

NOTES

LEVERAGING TITLE VI AND THE ADMINISTRATIVE COMPLAINT PROCESS TO CHALLENGE DISCRIMINATORY SCHOOL DRESS CODE POLICIES

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Varying enforcement of school hair policies and other grooming regulations against students has contributed, at least in part, to disparate exclusion of Black students from classroom and extracurricular activities. The consequences arising out of exclusion from school activities can be severe, ranging from lower academic performance to early involvement with the criminal justice system. Generally, disputes around such policies have been settled privately, thus giving no guidance to other students affected and offering no uniform solution.

This Note argues that although not ideally suited to litigation, the issue of discriminatory enforcement of school hair policies is ripe for administrative and legislative action. By taking advantage of the complaint process within the Office of Civil Rights of the Department of Education, students and families can spur the agency to investigate individual schools or even prompt broader regulatory reform. Additionally, this Note proposes that legislation designed to either recreate a private right of action to enforce regulations promulgated under Title VI, or one specifically outlawing discrimination based on hair texture or style will similarly offer a uniform solution.

INTRODUCTION

In recent years, the issue of schools punishing students for dress code violations—specifically, rules that target particular hairstyles—has received considerable media attention because such policies tend to be enforced disproportionately against Black students.¹ Either by explicitly prohibiting braids or dreadlocks or by implicitly banning “distracting” hairstyles, these policies have been invoked to punish students with detentions, suspensions, or revocations of other school-related privi-

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1. See, e.g., Neil Schoenherr, WashU Expert: K-12 School Policies on African-American Hair Are Discriminatory, theSOURCE (July 13, 2017), <https://source.wustl.edu/2017/07/washu-expert-naturally-curly-texture-african-american-hair-not-extreme-distracting-faddish/> [<https://perma.cc/Z8WW-294U>].

leges.² In addition to perpetuating harmful stereotypes about Black hair,³ disproportionately disciplining students for wearing their hair naturally, in braids, or in locks places students at risk for far more serious consequences.⁴

In view of these recent incidents, this Note will explain why litigation should not be the primary means through which students should challenge disparately enforced disciplinary policies in schools. Rather, as this Note will argue, this problem can (and should) be addressed by mobilizing the “sleeping giant” of civil rights law:⁵ Title VI of the Civil Rights Act of 1964.⁶ The Title VI complaint process empowers students experiencing discrimination in schools by enabling them to focus public attention on the issue and urge the Department of Education to intervene.⁷ Should the problem persist, the continued filing of complaints may encourage the Department to take further steps such as issuing guidance or promulgating regulations to specifically target the disparate enforcement of school dress code policies.⁸ Finally, this Note proposes legislative and administrative action to address disparate impact discrimination in schools and to provide individuals with a private right of action to enforce regulations prohibiting this form of discrimination.

Part I of this Note begins by overviewing recent incidents of Black students being punished for violating policies relating to hair and explaining why this is a problem that should be addressed. This involves a discussion of the school-to-prison pipeline and how school dress codes fit into the pipeline. Part I concludes by examining the history of legal challenges to hair policies in schools, discussing the Supreme Court’s position on school dress codes, and identifying which circuits have (and have not) established a right for students to independently govern their hairstyles.

2. See, e.g., Kay Lazar, *Black Malden Charter Students Punished for Braided Hair Extensions*, *Bos. Globe* (May 11, 2017), <https://www.bostonglobe.com/metro/2017/05/11/Black-students-malden-school-who-wear-braids-face-punishment-parents-say/stWDIBSCJhw1zocUWR1QMP/story.html> (on file with the *Columbia Law Review*).

3. See Letter from ACLU of Mass. to Alex Dan, Interim Sch. Dir., *Mystic Valley Charter Sch.* (May 22, 2017) [hereinafter *ACLU Letter*] (on file with the *Columbia Law Review*); Schoenherr, *supra* note 1.

4. See Derek W. Black, *Ending Zero Tolerance: The Crisis of Absolute School Discipline* 13–16 (2016) (“These discipline disparities, in no small part, also contribute to a lingering achievement gap between African Americans and whites. With African Americans disproportionately removed from the learning environment, they are necessarily academically disadvantaged.”); see also *ACLU Letter*, *supra* note 3.

5. Olatunde C.A. Johnson, *Lawyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 *Stan. L. Rev.* 1293, 1294 (2014).

6. 42 U.S.C. § 2000d–2000d-7 (2012).

7. See *infra* section III.A.

8. See *infra* section III.A.

In Part II, this Note further develops the constitutional arguments presented in Part I to determine whether students might successfully challenge school dress code policies targeting specific hairstyles. Next, Part II introduces Title VI by explaining the types of conduct it proscribes and how it applies in the school context. Then, Part II predicts how Title VI challenges to school dress codes might be structured, and whether they are likely to be successful. As Part II explains, while both constitutional and Title VI arguments may produce results for some students, such litigation is unlikely to help students in particular jurisdictions that have shown hostility to these types of arguments, thereby necessitating a more robust and predictable solution.

Part III proposes legislative and administrative solutions to the problem of disparately enforced dress codes. Title VI gives agencies the ability to promulgate and enforce regulations that prohibit disparate impact discrimination.⁹ Part III proposes the administrative complaint process (and any subsequent agency action) as the ideal solution to the issue presented in Parts I and II. In addition, that Part will discuss the viability of legislation and agency-issued guidance as potential alternatives.

I. BACKGROUND: THE SCHOOL-TO-PRISON PIPELINE AND THE RIGHT TO GOVERN ONE'S APPEARANCE IN SCHOOL

A. *School Dress Codes and the School-to-Prison Pipeline*

1. *The School-to-Prison Pipeline.* — The past few decades have seen school discipline grow harsher and more impersonal.¹⁰ Specifically, scholars have noted a rise in zero-tolerance policies by which schools are permitted to suspend or expel students for almost any type of behavior.¹¹ Supporters of these policies claim that removing students who engage in disruptive behavior will improve the experience of well-behaved students.¹² But researchers have found that zero-tolerance policies actually produce

9. See 42 U.S.C. § 2000d-1.

10. Black, *supra* note 4, at 1.

11. *Id.* at 7 (“[S]chools suspend and expel students for almost anything: truancy, cheating, running in the hall, dress-code violations, foul language, disruption, and disrespect.”); see also Daniel J. Losen & Russell J. Skiba, *Suspended Education: Urban Middle Schools in Crisis 2* (2010), https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf [<https://perma.cc/84Y2-E92K>] (“In part, the higher use of out-of-school suspension reflects the growth of policies such as ‘zero tolerance,’ an approach to school discipline that imposes removal from school for a broad array of school code violations - from violent behavior to truancy and dress code violations.”).

12. See, e.g., Charles Patrick Ewing, *Sensible Zero Tolerance Protects Students*, *Harv. Educ. Letter*, Jan./Feb. 2000, at 10, 10.

the opposite effect.¹³ The proliferation of such policies has led to a “substantial increase” in the use of suspension as a disciplinary tool since the 1970s.¹⁴ Even more concerning is that racial disparities in suspension rates have also grown during this time.¹⁵ Indeed, “studies show that African American students are more likely than their white peers to be suspended, expelled, or arrested for the *same kind* of conduct at school.”¹⁶

The cascade of negative effects associated with these increases in suspensions and expulsions—and the subsequent increase in disparity between Black and white students—is known as the “school-to-prison pipeline.”¹⁷ To begin with, being excluded from the classroom affects students’ abilities to perform academically.¹⁸ Essentially, “[t]he act of suspending a student, particularly for relatively minor behavior, makes that student more likely to be suspended again.”¹⁹ While the precise reasons for this are relatively unclear, it is known that repeat suspensions produce additional serious academic consequences.²⁰ More specifically, “[i]n the long term, school suspension and expulsion are moderately associated with a higher likelihood of school dropout and failure to graduate on time.”²¹

A 2012 study of 200,000 high school freshmen in Florida revealed that the dropout rate increased after a single suspension (from sixteen to thirty-two percent) and increased even further following a second suspension (from thirty-two to forty-two percent).²² The Fifth Circuit in 1974 described the problem posed by suspensions and expulsions as follows:

13. Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 *Am. Psychologist* 852, 854 (2008) [hereinafter APA, Zero Tolerance].

14. Losen & Skiba, *supra* note 11, at 2.

15. *Id.* at 2–3; see also Catherine Y. Kim, Daniel J. Losen, & Damon T. Hewitt, *The School-to-Prison Pipeline: Structuring Legal Reform 2* (2010) (“[A]lthough suspension rates have nearly doubled for all students, racial disparities in suspension rates have grown considerably worse over the past thirty years . . . [T]oday, [Black students] are more than three times as likely to be suspended [than white students].”).

16. Kim et al., *supra* note 15, at 2.

17. See, e.g., Black, *supra* note 4, at 11; Kim et al., *supra* note 15, at 2.

18. Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* 13 (2000), <https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf> [https://perma.cc/5MCW-VFRP] (“[S]uspensions have negative consequences on academic performance. Children suspended may receive failing grades in each class for every day they miss during the suspension. Students complain that during suspensions their teachers do not provide assignments so they may keep up with their schoolwork; consequently, they fall behind.”).

19. Black, *supra* note 4, at 9.

20. *Id.* at 10.

21. APA, Zero Tolerance, *supra* note 13, at 854.

22. Black, *supra* note 4, at 10.

[A] sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penalty, the ultimate punishment. In our increasingly technological society getting at least a high school education is almost necessary for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship, unless the child has the financial ability to migrate to another school system or enter private school.²³

In addition to depriving students of educational opportunities, being excluded from the classroom can also lead to involvement with the juvenile justice system.²⁴ Researchers have suggested that “many schools appear to be using the juvenile justice system to a greater extent and, in a relatively large percentage of cases, for infractions that would not previously have been considered dangerous or threatening.”²⁵

Researchers have also observed that Black students are particularly vulnerable to being targeted by zero-tolerance policies and the school-to-prison pipeline.²⁶ In elementary schools, over seven percent of Black students are suspended, compared to fewer than two percent of white students.²⁷ A study of middle schools in 2006 revealed that Black students were over three times more likely to be suspended than their white counterparts.²⁸ At the high school level, the suspension rate for Black students in 2016 was over twenty-three percent, while the rate for white students was just under seven percent.²⁹ Similarly, in 2003, Black youths accounted for just sixteen percent of the country’s overall juvenile population but constituted forty-five percent of juvenile arrests.³⁰ These disparities in school discipline contribute—to a significant degree—to the achievement gap between Black and white students and are a major cause for concern.³¹

Although the school-to-prison pipeline is largely focused on discipline for more serious offenses such as weapons or drugs, dress code infractions

23. *Lee v. Macon Cty. Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974).

24. See APA, *Zero Tolerance*, supra note 13, at 856 (“The increased reliance on more severe consequences in response to student disruption has also resulted in an increase of referrals to the juvenile justice system for infractions that were once handled in school. The term *school-to-prison pipeline* has emerged from the study of this phenomenon.” (citation omitted)); see also Black, supra note 4, at 11; Kim et al., supra note 15, at 2.

25. APA, *Zero Tolerance*, supra note 13, at 856.

26. See Judith A. Browne, *Advancement Project, Derailed! The Schoolhouse to Jailhouse Track* 12, 17 (2003); see also Black, supra note 4, at 12; Kim et al., supra note 15, at 2.

27. Black, supra note 4, at 12.

28. Losen & Skiba, supra note 11, at 5 fig.2.

29. Black, supra note 4, at 12.

30. Kim et al., supra note 15, at 2 (citing Howard N. Snyder, U.S. Dep’t of Justice, Office for Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2003*, at 9 (2005), <https://www.ncjrs.gov/pdffiles1/ojjdp/209735.pdf> [<https://perma.cc/D7BQ-ZM6Z>]).

31. Black, supra note 4, at 13–14.

figure into this equation as well. For example, during the 2012–2013 school year, two-thirds of suspensions given in Massachusetts were for nonviolent, noncriminal, and nondrug offenses.³² According to the schools, “these misbehaviors ranged from ‘dress code violations to acts of disrespect.’”³³ And Massachusetts is not alone in this—the state “regularly excludes students for the same petty reasons as every other state.”³⁴

Indeed, to suspend students for violating the dress code is excessive, particularly when those policies are used disproportionately against Black students and their hair. Prohibiting students from wearing their hair naturally (or in particular styles) perpetuates “harmful stereotypes about what a ‘good student’ looks like and sends the message to children of color that only students who adhere to a narrow, Eurocentric aesthetic are acceptable.”³⁵ And it is even worse to punish students through exclusion, which can have serious consequences on the futures of these young children.³⁶ As the next section discusses, a number of Black students in schools around the country have been unfairly disciplined under their schools’ grooming policies.

The overall purpose of this Note is to highlight how such policies disparately impact Black students, and to consider avenues through which students can attack the discriminatory enforcement of such policies. Doing so will likely be one step (of many) toward dismantling the school-to-prison pipeline—though it is worth mentioning that the pipeline itself is a much deeper and more complex issue than this Note is capable of covering.

2. *Recent Incidents of Black Students Being Targeted by School Grooming Policies.* — In recent years, a number of incidents involving Black students being punished for violating school grooming policies have received widespread coverage on both traditional news media and social media.³⁷ Perhaps the most widely publicized incident came in May 2017, when twin girls Mya and Deanna Cook were asked to “step out of class” and were given several infractions for violating their charter school’s dress code policy banning hair extensions.³⁸ Mya and Deanna were removed

32. *Id.* at 89.

33. *Id.* (quoting Joanna Taylor, Matt Cregor & Priya Lane, Lawyers’ Comm. for Civil Rights & Econ. Justice, *Not Measuring Up: The State of School Discipline in Massachusetts* 2 (2014)).

34. *Id.*

35. ACLU Letter, *supra* note 3.

36. See Black, *supra* note 4, at 10–12; Kim et al., *supra* note 15, at 78.

37. See, e.g., Rebecca Klein, NAACP Legal Defense Fund Asks Florida to End Racist Hair Policies at Schools, *HuffPost* (Oct. 10, 2018), https://www.huffpost.com/entry/florida-hair-policy-naacp_n_5bbe26f8e4b0876edaa4afce [<https://perma.cc/G447-8E7U>]; Kayla Lattimore, When Black Hair Violates the Dress Code, *NPR* (July 17, 2017), <https://www.npr.org/sections/ed/2017/07/17/534448313/when-Black-hair-violates-the-dress-code> [<https://perma.cc/T76Q-3XMH>]; Schoenherr, *supra* note 1.

38. Lattimore, *supra* note 37.

from their extracurricular activities, barred from prom, and received multiple detentions as a result of these infractions.³⁹ The twins were ultimately threatened with suspension if they did not change their hair.⁴⁰ Their parents responded that the school's policy disproportionately affected Black children, pointing to a number of white students who wore hair extensions and were not punished.⁴¹ Following significant public pressure and a complaint filed with the Massachusetts Board of Education, the school withdrew its policy for the remainder of the year.⁴² More recently, Faith Fennidy, a sixth-grade student in a Catholic school⁴³ near New Orleans was sent home after school administrators determined that her braided hairstyle violated the school's ban on hair extensions.⁴⁴ In response, her parents filed a suit against the school, which they voluntarily dismissed approximately two weeks later after the school changed the policy.⁴⁵

The experiences of Mya, Deanna, and Faith are hardly exceptional—similar incidents have occurred in the past several years involving Black students wearing their hair naturally,⁴⁶ in dreadlocks,⁴⁷ and even in headwraps.⁴⁸ The stories of these students are emblematic of the

39. Lazar, *supra* note 2; Lattimore, *supra* note 37.

40. Lattimore, *supra* note 37.

41. *Id.*

42. *Id.*; see also ACLU Letter, *supra* note 3.

43. For a discussion of Title VI's reach in schools (both private and public), see *infra* section II.B. For reasons discussed therein, this Note assumes that private schools are covered by Title VI's protections against intentional discrimination and the Department of Education's prohibitions on disparate impact discrimination.

44. Julia Jacobs & Dan Levin, *Black Girl Sent Home from School over Hair Extensions*, N.Y. Times (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/black-student-extensions-louisiana.html> [<https://perma.cc/CX7B-CWWA>].

45. Chad Calder, *Families Drop Lawsuit over Now-Withdrawn Hair Policy at Catholic School*, Advocate (Sept. 11, 2018), https://www.theadvocate.com/new-orleans/news/article_4c138c7e-b5e6-11e8-bd39-0fb7f5a86460.html [<https://perma.cc/5DV5-5N5F>].

46. See Clare Kim, *Florida School Threatens to Expel Student over 'Natural Hair'*, MSNBC (Nov. 26, 2013), <http://www.msnbc.com/the-last-word-94> [<https://perma.cc/AJ5K-G533>] (describing an incident in which a twelve-year-old Black student was "threatened . . . with expulsion for not cutting her natural hair").

47. Rebecca Klein, *Tiana Parker, 7, Switches Schools After Being Forbidden from Wearing Dreads*, HuffPost (Sept. 5, 2013), https://www.huffpost.com/entry/tiana-parker-dreads_n_3873868 [<https://perma.cc/LZK8-E2WJ>] [hereinafter Klein, *Forbidden from Wearing Dreads*] (describing how seven-year-old Tiana Parker was forced to switch schools after her school informed her that her dreadlocks "distract from the respectful and serious atmosphere [the school] strives for"); see also Jacobs & Levin, *supra* note 44 (reporting how six-year-old C.J. Stanley's parents removed him from his Catholic school in Florida after school officials informed his parents that C.J.'s dreadlocks violated the school's hair policy).

48. Blue Telusma, *North Carolina Students Threatened with Suspension for Wearing African Headwraps*, theGrio (Feb. 9, 2016), <https://thegrio.com/2016/02/09/north-carolina-students-threatened-with-suspension-for-wearing-african-headwraps/> [<https://perma.cc/66HH-HWSV>] (discussing protests in response to a North Carolina

discriminatory effects of dress code policies that target, either explicitly or implicitly, Black students. Some dress codes specifically target braids or dreadlocks.⁴⁹ Others do not always prohibit specific hairstyles, instead implementing bans on hair extensions or on “distracting” hairstyles.⁵⁰ While schools police this conduct in different ways, the end result is always the same: targeting and punishing Black students for wearing their hair in traditionally and culturally significant styles. As the ACLU, NAACP, and numerous other civil rights organizations pointed out in their letter to the school that Mya and Deanna Cook attended, the policies under which the twins were punished “discriminate[d] against Black girls by directly targeting a culturally traditional hairstyle and grooming choice.”⁵¹ Most concerning, “a quick review of the school’s yearbooks shows that white girls in the school wear extensions and/or dye their hair in violation of the Hair/Make-Up policy, suggesting the school’s grooming policy is disproportionately applied to Black girls.”⁵² The school’s disciplinary reports appear to support this claim.⁵³

If these incidents are understood to mean that the schools involved are using grooming policies to punish Black students in disproportionate numbers, this amounts to discrimination that must be addressed. Given the consequences of excluding students for petty dress code violations,

school’s policy banning all forms of headwear inside school buildings, with no exceptions for cultural or religious garments).

49. See Klein, *Forbidden from Wearing Dreads*, *supra* note 47 (“[T]he charter school’s dress code specifically says ‘hairstyles such as dreadlocks, afros, mohawks, and other faddish styles are unacceptable.’” (quoting Deborah Brown Cmty. Sch., *Parent/Student Handbook 2007–2008*, at 13–14 (2006), <http://www.dbcschool.org/admin/files/P46e588228bde4/SY%2007%20Parent%20Student%20Handbook.pdf> [<https://perma.cc/9QZT-NQML>])).

50. See Lazar, *supra* note 2 (“Cook said the school’s policy against braids that include hair extensions—additional hair that is woven in—disproportionately affects Black children.”); Kim, *supra* note 46 (“Faith Christian Academy implements a dress code and states how students are allowed to style their hair. ‘Hair must be a natural color and must not be a distraction,’ the student handbook reads, and lists examples that are not allowed including mohawks, shaved designs and rat tails.”).

51. ACLU Letter, *supra* note 3.

52. *Id.*

53. See 2015–16 Student Discipline Days Missed Report, Mass. Dep’t of Elementary & Secondary Educ., http://profiles.doe.mass.edu/ssdr/ssdr_days_missed_detail.aspx?orgcode=04700000&orgtypecode=5&=04700000&fycode=2016 [<https://perma.cc/D24S-4MCN>] (last visited Aug. 9, 2019) (showing that Black students make up only seventeen percent of the student body but account for forty-one percent of days missed due to disciplines received for nondrug, nonviolent, and noncriminal offenses). When broadened to all offenses, the numbers remain strikingly disproportionate. See 2015–16 Student Discipline Data Report, Mass. Dep’t of Elementary and Secondary Educ., <http://profiles.doe.mass.edu/ssdr/default.aspx?orgcode=04700000&orgtypecode=5&leftNavId=12565&TYPE=DISTRICT&fycode=2016> [<https://perma.cc/M9HA-924A>] (last visited Aug. 9, 2019) (showing that Black students make up only seventeen percent of the student body but account for thirty-eight percent of disciplines for all offenses).

and more generally, the risks associated with disparate punishment of students, it is important that students have appropriate means through which they can challenge such policies.

B. *Past Litigation Challenging School Grooming Policies and Attempts to Define a Constitutional Right*

The 1960s and 1970s saw a bevy of suits challenging the constitutional validity of school grooming policies. Relying primarily on the First, Ninth, and Fourteenth Amendments, families sued schools in an effort to establish a right for students to freely govern their appearance. At present, the Supreme Court has addressed the degree to which schools may regulate the clothing choices of students with respect to political messaging,⁵⁴ but the Court has yet to establish a bright-line rule as to the validity of dress codes which place restrictions on certain hairstyles. However, several circuit courts have addressed this issue with regard to regulations restricting the length of boys' hair and have adopted varying positions. This section will provide insight into the Supreme Court's stance on school regulation of appearance, as well as summarize the stances of the various circuit courts which have addressed the issue.

1. *The Supreme Court on School Regulation of Appearance.* — In *Tinker v. Des Moines Independent Community School District*, the Supreme Court considered the constitutionality of a school district's dress code regulation that forbade students from wearing black armbands signifying opposition to the war in Vietnam.⁵⁵ In striking down the regulation, the *Tinker* Court, through Justice Fortas, asserted that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁶ However, the Court held that this right must be balanced against the school's need for authority to “prescribe and control conduct in the schools.”⁵⁷ Absent a showing that the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” such a regulation cannot be upheld.⁵⁸ Upon finding no indication of substantial disruption caused by the armbands, the Court struck down the regulation as an unconstitutional restriction of the students' First Amendment rights to free speech and expression.⁵⁹

Still, the Court was careful to clarify that the regulation at issue in *Tinker* was distinct from the “regulation of the length of skirts or the type

54. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

55. *Id.* at 504.

56. *Id.* at 506.

57. *Id.* at 507.

58. *Id.* at 509 (internal quotation marks omitted) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

59. *Id.* at 514.

of clothing, to hairstyle, or deportment.”⁶⁰ Justice Fortas maintained that this regulation implicated “direct, primary First Amendment Rights akin to ‘pure speech.’”⁶¹ Thus, *Tinker* leaves unanswered the question of whether identical or similar constitutional protections apply in the context of school policies specifically targeting certain hairstyles. In the years following *Tinker*, however, several circuits have addressed this issue and have arrived at varying conclusions.

2. *Circuits Declining to Establish a Right.* — The more granular question of whether the constitution permits schools to regulate particular hairstyles was first answered in 1968 by the Fifth Circuit in *Ferrell v. Dallas Independent School District*.⁶² In the weeks leading up to the 1966–1967 school year, three boys were denied admission into their high school because, according to the school’s principal, “the length and style of [their] hair would cause commotion, trouble, distraction and a disturbance in the school.”⁶³ The District Court found that school officials acted reasonably in refusing to admit the students, and denied the students’ request for injunctive relief.⁶⁴ The Court of Appeals agreed, finding that the “constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.”⁶⁵ The Fifth Circuit found that the state’s interest in “providing the best education possible for its people” was compelling, and that potential distractions caused by the boys’ hairstyles impaired that interest, and therefore could lawfully be circumscribed.⁶⁶

Some years later, the Fifth Circuit revisited the issue raised in *Ferrell*, and instead of applying a similar balancing test, decided that there exists no “constitutionally protected right to wear one’s hair in a public high school in the length and style that suits the wearer.”⁶⁷ Through Judge Lewis R. Morgan, the Fifth Circuit rejected arguments under the First, Eighth, Ninth, Tenth, and Fourteenth Amendments that such a right exists.⁶⁸ Even further, in ordering dismissal of the case, the Court announced a rule which forecloses nearly all constitutional challenges to

60. *Id.* at 507–08.

61. *Id.* at 508.

62. 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856 (1968) (mem.).

63. *Id.* at 699.

64. *Id.* at 701; see also *Ferrell v. Dall. Indep. Sch. Dist.*, 261 F. Supp. 545, 552–53 (N.D. Tex. 1966) (denying Plaintiffs’ motion for injunctive relief).

65. *Ferrell*, 392 F.2d at 702–03.

66. *Id.* at 703. The *Ferrell* court also rejected Plaintiffs’ argument that the school’s policy violated their liberty- and property-based Fifth Amendment rights to pursue careers as musicians. See *id.* at 703–04. In dissent, Judge Elbert Tuttle sharply criticized the majority’s decision, arguing that “there is no countervailing state need or requirement that would warrant such interference with the constitutional first amendment right.” *Id.* at 705–06 (Tuttle, J., dissenting).

67. *Karr v. Schmidt*, 460 F.2d 609, 613 (5th Cir. 1972), cert. denied, 409 U.S. 989 (1972) (mem.).

68. *Id.* at 613–16.

a school grooming policy: “Where a complaint merely alleges the constitutional invalidity of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.”⁶⁹ The Sixth,⁷⁰ Ninth,⁷¹ and Tenth⁷² Circuits have similarly held that students do not have a constitutional right to wear their hair in any style of their choosing. As discussed in the following section, other circuits have defined such a right and upheld it against insufficiently compelling state justifications, while the remaining circuits have not addressed the issue.

3. *Circuits Establishing a Right.* — First, the Seventh Circuit, in holding that “[t]he right to wear one’s hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution,” grounded its decision in the First and Ninth Amendments.⁷³ According to Judge Otto Kerner, this right exists either in “the ‘penumbras’ of the first amendment freedom of speech,” or in the “ninth amendment as an ‘additional fundamental right[] which exist[s] alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.’”⁷⁴ Thus, in order to place limitations on the length of boys’ hair, the state has a “substantial burden of justification.”⁷⁵ To satisfy this burden, the state must show that the restriction “furthers an important or substantial governmental interest” that is “unrelated to the suppression of free expression” and is “no greater than is essential to the furtherance of that interest.”⁷⁶ In *Breen*, the defendants asserted that the plaintiff’s long hair “distract[ed] his fellow students from their school work,” and that “students whose appearance conforms

69. *Id.* at 618.

70. See *Jackson v. Dorrier*, 424 F.2d 213, 218 (6th Cir. 1970) (finding that a school regulation prohibiting male students from wearing long hair did not violate their First, Third, Fourth, Fifth, Ninth, or Fourteenth Amendment rights); see also *Gfell v. Rickelman*, 441 F.2d 444, 446 (6th Cir. 1971) (affirming the District Court’s ruling that “the hair length provision of the dress code did not deprive appellants of any constitutional rights”).

71. *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 940 (9th Cir. 1971) (“We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed.”).

72. *Freeman v. Flake*, 448 F.2d 258, 262 (10th Cir. 1971) (“Complaints which are based on nothing more than school regulations of the length of a male student’s hair do not ‘directly and sharply implicate basic constitutional values’ and are not cognizable in federal courts” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

73. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969); see also *Arnold v. Carpenter*, 459 F.2d 939, 941–42 (7th Cir. 1972).

74. *Breen*, 419 F.2d at 1036 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965)).

75. *Id.* (internal quotation marks omitted) (quoting *Griswold*, 381 U.S. at 505).

76. *Id.* (internal quotation marks omitted) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

to community standards perform better in school.”⁷⁷ The Seventh Circuit found neither justification compelling and ultimately invalidated the regulation.⁷⁸

In comparison, the First Circuit declined to offer the full protection of the First Amendment to students violating their schools’ hair policies, and instead found a right to govern personal appearance within the Fourteenth Amendment.⁷⁹ The court in *Richards v. Thurston* held that “the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests.”⁸⁰ In comparing the student’s liberty interest against possible state interests, the court held that “such compelled conformity to conventional standards of appearance” did not “seem a justifiable part of the educational process.”⁸¹ In light of this reasoning, the First Circuit affirmed the district court’s grant of a permanent injunction voiding the school’s policy. The Eighth Circuit in *Bishop v. Colaw* similarly found that the right to govern one’s personal appearance is “a freedom which ranks high on the spectrum of our societal values” and therefore “commands the protection of the Fourteenth Amendment Due Process Clause.”⁸² The policy in *Bishop* was also invalidated after the court found no evidence to “demonstrate the necessity of its regulation of the hair length and style of male students.”⁸³

Finally, in *Massie v. Henry*, the Fourth Circuit “treat[ed] [students’] right to wear their hair as they wish as an aspect of the right to be secure in one’s person guaranteed by the due process clause,” with “overlapping equal protection clause considerations.”⁸⁴ Following the reasoning set forth in *Bishop*, the court weighed this right against the state’s interest and found in favor of the plaintiffs.⁸⁵

As discussed in Part II, the discord among the various circuits and the Supreme Court’s silence on the issue means that whether a student is granted relief will ultimately depend on which jurisdiction hears the case. Accordingly, it is worth considering additional strategies that might result in a more uniform outcome.

77. *Id.*

78. See *id.* at 1036–38.

79. See *Richards v. Thurston*, 424 F.2d 1281, 1283–84 (1st Cir. 1970).

80. *Id.* at 1284.

81. *Id.* at 1286.

82. 450 F.2d 1069, 1075 (8th Cir. 1971).

83. *Id.* at 1077.

84. 455 F.2d 779, 783 (4th Cir. 1972).

85. *Id.*

II. POTENTIAL LITIGATION STRATEGIES

For students punished under discriminatory school grooming policies, courts seem to be a natural starting point. Obtaining a judgment that a school discriminates against students when it adopts policies which prohibit braids or dreadlocks, or when it enforces a seemingly neutral policy disproportionately against students wearing these hairstyles, would serve the twin aims of providing relief to the affected student(s) and signaling to schools that such disciplinary policies are unlawful. However, plaintiffs in many jurisdictions are unlikely to prevail on such claims. Section II.A further develops the arguments advanced in Part I.B. to determine whether courts are likely to find that the Constitution protects a student's right to choose their hairstyle. Section II.B will introduce Title VI litigation as a potential alternative to constitutional claims and discuss whether such claims are likely to be successful.

A. *Constitutional Claims*

The issue of whether there exists a constitutional right to choose one's hairstyle in school is largely settled, as discussed in section I.B. Students living in the First,⁸⁶ Fourth,⁸⁷ Seventh,⁸⁸ and Eighth⁸⁹ Circuits are likely to have some measure of success by arguing that their First, Ninth, or Fourteenth Amendment rights have been violated by the schools placing restrictions on their hairstyles. But students living in the Third,⁹⁰ Fifth,⁹¹ Sixth,⁹² Ninth,⁹³ Tenth,⁹⁴ and Eleventh⁹⁵ Circuits will be

86. *Richards*, 424 F.2d at 1283–84 (1st Cir. 1970) (finding that the right to govern one's personal appearance is guaranteed by the Due Process Clause of the Fourteenth Amendment, which "establishes a sphere of liberty for every individual, subject to reasonable intrusions by the state").

87. *Massie*, 455 F.2d at 783 (holding that the right is guaranteed by the Due Process Clause, with "overlapping equal protection clause considerations").

88. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (finding that the right exists under either the First or Ninth Amendments).

89. *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971) (concluding that the right "commands the protection of the Fourteenth Amendment Due Process Clause").

90. *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600, 607 (3d Cir. 1975) ("[W]e conclude that student hair cases fall on the side where the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's.").

91. *Stevenson v. Bd. of Educ.*, 426 F.2d 1154, 1158 (5th Cir. 1970) (finding no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer), cert. denied, 400 U.S. 957 (1970) (mem.).

92. *Jackson v. Dorrier*, 424 F.2d 213, 218 (6th Cir. 1970) (holding that hair regulations did not violate students' constitutional rights).

93. *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 940 (9th Cir. 1971) (finding that the school district's regulation of certain male hair lengths and styles did not violate any constitutional right).

94. *Freeman v. Flake*, 448 F.2d 258, 262 (10th Cir. 1971) (concluding that the school's regulation of male student hair length presented no cognizable injury).

left without a constitutional remedy. Although they have not directly addressed the issue in schools, the Second and D.C. Circuits have addressed similar issues in the employment context, and their decisions suggest unpredictable results.⁹⁶

Although the Supreme Court has not decided whether there is a constitutionally protected right to govern one's hairstyle in school,⁹⁷ it has done so in the employment context. In *Kelley v. Johnson*, on appeal from the Second Circuit, the Supreme Court was called upon to decide whether the Suffolk County Police Department's grooming regulations violated the patrolmen's constitutional rights.⁹⁸ The plaintiff alleged that

95. *Davenport v. Randolph Cty. Bd. of Educ.*, 730 F.2d 1395, 1397 (11th Cir. 1987) (adopting the Fifth Circuit's view of hair cases as set forth in *Karr* that grooming regulations are "constitutionally valid" (internal quotation marks omitted) (quoting *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972) (en banc)).

96. See, e.g., *Dwen v. Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973) (considering whether a police department's regulation of employee grooming violated plaintiff's constitutional rights and holding that "choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation"); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1118-19 (D.C. Cir. 1973) (upholding employer's policy prohibiting men from wearing long hair in part because "the Supreme Court sees no federal question in this area").

97. See *supra* section I.B.1.

98. 425 U.S. 238 (1976). The challenged regulation contained the following restrictions:

2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wearing of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical

the regulations violated his right of free expression under the First Amendment, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁹⁹ The Court rejected his claims, emphasizing that the plaintiff was challenging the regulation not as a general member of the public, but as a police officer—an important distinction in the Court’s view.¹⁰⁰ A police department’s “[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State’s police power.”¹⁰¹ Accordingly, the question became whether the decision to enact the regulations was “so irrational that it may be branded ‘arbitrary,’ and therefore a deprivation of respondent’s ‘liberty’ interest in freedom to choose his own hairstyle.”¹⁰² The Court found no violation of Johnson’s constitutional rights,¹⁰³ but emphasized the difference between grooming regulations for policemen and those for private citizens; although the Court made this distinction, it did so without specifying what is permissible for the latter.¹⁰⁴

Perhaps most illustrative of the Supreme Court’s position on school grooming regulations is its refusal to grant certiorari to any of the cases concerning the length of boys’ hair described in section I.B.¹⁰⁵ Given the Court’s inaction, it would seem that students looking to invalidate their school’s dress code under the theory that the policies violate their constitutional rights will be limited to the established law in their circuit. A fairly recent case in the Western District of Louisiana, *Fencerooy v. Morehouse Parish School Board*, is demonstrative of the obstacles that plaintiffs must overcome in jurisdictions like the Fifth Circuit.¹⁰⁶ There,

disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards.

Dwen v. Barry, 336 F. Supp. 487, 489 (E.D.N.Y. 1971), rev’d, 483 F.2d 1126 (2d Cir. 1973), rev’d on other grounds sub nom. *Johnson*, 425 U.S. 238.

99. *Johnson*, 425 U.S. at 240–41.

100. *Id.* at 244–45.

101. *Id.* at 247.

102. *Id.* at 248.

103. *Id.* at 249.

104. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (“The restrictions that the Constitution places upon the government . . . as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer . . . Private citizens perhaps cannot be prevented from wearing long hair, but policemen can.” (citing *Johnson*, 425 U.S. at 247)).

105. See, e.g., *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), cert. denied, 409 U.S. 989 (1972) (mem.); *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972) (mem.); *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932 (9th Cir. 1971), cert. denied, 404 U.S. 1042 (1972) (mem.); *Stevenson v. Bd. of Educ.*, 426 F.2d 1154 (5th Cir. 1970), cert. denied, 400 U.S. 957 (1970) (mem.); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), cert. denied, 400 U.S. 850 (1970) (mem.); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970) (mem.).

106. No. Civ.A. 05-0480, 2006 WL 39255, at *3 (W.D. La. Jan. 6, 2006).

the District Court granted summary judgment in favor of the school because the Fifth Circuit's decision in *Karr*—which found that the asserted injury is not cognizable in federal courts¹⁰⁷—dictated such an outcome.¹⁰⁸ Moreover, even students in circuits that have previously struck down certain grooming policies may find no recourse.¹⁰⁹ Because the outlook for prospective litigants is grim under the theories discussed in this section, a different solution is needed.

B. *Title VI in Schools*

Perhaps the most significant shortcoming of the aforementioned cases is that they do not provide sufficient guidance regarding the specific issue of Black students being affected by bans on specific hairstyles like braids or dreadlocks. The analysis found in these cases is generally grounded in a proposed constitutional right to govern one's personal appearance and does not discuss the racialized implications of policies targeting specific hairstyles predominantly worn by Black students. Moreover, the Supreme Court's reluctance to review hair policy cases¹¹⁰ and the considerable discord between the circuits on this issue suggests that alternative approaches might prove more successful.

1. *Overview of Title VI.* — Section 601 of Title VI of the Civil Rights Act 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.”¹¹¹

It is important to begin this discussion of Title VI by assessing how it applies in the context of primary and secondary education. More specifically, what is the scope of “any program or activity receiving Federal financial assistance”?¹¹² According to the Supreme Court, “[a]lthough the word ‘financial’ usually indicates ‘money,’ federal financial assistance may take nonmoney form.”¹¹³ For example, the U.S. Department of Education defines “Federal financial assistance” as, among other things, “grants and loans of Federal funds, . . . the sale and lease of, and

107. *Karr*, 460 F.2d at 611.

108. *Fenceroy*, 2006 WL 39255, at *3.

109. See *Isaacs v. Bd. of Educ.*, 40 F. Supp. 2d 335, 339–40 (D. Md. 1999) (applying the test set forth in *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972), and upholding the school's ban on culturally significant headwraps because “the relative likelihood of disruption [was] great enough to justify” the school's decision).

110. See *Stevenson*, 426 F.2d 1154, cert. denied, 400 U.S. 957 (1970) (mem.); *Jackson*, 424 F.2d 213, cert. denied, 400 U.S. 850 (1970) (mem.); *Breen*, 419 F.2d 1034, cert. denied, 398 U.S. 937 (1970) (mem.).

111. 42 U.S.C. § 2000d (2012).

112. *Id.*

113. *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 607–08 n.11 (1986).

the permission to use . . . Federal property . . . , [and] any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.”¹¹⁴ In sum, Title VI’s coverage extends to a broad range of programs and activities receiving federal support.¹¹⁵ Additionally, “recipients” are defined as “any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient.”¹¹⁶

Lastly, Title VI defines “program or activity” as including “all the operations” of state or local government departments and agencies; public elementary and secondary schools; colleges, universities, public systems of higher education; and private organizations that are “principally engaged in the business of providing education,” or private organizations which receive federal assistance for the entity as a whole.¹¹⁷ Thus, Title VI’s protections against discrimination extend to every single public school in the United States and to any private school that receives any federal assistance in any capacity.

2. *Intentional Discrimination Under Title VI.* — Next, it is critical to understand precisely what types of conduct Title VI proscribes. In interpreting § 601’s mandate, the Supreme Court in *Regents of University of California v. Bakke* examined the legislative history of Title VI and found that it “reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that

114. 34 C.F.R. § 100.13(f) (2019); see also *id.* app. A. Also included in the Department’s definition of “Federal financial assistance” are “the grant or donation of Federal property and interests in property” and “the detail of Federal personnel.” *Id.* § 100.13(f).

115. Office for Civil Rights, Education and Title VI, U.S. Dep’t of Educ., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/N9VL-SJK9>] [hereinafter OCR, Education and Title VI] (last modified Sept. 25, 2018) (explaining that Title VI protections apply to approximately “17,000 local education systems; 4,700 colleges and universities; 10,000 proprietary institutions; and other institutions, such as libraries and museums that receive [Department of Education] funds”).

116. 34 C.F.R. § 100.13(i).

117. 42 U.S.C. § 2000d-4a (2012); see also 34 C.F.R. § 100.13(g); Debra Wilson & Stephanie J. Gold, Nat’l Ass’n of Indep. Schs., *Independent Schools and Federal Laws: A Guide to Key Federal Laws and How They Apply to Your School* (2013), http://www.nais.org/Articles/Documents/Independent_Schools_and_Federal_Laws_Advisory_2013.pdf [<https://perma.cc/YAR2-NFU6>]. It is worth noting that Title VI has not always received such a broad interpretation. In 1987, Congress passed the Civil Rights Restoration Act of 1987, after finding that recent Supreme Court decisions had “unduly narrowed” the “broad application” of Title VI and several other civil rights statutes. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 2, 102 Stat. 28, 28 (1988). Pursuant to these findings, Congress amended Title VI by adding § 606, which significantly broadened the reach of § 601 by making it apply to the *entirety* of any entity which receives federal assistance, so long as “any part” of such entity receives federal assistance. *Id.* § 6.

of the Constitution.”¹¹⁸ In view of this intent, the Court held that Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”¹¹⁹ As the Court later explained in *Alexander v. Choate*, “Title VI itself directly reache[s] only instances of intentional discrimination.”¹²⁰

Claims of intentional discrimination under Title VI closely mirror those made under the Fourteenth Amendment or Title VII.¹²¹ Intentional discrimination based on race exists when the decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹²² Generally speaking, such a showing can be made through the use of direct evidence showing discriminatory classifications or intent, or circumstantial evidence permitting an inference of discriminatory intent directed at a particular individual or group.¹²³

3. *Disparate Impact Discrimination Under Title VI.* — Although § 601 was understood to only provide protections against instances of intentional discrimination, for a number of years another section, § 602, also provided an implied cause of action for private individuals subjected to disparate impact discrimination.¹²⁴ This section authorizes and directs federal agencies to “issue[] rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance.”¹²⁵ In response to this mandate, twenty-six federal agencies have promulgated regulations under § 602 designed to prohibit disparate impact discrimination.¹²⁶ For example, the Department of Education’s regulations include the following prohibition:

A recipient, in determining . . . the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of

118. 438 U.S. 265, 284 (1978).

119. *Id.* at 287.

120. 469 U.S. 287, 293 (1985).

121. Civil Rights Div., U.S. Dep’t of Justice, Title VI Legal Manual § 6, at 3, <https://www.justice.gov/crt/case-document/file/934826/download> [<https://perma.cc/D46X-5FLE>] [hereinafter Title VI Legal Manual].

122. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

123. Title VI Legal Manual, *supra* note 121, § 6, at 4–6.

124. See 42 U.S.C. § 2000d-1 (2017); see also Title VI Legal Manual, *supra* note 121, § 9, at 1 (discussing the impact of the Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which it “explained that the private right of action under Title VI exists only under Section 601, for cases of intentional discrimination”).

125. 42 U.S.C. § 2000d-1.

126. Title VI Legal Manual, *supra* note 121, § 7, at 3.

defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.¹²⁷

The Department of Education has established a number of procedures to ensure compliance with this mandate. First, to be eligible for funding, applicants must include “an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.”¹²⁸ Second, approved recipients are subject to periodic compliance reviews, individuals experiencing discrimination may submit complaints to the Department, and the agency may investigate suspected noncompliance.¹²⁹ Finally, where reviews, complaints, or investigations reveal noncompliance, the Department will attempt to effect compliance through informal means.¹³⁰ However, should noncompliance continue, recipients risk suspension or termination of federal assistance following notice and an opportunity to be heard.¹³¹

Additionally, for nearly forty years following the enactment of § 602, private individuals experiencing disparate impact discrimination occasionally sued to enforce regulations promulgated pursuant to this section.¹³² However, in 2001 the Supreme Court issued a decision in *Alexander*

127. 34 C.F.R. § 100.3(b)(2) (2019).

128. *Id.* § 100.4(a)(1).

129. *Id.* § 100.7(a)–(d).

130. *Id.* § 100.7(d)(1).

131. *Id.* § 100.8.

132. See, e.g., *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 591–93 (1983) (plurality opinion) (“[I]t must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination”); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 937 (3d Cir. 1997) (“[W]e hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964”); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (“A plaintiff may pursue a claim under a disparate impact theory as well. However, a disparate impact theory is not applicable in the case at hand.”); *Villanueva v. Carere*, 85 F.3d 481, 486–87 (10th Cir. 1996) (deciding, among other things, whether a Colorado School Board’s decision to open a charter school and close two public elementary schools had a discriminatory impact on Latinx students in violation of regulations promulgated under Title VI); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (“Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance. A plaintiff alleging a violation of the DOT regulations must make a prima facie showing that the alleged conduct has a disparate impact.” (citations omitted)); *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406–07 (11th Cir. 1993) (“Since the district court evaluated the challenged Board actions under the Title VI disparate impact analysis, . . . and since the Board did not object to the district court’s choice of legal standards, . . . we assume *arguendo* that it was proper to apply the disparate impact analysis in this case.”); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) (“It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act [P]laintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient.” (citations omitted)); *Latinos Unidos De Chelsea En Accion v. Sec’y of Hous.*

*v. Sandoval*¹³³ that “denied the existence of a private cause of action critical to the civil rights movement.”¹³⁴ The *Sandoval* Court reiterated its understanding that § 601 of Title VI permits private individuals to sue to enforce its ban on intentional discrimination but simultaneously drastically weakened the force of Title VI by eliminating a private right of action to enforce regulations prohibiting disparate-impact discrimination.¹³⁵ The plaintiffs in *Sandoval* challenged the Alabama Department of Transportation’s policy of administering its driver’s license exams exclusively in English.¹³⁶ The plaintiffs alleged that the policy violated the Department’s obligations under a regulation promulgated by the Department of Justice pursuant to Title VI.¹³⁷ In relevant part, the DOJ regulation forbids funding recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjugating individuals to discrimination because of their race, color, or national origin.”¹³⁸ Without addressing the validity of the regulation itself, the *Sandoval* Court found that neither the text nor the structure of § 602 showed any congressional intent to create additional rights for protected individuals by creating a private cause of action.¹³⁹

Thus, post-*Sandoval*, the burden of enforcing disparate-impact regulations promulgated under § 602 falls entirely on administrative agencies.¹⁴⁰ The *Sandoval* Court explained that the primary mechanism

& Urban Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986) (“Under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact.”); *Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986) (“Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case In this latter type of case, proof of discriminatory intent is not necessary.”); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (“There is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims.” (footnote omitted)); *Lucille P. ex rel Larry P. v. Riles*, 793 F.2d 969, 981–82 (9th Cir. 1984) (“[P]roof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself.” (citing *Guardians Ass’n*, 463 U.S. at 608 n.1 (Powell, J., concurring in the judgment))).

133. 532 U.S. 275 (2001).

134. Meridel J. Bulle-Vu, Note, Statistical Intent: A Post-*Sandoval* Litigation Strategy for Title VI ‘Impact’ Cases, 17 *Geo. J. on Poverty L. & Pol’y* 461, 463 (2010).

135. *Sandoval*, 532 U.S. at 280, 293; Bulle-Vu, *supra* note 134, at 462–63.

136. *Sandoval*, 532 U.S. at 279.

137. *Id.* at 278.

138. *Id.* at 278 (quoting 28 C.F.R. § 42.104(b)(2) (2000)).

139. See *id.* at 279–93 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.” (footnote omitted)).

140. *Id.* at 289–91 (“The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”); see also Note, After *Sandoval*: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 *Harv. L.*

of enforcing such regulations is the termination of funding to the program recipient, albeit subject to certain restrictions set forth in the statute.¹⁴¹ Although *Sandoval* admittedly dealt a significant blow to the ability of individuals to vindicate rights created by agency regulations, this Note argues that employing the enforcement powers of agencies is the best way to address the issue of discriminatory enforcement of school grooming policies. But first, it is important to consider how litigation may be used as a tool to combat discrimination in schools.

C. *Potential Litigation Strategies Under Title VI*

1. *Intentional Discrimination Claims.* — Title VI claims of intentional discrimination closely mirror those made under Title VII or under the equal protection clause of the Fourteenth Amendment.¹⁴² Irrespective of motive, racial classifications are “presumptively invalid and can be upheld only upon an extraordinary justification.”¹⁴³ Rules that are “ostensibly neutral” but are “obvious pretext for racial discrimination” are similarly invalid.¹⁴⁴ Moreover, neutral laws that have a “disproportionately adverse effect upon a racial minority” are “unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”¹⁴⁵

Because many of the incidents described in Part I do not involve explicit classifications,¹⁴⁶ it is helpful to turn to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, in which the Supreme Court provided some guidance for plaintiffs looking to establish intent in policies that do not explicitly discriminate against a particular individual or

Rev. 1774, 1789–93 (2003) (“The use of disparate impact analysis as a substantive compliance condition, rather than just a post-complaint enforcement response, would shift agency enforcement priorities to an earlier stage and encourage local participants to develop alternative solutions to prevent disparate harm.”).

141. *Sandoval*, 532 U.S. at 289 (“Section 602 empowers agencies to enforce their regulations either by terminating funding to the ‘particular program, or part thereof,’ that has violated the regulation or ‘by any other means authorized by law.’” (quoting 42 U.S.C. § 2000d-1 (2000))).

142. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1977) (plurality opinion) (Powell, J.) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”); see also Title VI Legal Manual, supra note 121, § 6, at 3 (“The elements of a Title VI intent claim derive from and are similar to the analysis of cases decided under the Fourteenth Amendment’s Equal Protection Clause and Title VII of the Civil Rights Act of 1964, as amended.” (footnotes omitted)).

143. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

144. *Id.* (citing *Guinn v. United States*, 283 U.S. 347, 364–65 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)).

145. *Id.*

146. See supra section I.A.2.

group.¹⁴⁷ The evidentiary inquiry into intent becomes “relatively easy” when the plaintiff can establish that a “clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”¹⁴⁸ Factors considered to establish such a pattern can include statistical evidence showing extreme disparities, the historical background of the decision, and the decision’s legislative or administrative history.¹⁴⁹

Students experiencing discrimination could theoretically prevail on Title VI intentional discrimination claims by showing that a particular school’s (or school district’s) hair policy is enforced in an extremely disproportionate manner, such that discriminatory intent may be inferred, thereby permitting recovery for the plaintiffs. However, such cases are “rare” and require evidence of a “stark” pattern, making success on such claims unlikely absent truly extraordinary facts.¹⁵⁰ Furthermore, litigation of similar issues under Equal Protection or Title VII frameworks suggests a low probability of success.

In 2010, Chastity Jones received an employment offer from Catastrophe Management Solutions (CMS), only to have the offer revoked when she refused to cut her dreadlocks following the request of a human resources manager.¹⁵¹ The Equal Opportunity Employment Commission filed suit against CMS, contending that CMS’s “prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent.”¹⁵² The Eleventh Circuit rejected this argument after concluding that “Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices.”¹⁵³ In the court’s view, dreadlocks were a cultural practice, not an immutable characteristic.¹⁵⁴ Concerningly, although the court admitted that “discrimination on the basis of Black hair texture” would violate Title VII, it nonetheless held

147. 429 U.S. 252, 266–68 (1977).

148. *Id.* at 266.

149. See *id.* at 266 n.13, 267–68; see also Title VI Legal Manual, *supra* note 121, § 6, at 9–11.

150. *Arlington Heights*, 429 U.S. at 266.

151. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021–22 (11th Cir. 2016). CMS’s policy read: “All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable” *Id.* at 1022 (internal quotation marks omitted).

152. *Id.* at 1023 (internal quotation marks omitted) (quoting Plaintiff’s First Amended Complaint at ¶ 28, *Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (No. 1:13-cv-00476-CB-M)).

153. *Id.* at 1030.

154. *Id.*

that “adverse action on the basis of Black hairstyle” would not.¹⁵⁵ For many, this decision reinforced the “nearly forty years of federal precedent permitting the lawful deprivation of employment opportunities for which African descendant women are qualified alongside their equal inclusion, dignity, and privileges of employment when they grow their unstraightened, naturally textured hair long or when their hair does not perfectly resemble an afro.”¹⁵⁶ If courts decide to apply the reasoning set forth in *EEOC v. Catastrophe Management Solutions* to school grooming policies, it may be inferred that such courts would find no violation of Title VI.

In 2006, Oscar Fenceroy, who was entering junior high school in Louisiana, was required to remove his braids or be denied admission.¹⁵⁷ Oscar’s parents sued on his behalf, alleging that the dress code violated his rights under the Equal Protection Clause and First Amendment, as well as their parental rights.¹⁵⁸ In essence, the Fenceroy’s argued that the policy denied Oscar equal protection because (1) the policy had a “disparate impact on Black males and (2) because males, but not females, are prohibited from wearing their hair in braids.”¹⁵⁹ The District Court dismissed the first claim, holding that the plaintiffs failed to state a claim under the Equal Protection Clause, relying on a Fifth Circuit case for the proposition that “a party who wishes to make out an Equal Protection claim must prove ‘the existence of purposeful discrimination’ motivating the state action which caused the complained-of injury.”¹⁶⁰ The second claim survived the motion to dismiss,¹⁶¹ but the District Court ultimately found in favor of the school, because under *Karr*,¹⁶² the school “advanced legitimate concerns to support its dress code policy.”¹⁶³

The rulings in the cases described in this section do not bode well for students looking to challenge dress-code policies which ban specific

155. *Id.* The court continued, “That dreadlocks are a ‘natural outgrowth’ of the texture of black hair does not make them an immutable characteristic of race.” *Id.* For a discussion of the court’s puzzling opinion in this case and on the immutability doctrine, see D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. Miami L. Rev. 987, 1018–25 (2017).

156. Greene, *supra* note 155, at 1036.

157. *Fenceroy v. Morehouse Parish Sch. Bd.*, No. Civ.A. 05-0480, 2005 WL 1968442, at *1 (W.D. La. Aug. 15, 2005). The school adopted a policy prior to the 2004–2005 school year which read: “Hair must be neat, well groomed, and clean at all times. Designs cut into the hair are *NOT* allowed. Males [sic] students *MAY NOT* wear cornrows, plaits or braids. Extreme hair styles including ‘spikes’ are not acceptable.” *Id.*

158. *Id.*

159. *Id.* at *3.

160. *Id.* (quoting *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997)).

161. *Id.* at *4.

162. *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), cert. denied, 409 U.S. 989 (1972) (mem.).

163. *Fenceroy*, 2006 WL 39255, at *4.

hairstyles (like braids or dreadlocks), or those which ban extensions and other “distracting” hairstyles. Though not impossible to win, it seems likely—if not inevitable—that courts will follow either *Catastrophe Management Solutions*, and hold that discrimination against Black hairstyles is not within the purview of Title VI; or *Fenceroy*, and simply find no evidence of purposeful discrimination. Moreover, because such disputes are most often settled privately, there is a lack of publicly available information to help guide students and parents seeking to challenge discriminatory school grooming policies. Thus, until courts, administrative agencies, or legislators are able to establish a bright-line rule with respect to this issue, incidents will continue to be resolved on an ad hoc basis, meaning that the responsibility to correct such behavior rests almost entirely on students and families.

III. FINDING A WAY FORWARD

Given the unfavorable odds of success in courts, how might affected individuals work to remedy disparately enforced school dress codes? As this Part argues, legislation, agency rulemaking, and agency enforcement each present a viable alternative to litigation. Title VI provides administrative agencies, like the Department of Education, with significant authority to dismantle discrimination in schools.¹⁶⁴ Section III.A begins by offering the administrative complaint process as a mechanism for private enforcement, or alternatively how agencies can issue guidance to shape disciplinary policy decisions in schools. Next, section III.B discusses potential legislative solutions in light of Congress’s 2004 attempt to update the Civil Rights Act post-*Sandoval*.

A. *Administrative Solutions*

1. *The Administrative Complaint Process.* — The Department of Education’s (ED) Office for Civil Rights (OCR) is responsible for enforcing Title VI as it applies to activities or programs funded by the department.¹⁶⁵ The fifty state educational agencies, 17,000 local education systems, and 4,700 colleges and universities that receive ED funding must comply with Title VI’s provisions against discrimination in order to remain eligible for assistance.¹⁶⁶ The primary enforcement mechanism OCR uses to assure compliance is the investigation and resolution of complaints filed by individuals alleging discrimination on the basis of

164. 42 U.S.C. § 2000(d) (2012).

165. OCR, Education and Title VI, *supra* note 115.

166. See *id.* Areas subject to OCR enforcement include admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics, housing, and employment—so long as the policy or program affects those who are intended to benefit from the federal funds. See *id.*

race, color, or national origin.¹⁶⁷ To this end, OCR provides some guidance to individuals experiencing discrimination (or a third party filing on behalf of such individuals), including information on how to file a complaint and what should be included in a complaint letter.¹⁶⁸ When an investigation of a complaint reveals a Title VI violation, OCR will first attempt to obtain voluntary compliance.¹⁶⁹ If this attempt fails, OCR may then initiate enforcement action by either (1) referring the case to the DOJ for court action or (2) initiating proceedings before an administrative law judge to terminate federal funding.¹⁷⁰

Administrative enforcement of Title VI's provisions presents many advantages to potential claimants. For one, administrative actions can be cheaper than court enforcement, particularly when the agency shares the resources, time, and costs necessary to properly vindicate Title VI

167. *Id.* In addition to investigating and resolving complaints, OCR may, at its own discretion, initiate compliance reviews of selected institutions. *Id.* Because OCR does not have the capacity to review the policies and practices of *all* funding recipients, it provides guidance and support to recipients in order to encourage voluntary compliance. *Id.*

168. OCR offers the following guidance on its website:

Anyone who believes there has been an act of discrimination on the basis of race, color or national origin, against any person or group, in a program or activity that receives ED financial assistance, may file a complaint with OCR under Title VI. The person or organization filing the complaint need not be a victim of the alleged discrimination but may complain on behalf of another person or group. A complaint should be sent to the OCR regional office that serves the state in which the alleged discrimination occurred (See list of regional offices.) [sic] A complaint must be filed within 180 days of the date of the alleged discrimination unless the time for filing is extended for good cause by the Regional Civil Rights Director. If you have also filed a complaint under an institutional grievance process, see the time limit.

Complaint letters should explain 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 complainant(s) and the alleged offending institution or agency; and as much background information as possible about the alleged discriminatory act(s). OCR regional offices may be contacted for assistance in preparing complaints. OCR keeps the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the Freedom of Information Act, the Privacy Act or otherwise required by law.

Id.; see also U.S. Dep't of Educ., How to File a Discrimination Complaint With the Office for Civil Rights (2010), <https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf> [<https://perma.cc/8X5S-L49P>].

169. OCR, Education and Title VI, *supra* note 115.

170. *Id.* Funding may only be terminated after the recipient has had an opportunity for a hearing before an administrative law judge, and after all other appeals have been exhausted. *Id.*

claims.¹⁷¹ Administrative agencies like ED carry a wealth of knowledge and experience in resolving Title VI complaints which aids them in identifying violations and crafting appropriate remedies.¹⁷² Moreover, agencies may be less limited than courts in their ability to impose flexible remedies, such as those which require direct oversight or a change in local policies.¹⁷³ Finally, the administrative complaint process can raise awareness of important civil rights issues affecting students and eventually provoke broader policy changes by “enlarg[ing] the rules that govern grantees,” thereby creating “a set of rules that govern grantees at the time they receive federal funds, before a complaint is filed.”¹⁷⁴ In this respect, by resolving complaints, ED can signal to *all* funding recipients which types of conduct may result in termination of funding, thereby potentially deterring such conduct.

A study of recent OCR complaint resolutions and compliance reviews highlights the advantages of agency enforcement mechanisms. In 2014, OCR initiated a compliance review of the Minneapolis Public School District to determine whether “the District discriminates against Black students on the basis of race by disciplining them more frequently and more harshly on the basis of race, in violation of Title VI and its implementing regulations.”¹⁷⁵ In conducting this compliance review, OCR assessed the school district’s discipline policies, as well as student enrollment and discipline records for the 2010–2011 and 2011–2012 school years.¹⁷⁶ From this data, OCR found that during both school years, Black students comprised approximately forty percent of the student body, but were the subject of nearly seventy percent of disciplinary incidents, almost eighty percent of out-of-school suspensions, and about seventy percent of law enforcement referrals.¹⁷⁷ Additionally, OCR analyzed individual disciplinary incidents and identified ninety-six different occasions in which Black students were given harsher punish-

171. See Johnson, *supra* note 5, at 1328.

172. *Id.* See generally Office for Civil Rights, U.S. Dep’t of Educ., Title VI Enforcement Highlights (2012), <https://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf> [<https://perma.cc/4SAD-TTW8>] (highlighting ED’s Title VI enforcement from 2009 to 2012).

173. Johnson, *supra* note 5, at 1328 (“While courts may be less willing to order remedies that require supervision or intrusion into state and local practices, a federal agency’s funding and regulatory relationship with the relevant state or transit agency provides a potential opening for enforcement of remedies.” (footnote omitted)).

174. *Id.* at 1329.

175. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Bernadeia H. Johnson, Superintendent, Minneapolis Pub. Schs. 1 (Nov. 20, 2014) (on file with the *Columbia Law Review*). OCR incorporated into this review an individual complaint filed in 2012 which alleged that the district discriminated against Black students by administratively transferring them to another school at rates that are disproportionate to their enrollments. See *id.* at 1 n.1.

176. *Id.* at 4.

177. *Id.* at 17.

ment than similarly situated white students.¹⁷⁸ Based on the data and incidents evaluated, OCR concluded that “students engaging in similar misconduct did not always receive the same discipline and that Black students were disproportionately represented compared to white students . . . in the proportion of students who were disciplined.”¹⁷⁹ The report also found that Black students were similarly overrepresented in the “proportion of students receiving out-of-school suspensions, in-school suspensions, administrative transfers to other schools, referrals to law enforcement, and all other disciplinary actions taken by the District.”¹⁸⁰ Before OCR completed its investigation, the school district entered into an agreement with OCR to fully resolve its compliance issues.¹⁸¹ The agreement provided that the district would, among other things, comprehensively revise its disciplinary policies, appoint a district “discipline supervisor,” and establish a “discipline team” to conduct ongoing reviews of disciplinary actions and to ensure that the district’s disciplinary policies are implemented in a nondiscriminatory manner.¹⁸²

OCR has conducted substantially similar investigations in various school districts in California,¹⁸³ Kentucky,¹⁸⁴ Mississippi,¹⁸⁵ New York,¹⁸⁶ and Wisconsin.¹⁸⁷ In each case, OCR found discriminatory discipline policies or practices and entered into an agreement with the schools that generally imposed requirements similar to those described above: a review of policies and practices, training for teachers and administrators, and oversight.¹⁸⁸ The outcomes reached in these cases are demonstrative of OCR’s investigative and enforcement powers under Title VI, and reveal how the complaint process might produce positive outcomes for Black students disproportionately affected by their school’s hair policies.

178. Id. at 12.

179. Id. at 16.

180. Id. at 16–17.

181. Id. at 17.

182. Office for Civil Rights, U.S. Dep’t of Educ., Resolution Agreement #05-12-5001: Minneapolis Public Schools (Nov. 13, 2014) (on file with the *Columbia Law Review*).

183. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Anthony Smith, Superintendent, Oakland Unified Sch. Dist. (Sept. 27, 2012) (on file with the *Columbia Law Review*).

184. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Mary Gemmill, Superintendent, Christian Cty. Pub. Schs. (Feb. 28, 2014) (on file with the *Columbia Law Review*).

185. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Gearl Loden, Superintendent, Tupelo Pub. Sch. Dist. (Sept. 25, 2014) (on file with the *Columbia Law Review*).

186. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Joseph Corr, Superintendent, N. Colonie Cent. Schs. (Dec. 30, 2013) (on file with the *Columbia Law Review*).

187. Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Connie Valenza, Superintendent, Platteville Pub. Schs. (Nov. 20, 2013) (on file with the *Columbia Law Review*).

188. See *supra* notes 182–187.

At a minimum, filing complaints could focus attention on these issues and provide students with some measure of support in pursuing claims against their schools. At its best, the complaint process could result in a shift in the school's policies, better oversight, and more accountability.

It is worth noting that a significant shortcoming of the complaint process is OCR's limited capacity to investigate every single complaint filed in a timely manner. Indeed, in 2016 OCR received 16,720 complaints but only managed to resolve 8,625.¹⁸⁹ Of the 16,720 complaints filed, nearly 2,500 were Title VI claims.¹⁹⁰ These figures introduce some measure of uncertainty as to whether OCR is logistically capable of investigating and resolving potential Title VI complaints alleging discriminatory grooming policies. Given the overwhelming number of total complaints filed, these Title VI complaints may not be investigated in a timely manner so as to provide some relief to the student, if they are investigated at all. Moreover, OCR's enforcement priorities are vulnerable to changes in the executive branch; as administrations change, so do enforcement priorities within administrative agencies. Relying solely on the administrative complaint process risks such complaints being buried beneath any number of other tasks that the executive branch deems more important; to avoid this issue, the complaint process should be coupled with the additional forms of relief discussed below.

2. *Guidance Issued by the Department of Education.* — Due to OCR's limited ability to conduct regular reviews of the policies of *all* entities receiving ED funds, the Department also attempts to encourage voluntary compliance by providing what it terms "technical assistance."¹⁹¹ Such assistance commonly takes the form of guidance issued by ED to funding recipients to aid them in meeting their obligations under Title VI.¹⁹² On January 8, 2014, the DOJ, jointly with ED, issued guidance to schools to assist them in "administer[ing] student discipline without discriminating on the basis of race, color, or national origin."¹⁹³ Aimed at eliminating racial disparities in school discipline, this guidance reminded schools and administrators of their obligations under Title VI and

189. Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., *Securing Equal Educational Opportunity: Report to the President and Secretary of Education* 5 (2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> [<https://perma.cc/HS8A-M375>].

190. *Id.* at 7.

191. OCR, *Education and Title VI*, *supra* note 115.

192. *Id.*

193. U.S. Dep't of Justice & U.S. Dep't of Educ., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 1* (Jan. 8, 2014) (on file with the *Columbia Law Review*).

clarified how the agencies would identify both intentional and disparate impact discrimination in disciplinary policies and procedures.¹⁹⁴

The guidance letter also provided several examples of situations in which the departments might find Title VI violations, and even included a supplemental list of recommendations to schools to guide them in shaping their disciplinary policies.¹⁹⁵ The DOJ and ED could update the list of examples to include a hypothetical situation drawn from those presented in Part II to explain how such incidents might amount to a Title VI violation. Or, they could modify the list of recommendations to suggest ways in which schools might update their dress code policies and

194. *Id.* at 1–3. The guidance letter introduced a three-part inquiry that the agencies would use to find intentional discrimination:

- (1) Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the disciplinary process? . . .
- (2) Can the school articulate a legitimate, nondiscriminatory reason for the different treatment? . . .
- (3) Is the reason articulated a pretext for discrimination? . . .

Id. at 8–9. The guidance also presented a three-part inquiry for disparate impact discrimination:

- (1) Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races? For example, depending on the facts of a particular case, an adverse impact may include, but is not limited to, instances where students of a particular race, as compared to students of other races, are disproportionately: sanctioned at higher rates; disciplined for specific offenses; subjected to longer sanctions or more severe penalties; removed from the regular school setting to an alternative school setting; or excluded from one or more educational programs or activities. If there were no adverse impact, then, under this inquiry, the Departments would not find sufficient evidence to determine that the school had engaged in discrimination. If there were an adverse impact, then:
- (2) Is the discipline policy necessary to meet an important educational goal? In conducting the second step of this inquiry, the Departments will consider both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it. If the policy is not necessary to meet an important educational goal, then the Departments would find that the school had engaged in discrimination. If the policy is necessary to meet an important educational goal, then the Departments would ask:
- (3) Are there comparably effective alternative policies or practices that would meet the school’s stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school’s proffered justification a pretext for discrimination? If the answer is yes to either question, then the Departments would find that the school had engaged in discrimination. If no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.

Id. at 11–12 (footnotes omitted).

195. *Id.* at 14–19.

train faculty members to ensure that such policies are written and enforced in a nondiscriminatory manner. Doing so would move toward solving the issue of disparately enforced school dress code policies by signaling to schools that changes in policy and practice must be made in order to maintain compliance with the departments' renewed interpretation of Title VI and its accompanying regulations. Even further, updated guidance would empower students and families challenging their school's dress code policies—during discussions with the school or the more formal complaint process mentioned in section III.A.1, affected individuals could point to such guidance to ensure that schools are meeting their obligation to treat students in a nondiscriminatory manner.

Despite its prospective benefits, administrative guidance is subject to many of the same political difficulties discussed in section III.A.1. For example, just as agencies may issue guidance without the need for a formal notice-and-comment rulemaking process, so too can agencies withdraw such guidance without similar process. On December 21, 2018, the Assistant Secretary for Civil Rights within the Department of Education announced that the Department was withdrawing the 2014 guidance letter.¹⁹⁶ The 2018 letter informed recipients that the ED and the DOJ had jointly “concluded that the Guidance and associated documents advance policy preferences and positions not required or contemplated by Title IV or Title VI,” and accordingly decided to withdraw and rescind the guidance.¹⁹⁷ Without any advance notice or public input, the current leadership of ED undid the work of its predecessors and deprived schools of support critical to addressing disparate impact discrimination in school discipline. This recent development elucidates the need for an additional solution which incorporates more public input and provides more robust procedural protection: legislation.

B. *Legislative Solutions*

Not long after the Supreme Court issued its ruling in *Sandoval*, Congress sought to overturn the decision through legislation. In February 2004, Senator Edward Kennedy and Representative John Lewis introduced identical forms of the Civil Rights Act of 2004¹⁹⁸ to their respective houses of Congress. The drafters stated that “[t]he Supreme Court had no basis in law or in legislative history in *Sandoval* for denying

196. U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on the Withdrawal of Guidance for the Nondiscriminatory Administration of School Discipline (Dec. 21, 2018) (on file with the *Columbia Law Review*).

197. *Id.* at 2.

198. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. (2004); H.R. 3809, 108th Cong. (2004).

a right of action pursuant to regulations promulgated under Title VI,” and sought to overturn the decision in two primary ways.¹⁹⁹

First, the bill would have added disparate impact discrimination to Title VI’s prohibited forms of discrimination listed in § 601.²⁰⁰ Essentially, the drafters reinterpreted § 601 to include both intentional and disparate impact forms of discrimination, and for the latter requiring that claimants show (1) there is a policy or practice causing a disparate impact on the basis of race, color, or national origin; (2) the policy or practice is not related to or necessary to achieve the nondiscriminatory goals of the program or activity; and (3) a less discriminatory alternative exists.²⁰¹ Second, the bill would have amended § 602 to create a private right of action to enforce regulations promulgated by agencies under Title VI.²⁰² Thus, if passed, the proposed bill would have significantly

199. S. 2088 § 101(8); H.R. 3809 § 101(8).

200. E.g. S. 2088 § 102. This would be accomplished by adding a subsection (b) to § 601 to clarify what constitutes “discrimination”:

(b)(1)(A) Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if—

(i) a person aggrieved by discrimination on the basis of race, color, or national origin (referred to in this title as an ‘aggrieved person’) demonstrates that an entity subject to this title (referred to in this title as a ‘covered entity’) has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner; or

(ii) the aggrieved person demonstrates (consistent with the demonstration required under title VII with respect to an ‘alternative employment practice’) that a less discriminatory alternative policy or practice exists, and the covered entity refuses to adopt such alternative policy or practice.

(B)(i) With respect to demonstrating that a particular policy or practice causes a disparate impact as described in subparagraph (A)(i), the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one policy or practice.

(ii) If the covered entity demonstrates that a specific policy or practice does not cause the disparate impact, the covered entity shall not be required to demonstrate that such policy or practice is necessary to achieve the goals of its program or activity.

Id.

201. Id.

202. Id. § 103. The relevant text of the bill reads:

(a) CIVIL RIGHTS ACT OF 1964.—Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1) is amended—

(1) by inserting “(a)” before “Each Federal department and agency which is empowered”; and

expanded the protections provided by Title VI and given private parties a way of enforcing such expanded protections. However, upon introduction, both versions of the bill were referred to committees in their respective houses of Congress where they simply disappeared. There is no information in the legislative history to suggest that the committees considered passing or modifying the bill in any way.²⁰³

States have also recently undertaken efforts to address discrimination based on hair. More specifically, the California and New York state legislatures have each passed bills banning employers and schools from discriminating against people wearing natural hairstyles.²⁰⁴ Signed into law on July 3, 2019, California's S.B. 188 begins with a declaration that the "history of our nation is riddled with laws and societal norms that equated 'blackness,' and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment," and "[d]espite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination with serious economic and health consequences, especially for Black individuals."²⁰⁵ The Bill clarifies that "[w]orkplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."²⁰⁶

(2) by adding at the end the following:

"(b) Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights."

Id.

203. See All Actions: S. 2088, 108th Congress (2003–2004), <https://www.congress.gov/bill/108th-congress/senate-bill/2088/all-actions> [<https://perma.cc/34UP-89XT>] (last visited Sept. 8, 2019) (citing no activity with respect to the bill since it was introduced in the Senate besides a referral to a Senate committee); All Actions: H.R. 3809, 108th Congress (2003–2004), <https://www.congress.gov/bill/108th-congress/house-bill/3809/all-actions> [<https://perma.cc/3YW7-XYEB>] (last visited Sept. 8, 2019) (citing no activity with respect to the bill besides its introduction and referrals to various House committees in early 2004).

204. Phil Willon & Alexa Díaz, California Becomes First State to Ban Discrimination Based on One's Natural Hair, *L.A. Times* (July 3, 2019), <https://www.latimes.com/local/lanow/la-pol-ca-natural-hair-discrimination-bill-20190703-story.html> [<https://perma.cc/7ZQP-DBGZ>].

205. S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

206. Id. The Bill then goes on to explain that although "[f]ederal courts accept that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, and therefore protects against discrimination against afros," such courts "do not understand that afros are not the only natural presentation of Black hair. Black hair can also be naturally presented in braids, twists, and locks." Id.

To combat these effects, S.B. 188 amends California's Education Code's definition of "race" to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."²⁰⁷ Armed with this more expansive conception of race, the California Education Code's prohibition of discrimination in educational institutions receiving state funding²⁰⁸ will soon extend to "purportedly race-neutral grooming policies that disparately impact Black individuals and exclude them" from school and workplace environments.²⁰⁹ Educational institutions receiving state funding are subject to various oversight and reporting requirements, which may also be enforced through civil action.²¹⁰ Only days later, New York passed a nearly identical law, extending the statutory definition of race in its Human Rights Law to traits—such as hairstyles—traditionally associated with race,²¹¹ thereby bringing hair styles and textures within its protections against racial discrimination.²¹²

The persistence of disparate impact discrimination in schools, and the current administration's refusal to intervene, suggests that this issue is ripe for legislative action. The efforts described above present two potential avenues through which Congress may attack disparate impact discrimination in school grooming policies. First, as the draft Civil Rights Act of 2004 suggests, Title VI could be amended to explicitly prohibit disparate impact discrimination, provide a framework under which such claims could be adjudicated, and recreate a private right of action to enforce disparate impact regulations. Second, following the examples set by California and New York, antidiscrimination protections can be significantly expanded by updating statutory definitions in Title VI and other areas of civil rights law to include certain traits such as hairstyle or hair texture. Passing legislation taking either approach—or some combination of the two—would undoubtedly be a valuable first step toward eliminating disparate impact discrimination of all types in schools (and other Title VI entities).

207. *Id.* "Protective hairstyles" includes hairstyles such as "braids, locks, and twists." *Id.*

208. Cal. Educ. Code § 220 (2019).

209. Cal. S.B. 188; see also Liam Stack, *California Is First State to Ban Discrimination Based on Natural Hair*, *N.Y. Times* (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/natural-hair-discrimination-ban.html> [<https://perma.cc/M8WJ-8672>] ("[T]he bill seeks to ban employers and schools from enforcing grooming policies that claim to be race neutral but in reality have a disproportionate impact on people of color.").

210. See Cal. Educ. Code §§ 260–262.4.

211. S. 6209, 2019 Leg., Reg. Sess. 2018–2019 (N.Y. 2019).

212. See N.Y. Exec. Law §§ 292, 296 (McKinney 2019); see also Janelle Griffith, *New York Is Second State to Ban Discrimination Based on Natural Hairstyles*, *NBC News* (July 15, 2019), <https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931> [<https://perma.cc/PTJ2-7PG9>].

CONCLUSION

Title VI is a somewhat underutilized mechanism of civil rights law, particularly in comparison to its Title IX and Title VII counterparts. Telling a student that their natural hair is a “distraction,” or that it violates the dress code when braided with extensions, under most circumstances, amounts to at least disparate impact discrimination, and can be very damaging to a young student’s sense of self-worth and cultural identity. This Note analyzes Title VI as the most appropriate solution for these instances of discrimination, as disparate impact discrimination is considerably easier to prove in comparison to intentional discrimination. And, if viewed as a Title VI violation, this issue can be resolved without requiring extensive litigation.

By taking advantage of the administrative complaint process, affected individuals may avoid some of the costs and unpredictability associated with litigation, instead shifting the burden to administrative agencies to enforce regulations proscribing disparate impact discrimination. Most importantly, this process will bring the issue to the attention of agencies and legislators alike, and potentially provoke a more proactive response in the form of guidance letters, additional regulations, or even legislative reform.