of addressing disparities within district cohorts.
11. Supporting regular administrator, teacher, and family visits across district cohorts to compare efforts within the cohort.[124]

Once district cohorts settle on an active efforts plan, and the plan is approved by the overseeing OCR regional office, each individual district would be responsible for the implementation and documentation of the active efforts. District cohorts, however, would be available to provide support to struggling districts or to compare results, ideas, and strategies.

The proposed language would require a minimum Federal standard of active efforts to address disparities in education based on race, color, or national origin. However, the actual definition of "active efforts" and the implementation plans would be locally controlled by school districts with the support of other, local district "peers" in the same district cohort.

ICWA was implemented to prevent the breakup of the Indian family which was a result of widespread, systemic, government discriminatory actions. Similarly, Title VI was implemented to prevent discrimination in public programs—especially public schools. Requiring active efforts makes federally funded programs more accountable for what they *do* to further the goals of Title VI just as active efforts in ICWA makes state courts more accountable for what they *do* to further the goals of ICWA in ending discrimination against Indian families. In the end,

[123] Possible sources for prompting discussion include: *What can we do to Fight Discrimination?*, INCLUSION EUR. (Jan. 1, 2013), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1284&context=gladnetcollect. This document includes sections on "What you can do against discrimination," "Planning a meeting," "After a meeting," and "How to organize an action."

[124] *See generally*, 2015 ICWA Guidelines, *supra* note 109, at 10,150. Other active effort ideas may be found at https://www.aclu.org/blog/race-discrimination-school-discipline-real-problem.

active efforts requires proactive measures to change the procedures, impacts, and outcomes of a system that negatively impacts minority groups.

B. What are "District Cohorts"? Basics and Requirements

District cohorts, in the present context, are groups of three to seven districts within a reasonable geographical region and reporting to the same OCR regional office. District cohort requirements would further the original goals of Title VI, eliminate some of the harm done by district self-reporting, and promote successful adherence to the proposed Title VI additions.

In practice, OCR regional offices would assign school districts to particular cohorts based upon location. However, the OCR could also consider the Title VI successes and struggles of each district and group successful and struggling districts in order to provide levels of peer support. The ultimate goal of the district cohorts is to provide an additional, peer review for self-reporting districts and to provide additional peer support as districts work to implement the proposed Title VI active efforts requirements. The work and decisions of the district cohorts would be under the supervision of regional OCR offices and would be required to meet the Federal minimum for both self-reporting and active efforts. OCR regional offices could implement various strategies to streamline or standardize the district cohort process (e.g., requiring cohort reports to include answers to specific, tailored questions from a bank of OCR questions).

District cohorts would be responsible for reviewing self-reports from districts answering discrimination claims. In the self-report reviews, cohorts would be required to provide feedback, support, and ideas to the reporting district before the report could be filed with the OCR. The cohort reviews would be included in the final report to the OCR.

1. The District Cohort Model, Self-Reporting, and Active Efforts

The far-reaching impacts of racial discrimination are as much a problem in the United States' as they ever were. Self-reporting is not working. Adding an additional review step to self-reporting would add an element of "peer pressure" since all reports would be reviewed by administrators from the other districts in the cohort. The mid-level review would have the intended effect of reducing report bias thus further protecting individuals alleging discrimination. The peer district cohort review of districts self-reporting would keep the burden on the school districts and off of the OCR and parents while also providing a support group for struggling districts.

District cohorts would also be tasked with the responsibility to create plans to meet the new active efforts requirements of Title VI. Active efforts to reduce discriminatory disparate impacts are based on the understanding that Title VI is intended to prohibit intentional discrimination but also to proactively eradicate any educational disparities that "encourages, entrenches, subsidizes, or results in racial discrimination."[125] District cohorts would provide action plans and annual reports to the OCR regional office detailing proactive ways or results of addressing discrimination through teacher training, community involvement, etc.

2. The California Model: One Approach District Cohorts May Implement to Regulate Self-Reporting and Employ Active Efforts

As highlighted above, California recently acknowledged the ineffectiveness of school districts self-reporting.[126] In order to combat this problem, a group of advocates[127] wrote the August 13, 2015 memo *Physical Education and Physical Fitness Title VI Compliance in California Public Schools* to the Assistant Secretary for Civil Rights of the U.S. Department of

[125] *Overview of Title VI*, *supra* note 1.
[126] *See Title VI Compliance in California Public Schools*, *supra* note 83.
[127] *Id.*

Education.[128] In that memo, the alliance suggested a framework "to ensure compliance . . . civil rights requirements by California public schools."[129] The Los Angeles County Department of Public Health's (DPH) "Tool Kit"[130] provides one potential framework that district cohorts could adopt in order to reduce the harm of districts self-reporting Title VI compliance.

The DPH Tool Kit includes a "self-assessment Checklist and model action plan (MAP) for compliance with civil rights and education requirements."[131] However, the Tool Kit goes beyond just providing a required structure for self-reporting. The Tool Kit "is designed to enable school district staff—as well as parents, students, and others—to conduct a comprehensive assessment . . . establish a baseline, and . . . develop an action plan to address gaps and highlight strengths."[132]

Perhaps one of the Tool Kit's greatest strengths—besides its inclusion of parents, students, and community members in the assessment process—is the proactive rather than reactive approach. Although this example focuses on ensuring compliance with Education Code 51210.1(b)(2)[133] rather than on addressing Title VI complaints, the same approach could be used by district cohorts in their active effort plans and review.

Changing the current reporting scheme and empowering district cohorts to implement active efforts, changes the approach from "punishing 'wrongdoers'"[134] to establishing a system that "determines the ends that the law should produce and then shapes standards of legal liability to achieve them."[135] Rather than requiring a self-analysis of whether a district has messed up, review and assessment should focus on the end goal of receiving the most accurate information

[128] *Id.*
[129] *Id.* at 10.
[130] *Id.* at 3.
[131] *Id.* at 10.
[132] *Id.*
[133] *Id.* at 9.
[134] Black, *supra* note 6, at 157.
[135] *Id.*

in order to create an equitable system. The focus is not punishing the districts that have floundered—it is achieving a system that provides quality and equal education to all students regardless of "race, color, or national origin."[136]

CONCLUSION

Public education systems that fail to properly address discrimination will continue to fail a vast majority of students and school districts alike. In the words of Allison R. Brown, "While we celebrate victories such as the Civil Rights Act of 1964, those celebrations must be short-lived as there is still much work to do."[137] The current OCR approach to addressing claims of discrimination harms both students and school districts and must be reformed in order for the next step in educational equality to occur. "When we look carefully at the teachers, parents, youth, community members, faith leaders, business leaders, and legislators whose work brought us the Civil Rights Act and *Brown v. Board*, we see proof that if we all keep doing our part, we can pick up where they left off and continue their work to finally achieve equity."[138]

[136] Title VI, 42 U.S.C. § 2000d, Pub. L. 88-352, § 601 (1964).
[137] Brown, *supra* note 94, at 138.
[138] *Id.*