

THE SCHOOL-TO-PRISON PIPELINE TRAGEDY ON MONTANA’S AMERICAN INDIAN RESERVATIONS

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I.

INTRODUCTION

American Indian¹ adolescents in Montana are caught in a school-to-prison pipeline. They are plagued with low academic achievement, high dropout, suspension and expulsion rates, and disproportionate contact with the juvenile and criminal justice systems.² This phenomenon has been well documented in poor, minority communities throughout the country. But it has received little attention with respect to the American Indian population in Montana, for whom the problem is particularly acute. Indeed, the pipeline is uniquely disturbing for American Indian youth in Montana because this same population has been affected by another heartbreaking and related trend: alarming levels of adolescent suicides and self-harm.

This article presents previously unexamined regional data and provides exclusive personal narratives that demonstrate the shocking educational inequities American Indian children suffer in Montana. It also makes recommendations for addressing the problem. Following this Introduction, Part II lays out the theory of the school-to-prison pipeline and introduces the tribes of the Fort Peck and Rocky Boy's reservations. Part III provides some background on American Indian education and describes the article's "critical race theory" approach to the problem. Part IV presents data illustrating the existence of the school-to-prison pipeline for American Indians in Montana by demonstrating school funding inequalities, racial imbalances in academic achievement among public school students, and racially disproportionate school discipline. Part V describes the youth suicide crisis on the Fort Peck Reservation and its relationship to school practices. Part VI examines the disproportionate involvement of American Indian youth with the state's juvenile justice system. Part VII suggests that, in part, the school-to-prison pipeline problem can be addressed through charter school legislation. Part VIII proposes legal challenges to combat the pipeline and posits that the limited number of legal avenues available for reversing the pipeline illustrates a more general nationwide

1. As employed in this article, the term "American Indian" refers to persons "having origins in any of the original peoples of North and South America, including Central America, and who maintains tribal affiliation or community attachment." "White" refers to non-Hispanic white persons "having origins in any of the original peoples of Europe, the Middle East or North Africa." These are the racial categories employed by the Office of Public Instruction in the data collected from the state for this article. MONT. OFFICE OF PUB. INSTRUCTION, GLOSSARY: 2011–2012 DISCIPLINE DATA COLLECTION, 5 (on file with author). The Board of Crime Control does not define the racial categories used in its data on "Disproportionate Minority Contact."

2. American Indians are the largest racial minority group in Montana's public schools. Hispanics, the next most populous minority group, have a total public school enrollment of less than one-third of the American Indian enrollment. This article focuses only on comparing Montana's most populous minority group with white students. MONT. OFFICE OF PUB. INSTRUCTION, MONT. PUB. SCHOOL ENROLLMENT DATA, 4, available at http://www.opi.mt.gov/pdf/Measurement/11Enroll_GradTables.pdf.

dilemma in education law, requiring lawyers and advocates to develop innovative strategies to solve this critical problem.³

II.

FOUNDATIONS OF THE PIPELINE

A. The Nationwide School-to-Prison Pipeline

The school-to-prison pipeline refers to a variety of systems, ostensibly designed to serve our nation's youth, that effectively relocate the most at-risk schoolchildren out of classrooms and into the juvenile justice system.⁴ As characterized by legal academics and civil rights litigators Catherine Kim, Daniel Losen, and Damon Hewitt:

[The school-to-prison pipeline involves a] confluence of education policies in under-resourced public schools and a predominantly punitive juvenile justice system that fails to provide education and mental health services for most at-risk students and drastically increases the likelihood that these children will end up with a criminal record rather than a high school diploma.⁵

These policies and practices acutely affect American Indian students throughout Montana.

Young American Indians in Montana are not the only group affected—this phenomenon can be witnessed nationwide because its causes are ubiquitous. The pipeline, a journey taken by many low-income youth of color, begins in racially and socioeconomically segregated public schools. The poorest school districts, with the lowest levels of funding, also serve students with the greatest needs, including children who are disproportionately low-income, of color, English language learners, with disabilities, and homeless.⁶ These districts are characterized by overcrowding, understaffing, inferior facilities and resources,

3. The data on schools examined in this article come primarily from answers to “freedom of information” requests to the Montana Office of Public Instruction (OPI) and Board of Crime Control that I made in the summer of 2011. The narratives, perspectives, and opinions that are reported come from people with knowledge of the situation of American Indian school-aged children in Montana. During the summer of 2011, I interviewed public defenders, officials at OPI, tribal council members, academics at the University of Montana, tribal members, and students, parents, and staff at schools on the Fort Peck Reservation.

4. *Locating the School-to-Prison Pipeline*, AMERICAN CIVIL LIBERTIES UNION, http://www.aclu.org/images/asset_upload_file966_35553.pdf (last visited Oct. 2, 2012).

5. CATHERINE KIM, DANIEL LOSEN & DAMON HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 4 (2010).

6. See Monica Teixeira de Sousa, *A Race to the Bottom? President Obama's Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629, 634 (2010) (districts with high poverty rates are disproportionately “located in central cities, with high percentages of students with disabilities, or with high percentages of English language learners”).

and inadequate counseling and mental health services.⁷ Additionally, funding for many of these schools is dependent on test performance, creating incentives to expel or “push out” low-performing students in order to boost the schools’ reported test scores.⁸ Unsurprisingly, these issues lead to disengagement and dropout, and increase the likelihood that the young people in these districts will end up as criminal defendants.⁹

The unequal treatment of low-income students of color is exacerbated by racial disparities in the rate and severity of school disciplinary practices.¹⁰ Minority children, as well as children with learning and emotional disabilities, are removed from their classrooms, suspended, and expelled at rates far higher than white and non-disabled children.¹¹ Thus, the children who need instructional time and guidance the most are precisely those who are excluded from the educational environment. A recent surge of “zero tolerance” policies in schools, which mandate certain punishments for school infractions regardless of mitigating circumstances or the availability of disciplinary alternatives, has aggravated the situation.¹² This exclusion can be devastating; when children are removed from their regular classrooms for even a few days, their education is negatively affected.¹³ The longer the time away from school, the more severe the educational impact.¹⁴

7. See KIM, *supra* note 5.

8. *Id.* at 1, 26, 30–31 (noting that push-out also occurs when schools wish to discharge chronically truant and older or under-credited students). Pushing-out includes encouraging low performing or undesirable students to abandon the school.

9. *Id.* at 1 (noting that the deficiencies in school resources “increase students’ disengagement and the likelihood of their dropping out and later becoming involved with the courts”).

10. *Id.* at 2 (observing that “racial disparities in suspension rates have grown considerably worse over the past thirty years”).

11. *Id.*

12. *Id.* at 78–80.

13. *Id.* at 78 (“Exclusion from the classroom, for even a few days, disrupts a child’s education and may escalate misbehavior by removing the child from a structured environment and giving him or her increased time and opportunity to get into trouble. Studies show that a child who has been suspended is more likely to be retained in his or her grade, to drop out, to commit a crime, and to end up incarcerated as an adult.”). See also Stephanie Martinez, *A System Gone Berserk: How Are Zero-Tolerance Policies Really Affecting Schools?*, 53 PREVENTING SCH. FAILURE, ALTERNATIVE EDUC. FOR CHILDREN & YOUTH, Spring 2009, at 153, 155 (“Advocates of using suspension have suggested that removing disruptive students will create an environment in which teachers can teach and students can learn. However, researchers have demonstrated that suspension is not an effective change agent because students return to school displaying the same or more severe behaviors, which lead administrators to repeatedly use suspension for the same students. Suspension also negatively affects academic achievement, is a strong indicator that a student will drop out of school, and may lead to juvenile delinquency.”).

14. See Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URBAN SOC’Y 3, 367 (2006) (analyzing a study that found “that suspended students had substantially lower presuspension achievement than did students in the comparison group, gained considerably less academically throughout 3 years with suspensions, and had high drop-out rates” and “the more days that students spent in suspension, the less students gained in reading”).

Finally, schools nationwide are increasingly relying on local law enforcement to handle disciplinary issues that traditionally have been strictly the responsibility of teachers and administrators.¹⁵ School-based arrests by police officers who work as school safety personnel have increased considerably, including an escalation of arrests for minor infractions such as graffiti and schoolyard fights.¹⁶ Unfortunately, once children enter the court system, it becomes difficult to reenter mainstream public schools.¹⁷ Mainstream schools often deny admission to students with arrest, juvenile delinquency, or criminal records.¹⁸ “Alternative” schools for court-involved youth tend to be inferior and fail to keep students at grade level,¹⁹ as does the instruction provided to children in detention.²⁰ Indeed, most juveniles who become involved with the courts will never graduate from high school.²¹

The school-to-prison pipeline is a very difficult problem to address, is created by a variety of causes, and is not generally attributed to the covert workings of nefarious and racist individuals.²² For this reason, the best way to

15. See KIM, *supra* note 5, at 112–114. (“[T]he number of children arrested or referred to court for school discipline has grown in recent years . . . [a] factor exacerbating the increased criminalization of school misconduct involves the deployment of full-time police officers to patrol K-12 school hallways.”).

16. According to several state Public Defenders I spoke with, Montana is following this national trend by relying more heavily on school resource officers (SROs), pulled from local police departments, to monitor school safety. As police officers, they have the authority to arrest students for improper behavior.

17. KIM, *supra* note 5, at 3.

18. Jessica Feerman, Marsha Levick, Ami Mody, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1116–1118 (2010) (schools deny admissions to students reentering from the juvenile justice system because of perceived safety risks and academic concerns, and administrative barriers routinely place additional hurdles to enrollment).

19. *Id.* See also Amy P. Meek, *School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School*, 28 YALE L. & POL’Y REV. 155, 163 (2009) (“Alternative schools often do not receive the financial resources needed to provide an appropriate education to expelled and suspended students.”).

20. See Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 771–73 (2008) (“The education currently provided in some juvenile detention centers does not meet general state standards for public schools or the specific needs of incarcerated juveniles. There are no comprehensive statistics detailing the education currently provided in detention centers nationally, but anecdotal evidence, specific case studies, and audits suggest that there are serious deprivations within the juvenile detention system. . . . There is also a lack of coordination between public schools and correctional education programs which results in transition problems when juveniles enter and exit the juvenile justice system. These disruptions in education have long-term effects and lead to higher drop-out rates.”).

21. KIM, *supra* note 5, at 3.

22. While the school-to-prison pipeline undoubtedly exists, as demonstrated by the data and patterns explored in this and other reports and articles, few believe that it is the product of widespread intentional discrimination by nefarious and racist individuals working in the educational or juvenile justice systems. Thus, scholars have suggested approaching the issue through the lens of critical race theory. See *infra* note 23.

analyze the roots of the pipeline is perhaps through critical race theory,²³ a method that studies the subtle ways in which our laws and legal system reinforce white privilege.²⁴ Critical race theory encourages us to move beyond the assumption that racial discrimination results from invidious individual motives, and to recognize that institutional racism has many origins and causes, not all of which are intentional.²⁵ In examining the problem as a confluence of contributing factors, we should take “an expansive approach to equal protection by looking at the *concrete realities* that actions collectively produce.”²⁶

The “concrete realities” of the school-to-prison pipeline are clear for students throughout the nation. For Montana’s young American Indians, a predominantly poor and marginalized racial minority in the state, the situation is particularly dire. Too many of these students receive a substandard education that lacks any curriculum about their unique cultural heritage, get pushed out of school, and end up involved in the juvenile, and ultimately criminal, court system. This report details the policies and practices that contribute to this tragic situation.

An investigation of rural American Indians is important because it sheds light on the diverse manifestations of this nationwide pipeline problem, and calls attention to the innovative strategies needed to combat it both in regions that are not generally focused on and in the inner-city areas that have been the center of recent attention and reform.

B. Tribes and Reservations Examined in this Article

This investigation examines statewide patterns, but focuses in particular on two of Montana’s American Indian reservations that are representative of the larger epidemic: Fort Peck and Rocky Boy’s. The Fort Peck Reservation tribal community faces a confluence of classic school-to-prison pipeline factors affecting American Indian children, including disproportionately low academic achievement, high-risk behaviors, and school disciplinary exclusion. The Fort Peck Reservation also recently experienced an alarming, and related, pattern of early adolescent suicides. Rocky Boy’s Reservation is experiencing disproportionately high rates of American Indian youth involvement in the area’s juvenile and criminal justice systems.

The Fort Peck Reservation includes the Nakoda (Assiniboine Tribe) and Dakota and Lakota (Sioux Tribe) people. The large reservation is spread over four counties in the windswept plains of northeastern Montana. The Fort Peck

23. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1023 (2009) (emphasis added) (suggesting the application of a Critical Race Theory approach to analyze the school-to-prison pipeline).

24. *Id.* See discussion *infra* Part III.B.

25. See, e.g., Smith, *supra* note 23.

26. *Id.* (emphasis added).

tribes have traditionally relied on agriculture, tribal leases, and oil and gas revenues for subsistence.²⁷ The total tribal population on the reservation is 11,171.²⁸ Fort Peck youth attend school in four school districts: Wolf Point, Poplar, Brockton, and Frazer.²⁹ Forty-five percent of the residents on the reservation live below the poverty level, including half of all children.³⁰ Rocky Boy's Reservation includes two tribal groups, the Chippewa and Cree, and is located in north central Montana in portions of both Hill and Choteau counties.³¹ Rocky Boy's is the smallest reservation in Montana, has no central town site, and is very remote and rural.³² The principal use of the reservation land is grazing and farming.³³ There is no industry, and unemployment averages seventy percent during the winter, when household costs are highest.³⁴ The total number of students in grades K–12 who attend school on the reservation's Rocky Boy's School district is 550.³⁵ In addition, at least 200 Rocky Boy's children attend off-reservation schools in the nearby city of Havre and town of Box Elder.³⁶

Ninety-six percent of American Indian students in Montana attend public schools operated by the state.³⁷ There are only two tribal-run schools in Montana, neither of which serves the Fort Peck or Rocky Boy's tribes.³⁸ The state's Superintendent of Public Instruction has "general supervision" power over the public schools and districts and oversees funding, school assessment, and special education services.³⁹ The Superintendent's office also counsels the Board of Public Education on whether to give accreditation to schools, but the locally elected school district boards of trustees have substantial discretion and make most of the decisions regarding the administration of schools within their districts.⁴⁰

27. FORT PECK RESERVATION: ASSINIBOINE AND SIOUX TRIBES, 43, http://www.montanatribes.org/links_&_resources/tribes/Fort_Peck.pdf (last visited Nov. 8, 2013).

28. FORT PECK RESERVATION ASSINIBOINE AND SIOUX TRIBES, <http://www.fortpecktribes.org/> (last visited Apr. 27, 2013).

29. Louis Montclair, *2010–2011 School Year; Head of State Education to be at Three Schools Next Week*, FORT PECK JOURNAL (June 9, 2011).

30. FORT PECK ASSINIBOINE AND SIOUX TRIBES, *Community Information*, <http://www.fortpecktribes.org/community.html> (last visited Aug. 25, 2013).

31. DENISE JUNEAU, OFFICE OF PUB. INSTRUCTION, MONT. INDIANS; THEIR HISTORY AND LOCATION 56 (2009) (on file with author).

32. *Id.*

33. *Id.*

34. *Id.* at 59.

35. *Id.* at 58.

36. *Id.*

37. MONT. INDIAN EDUCATION ASSOCIATION, 3 (2009) *3rd Annual Urban Indian Education Report*, available at http://www.mtiea.org/3rd_annual_urban_indian_education_report_2009.pdf.

38. BD. OF DIRS., MONT. INDIAN EDUC. ASS'N, REPORT TO MEMBERSHIP 2009–2010 3 (2010), available at http://www.mtiea.org/downloads/report_to_membership_09.pdf.

39. Mont. Code Ann. § 20-3-106 (2011).

40. Mont. Code Ann. § 20-7-102 (2011).

While the focus here is on the Fort Peck and Rocky Boy's Reservations, and specifically the Wolf Point School District on Fort Peck, the problems described affect American Indian students statewide both on and off the reservations. There have been efforts in recent years to implement the state's long dormant Indian Education for All Act, which is intended to foster and preserve tribal cultural heritage in public education, and to equalize disparities in school funding. The Office of Public Instruction has also taken steps to address school inadequacies in Indian Country. Nonetheless, as documented below, the conditions in many of these schools remain dismal, plagued by staff shortages, poor resources and facilities, a lack of American Indians on staff, no training on how to work with American Indian populations, and little curricular attention to the Montana tribes' cultural heritage.

III.

BACKGROUND AND APPROACH

A. The Legacy of American Indian Boarding Schools and Educational Segregation

The education of American Indians in the United States has a deeply troubled history which informs the current situation. The first off-reservation assimilationist boarding school was founded in 1879.⁴¹ By 1909, the federal government had created nearly 200 boarding schools and 307 day schools, forcing over 100,000 American Indian students to attend, and often removing them from their homes for several years.⁴² These schools had a mission of assimilating tribal youth to "American" culture and lifestyle.⁴³ The American Indian students were not permitted to speak their native language or interact with their tribal families.⁴⁴ These assimilationist schools persisted for decades, exorcising ancient traditions from students in what amounted to a cultural genocide.⁴⁵ Sexual and physical abuse and starvation were also endemic.⁴⁶ In 1972, the Montana Legislature attempted to counteract the lingering stigma and effects of these schools by amending its constitution to include the "Indian Education for All" provision, which acknowledges that "[t]he state recognizes the distinct and unique cultural heritage of the American Indian and is committed

41. Andrea Smith, *Boarding School Abuses, Human Rights, and Reparations*, 31.4 SOCIAL JUSTICE 89, 89 (2004).

42. *Id.*

43. Richard Henry Pratt, who founded the first Indian boarding school, described his mission as "[k]ill the Indian in order to save the Man." *Id.* at 90.

44. *Id.* at 90. The method these schools employed was to "separate students from their parents, inculcate Christianity and white cultural values into them, and encourage or force them to assimilate into the dominant society." *Id.*

45. *Id.* at 90–91. The federal government elected to pursue "cultural" rather than "physical" genocide of the American Indian populations because it was seen as more economically efficient. Nevertheless, many American Indian students died of starvation while attending. *Id.*

46. *Id.* at 91.

in its educational goals to the preservation of their cultural heritage.”⁴⁷ Unfortunately, this provision was entirely ignored and unfunded for many years.⁴⁸

Patty McGeshick, the director of the Fort Peck Reservation Family Violence Resource Center, went to school in the Wolf Point District, which is located on the reservation. She recalls that she “would go into a classroom and there were white children on one side, Indian kids on the other side,” and that there was no communication between the school and the American Indian community it served.⁴⁹ As she explains, “[W]e have to look at a *legacy* of failures of communication. It goes back to historically not being able to trust the education system. If parents were violated by boarding schools, they are not going to have faith in those systems.”⁵⁰ Instead, she believes that schools need to reach out and build back trust from the tribes and American Indian parents: “Education systems have to understand how to deal with Native people, a culture that has been stripped away.”⁵¹

The sad history of public education for American Indians has led to mistrust and skepticism of the system among tribal communities. The ongoing conception of tribal culture and traditions as inferior and unworthy of instructional time may also negatively impact how American Indian students (1) are viewed by teachers and other pupils, and (2) respond in turn academically to these negative stereotypes. “Stereotype threat theory” posits that negative stereotypes about a group can become internalized among that group’s members, leading perversely to the perpetuation of stereotypical behaviors.⁵² Courts have reasoned that “teachers acting under false assumptions because of low test scores will treat the disadvantaged student in such a way as to make him conform to their low expectations; this acting out process—the self-fulfilling prophecy—makes it appear that the false assumptions were correct, and the student’s real talent is wasted.”⁵³ When academic achievement, skills, and cognition are measured through racially biased assessments that favor white, Anglo-cultural backgrounds, the extent of the impact that stereotype threat may have on child achievement is hard to determine.⁵⁴

Despite these measurement barriers, this article attempts to give voice to the

47. MONT. CODE ANN. § 20-1-501 (1999).

48. Rebecca Tsosie, *The Challenge of “Differentiated Citizenship”*: Can State Constitutions Protect Tribal Rights?, 64 MONT. L. REV. 199, 217 (2003) (“[F]or thirty years the provision has merely served as a hortatory statement on the ideals to be achieved by state law.”). The Act also suffers from decreasing fiscal support each year. See *infra* Part IV.

49. Interview with Patty McGeshick, Dir., Family Violence Resource Center, in Wolf Point, Mont. (Aug. 3, 2011).

50. *Id.*

51. *Id.*

52. Smith, *supra* note 23, at 1035.

53. *Id.* at 1036 (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 514 (D.D.C. 1967)).

54. This is known as “selection system bias.” *Id.* at 1035.

internalization of stereotype and bias among American Indian populations in Montana, as well as the effects of external prejudice, through qualitative research and first person interviews regarding poor academic achievement in these communities.⁵⁵ Some theorize that stereotypes are also contributing to the tragic suicide crisis, described in detail in Part V. For example, discussing the suicide crisis on the Fort Peck Reservation, Baptist minister and former tribal chairman Raymond White Tail Feather reflected, “The way of life, the federal government attempted to destroy this. When you do that to a people, what comes about is hopelessness.”⁵⁶

B. The Utility of a Critical Race Approach to Understanding the Problems Faced by American Indian Students

The data gathered for this article demonstrate conclusively that American Indian schoolchildren in Montana face crippling racial discrimination.⁵⁷ Accordingly, it is useful to examine the plight of American Indian children by employing the methods and insights of critical race theory, an approach to examining, exposing, and addressing the intractable problem of racial inequality in the United States. Critical race theory originated in the 1970s when, following several seminal legal and legislative milestones for the civil rights movement,⁵⁸ the federal government and the Supreme Court turned away from the progressive civil rights agenda.⁵⁹ In a widely read article in the *Yale Law Journal*, Derrick Bell reasoned that *Brown v. Board of Education*⁶⁰ failed to achieve racial equality because the plaintiffs’ lawyers sought only the remedy of desegregation, leaving in place the larger structural issues of resource and power inequities embedded in the existing legal, social, economic, and political systems.⁶¹ Recognizing that the legislative and litigation strategy of civil rights advocates was no longer viable, Bell, his students, and other scholars began to approach the question of racial inequality in a new way. Foundational critical race theorists

55. See *infra* Part IV.B.

56. Matt Volz, *Tragic Suicide Sprees Baffle Fort Peck Community*, THE BUFFALO POST (Mar. 21, 2011, 8:40 AM), <http://buffalopost.net/?p=14178> [hereinafter *Tragic Suicide*].

57. See *infra* Part IV.

58. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Civil Rights Act of 1964, Pub.L. 88–352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (1965).

59. See, e.g., Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 13 (2002) (“From the late 1960s through the 1980s, the trend on the Supreme Court moved away from the sociological jurisprudence approach to civil rights. Americans elected presidents who supported a new formalism in civil rights discourse. This formalism rejected liberal judicial activism aimed at social engineering. . . . [J]udges, such as those appointed by Nixon, Ford, and Reagan, were cautious. Doctrine must not be overturned on a whim, lest the Court lose its independence from the political process and judicial integrity be compromised.”).

60. 347 U.S. 483 (1954).

61. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

built on the critical legal studies movement, which involved a more general examination of the law's neutrality.⁶² They were skeptical of the practical impact of *de jure* "equality" on people of color, and adopted a method of "'storytelling,' an approach to scholarship and pedagogy in which they articulated the worldview of the downtrodden."⁶³ The critical race theory movement grew to encompass a number of modes of analysis of the ways in which the legal system perpetuates white supremacy and racial inequality—particularly through facially neutral or unintentional forms of racial discrimination.

Critical race theory primarily focuses on the lived experience of racial minorities, rather than the language of formal laws on the books.⁶⁴ Through this experience-based approach, critical race theorists examine the instrumentality of the law by asking "whether doctrinal developments have improved, worsened, or left unchanged the actual lives" of people of color.⁶⁵ Critical race theory values not only the rights, but also the narratives of subordinated or oppressed groups.

The critical race perspective sheds important light on the experiences of young American Indian students in Montana. First, the narrative approach provides vital insight into the ways in which these children are affected by inequality. While the data provided in Part IV of this article is certainly important and powerful, the narratives reported in Parts IV and V document the experiences of American Indian students and their parents in ways that the data alone cannot. The stories demonstrate that despite facially race-neutral policies on the state and federal level, the implementation of these policies has a dramatically disparate effect on American Indian students when compared to their white peers, resulting not only in inadequate education but also serious emotional damage and even self-harm for the American Indian youth.

IV.

THE DATA: THE PRESENCE OF PIPELINE INDICATORS IN MONTANA

Young American Indians, both on the Fort Peck Reservation and elsewhere in Montana, are victims of the school-to-prison pipeline, which entails academic

62. Dorothy A. Brown, *Introduction to Critical Race Theory*, in *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 1* (Dorothy A. Brown ed., 2003).

63. Jones, *supra* note 59, at 4.

64. Derrick Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 901, 906–907, *reprinted in* THE DERRICK BELL READER, 78–84, 81 (Richard Delgado ed., 2005). Critical race scholars embrace "an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies [T]he 'clearest unifying theme . . . is a call for a change of perspective, specifically, a demand that racial problems be viewed from the perspective of minority groups, rather than a white perspective.'" *Id.* (quoting Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 904 (1994)).

65. Brown, *Critical Race Theory*, *supra* note 62, at 8 (quoting Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1881 (1981) (reviewing DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (1980))).

underachievement in underfunded schools, high rates of school suspensions and expulsions, and inadequate mental health resources. The result is educational neglect and the criminalization of adolescent behaviors that would be better addressed by mental health and guidance intervention services than by exclusion and punishment. The confluence of these factors leads to self-harm, absence from school instruction, and involvement in the juvenile and criminal justice systems. The data below—from statewide sources as well as from the Wolf Point School District on the Fort Peck Reservation—is collected, analyzed, and presented together for the first time in this article. It provides shocking evidence of the adversity faced by American Indian children in Montana.

A. The Harmful Effects of Geographic Economic Segregation and School Accountability Programs on Students at Reservation Schools

The school-to-prison pipeline is composed of several inequalities and injustices suffered by children of color that accumulate with devastating results.⁶⁶ On a macro level, the racial segregation of neighborhoods and communities contributes to the pipeline because students of color in racially isolated areas often attend schools with minimal resources and high suspension and incarceration rates.⁶⁷ This sort of racial and economic segregation is evident on the reservations and in other concentrated communities of American Indians in Montana.⁶⁸ Local poverty also means that there is less funding available for health and human services and education for young people who live in these communities.⁶⁹

The nationwide emphasis on testing-based school accountability further exacerbates racially disparate funding levels. Public schools on reservations must meet testing standards under the federal No Child Left Behind (NCLB) Act. As its mission, the NCLB Act seeks to meet “the educational needs of low achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance.”⁷⁰ Perversely, this demographic has been left even *further* behind as a result of the testing regime. These students already attend schools typically

66. Smith, *supra* note 23, at 1027 (“[F]ragmented inequalities . . . have a drastically unequal cumulative impact on students of color.”).

67. *Id.*

68. Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 30 (2010) (“[S]everal of the greatest spatial concentrations of poverty in Montana are on reservations or otherwise within counties that have significant American Indian populations.”).

69. *Id.*

70. K. TSINANINAN LOMAWAIMA & TERESA L. MCCARTY, TO REMAIN AN INDIAN 154–155 (2006) (quoting OFFICE OF THE GEN. COUNSEL, U.S. COMM’N ON CIVIL RIGHTS, CLOSING THE ACHIEVEMENT GAP: THE IMPACT OF STANDARDS-BASED EDUCATION REFORM ON STUDENT PERFORMANCE (2004) [hereinafter CLOSING THE ACHIEVEMENT GAP]).

located in low-income areas where resources are scarce. By making funding for these schools contingent upon testing results, the NCLB Act facilitates fiscal inequality.⁷¹ Indeed, this precise concern was expressed years ago by the U.S. Commission on Civil Rights (USCCR), which issued a report in 2004 indicating that NCLB had in fact exacerbated the achievement gap between white and minority students and made no attempt to level resource disparities separating rich from poor schools.⁷² The report noted that the high stakes of exams fostered an obsessive curricular focus on testing, impeding the ability of teachers to develop students' logical reasoning and critical thinking skills. In 2009, President Obama signed into law a bill that included the "Race to the Top Fund," which provides financial incentives for states to develop and utilize performance-based testing, exacerbating the existing pressure on curriculum.⁷³

This narrower, test-focused curriculum leaves little time or incentive for instruction on American Indian cultural history and language. Teachers must give these subjects short shrift in favor of test-based content.⁷⁴ And because NCLB testing measures student proficiency using English only, American Indian students are instructed that the most important things they learn in school do not

71. *Id.* at 155. See also MARY EUNICE ROMERO LITTLE & TERESA L. MCCARTY, ARIZ. STATE UNIV. EDUC. POL'Y STUDIES LABORATORY, LANGUAGE PLANNING CHALLENGES AND PROSPECTS IN NATIVE AMERICAN COMMUNITIES AND SCHOOLS, 30–31 (2006), <http://eps1.asu.edu/epru/documents/EPSSL-0602-105-LPRU.pdf> ("The 'bottom line' for schools in Indian Country is federal funding. In most reservation schools, federal funds make up the bulk of school budgets. The threat of the withdrawal of federal funds, which NCLB ties directly to student performance on English standardized tests, hovers directly over the livelihood and future of Indigenous schools. For schools targeted by the law, the result is often the forced narrowing of the curriculum, hyper-attention to tests, and . . . the abandonment of proven Native language programs.").

72. LOMAWAIMA & MCCARTY, *supra* note 70, at 156. ("[T]he Commission notes that the prescriptive nature of the policy, its high stakes for minority students and schools, and the total lack of attention to closing the gap in financial resources between the richest and poorest schools are widening the gap between children of color and their more affluent White peers. . . . Further, the Commission expressed concern that 'the emphasis on testing built into NCLB will result in teaching to the test at the expense of developing reasoning and critical thinking skills.'") (internal citations omitted) (quoting CLOSING THE ACHIEVEMENT GAP, *supra* note 70).

73. See U.S. DEP'T OF EDUC., *Race to the Top Fund Executive Summary* (Nov. 2009), 3, available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (describing a system by which points can be awarded to states, increasing their chances of receiving funding, if they develop performance standards and assessments).

74. See LITTLE & MCCARTY, *supra*, note 71, at 6 ("In our own ongoing research . . . we have found that NCLB is having a chilling effect on the ability of tribal communities to provide linguistically, culturally, and academically rich curricula for Native students, even in nonpublic, federal, and community- and tribally-controlled schools. In formal interviews with teachers at one reservation school, for example, a teacher noted that, 'The school can spend *some* time teaching [the Native language], but we can't be bogged down—we have so many requirements to meet.' Another teacher put it more bluntly: 'We don't have time to teach [the Native language]; we've been told to teach to the standards.' Teachers describe NCLB-prescribed reading programs as 'not *real* teaching, but the kids are on task.' In another large urban public school district in the study, tribal elders—key personnel in the provision of bilingual education services for Native youth—have been furloughed in accordance with NCLB mandates that paraprofessionals possess an associate's degree or equivalent, thereby eliminating Native language and culture classes in affected schools.").

concern their own history, language, and culture.⁷⁵ This is a truly tragic development because heritage languages are vitally important for intra-tribal relationships and maintaining pride in one's unique cultural identity.⁷⁶ And studies demonstrate that instruction in heritage languages actually helps English language acquisition, so removal of this curriculum also has a devastating effect on American Indian students' general academic development and performance.⁷⁷

75. See LOMAWAIMA & MCCARTY, *supra* note 70, at 156 ("[T]here is widespread concern that NCLB compromises tribal sovereignty and Indigenous community choice, negatively impacts culturally based instruction, leads to hyperattention to standardized tests at the expense of pedagogically sound instruction, and is inadequately funded to enable tribes to meet its mandates.") (citing DAVID BEAULIEU, LILLIAN SPARKS & MARISA ALONSO, NAT'L INDIAN EDUC. ASS'N, PRELIMINARY REPORT ON NO CHILD LEFT BEHIND IN INDIAN COUNTRY (2005)). See also LITTLE & MCCARTY, *supra* note 71, at 6 ("Internal change occurs when speakers begin to shift their language loyalties, 'abandoning' their language in favor of a higher-status language, typically because they believe the higher-status language is more socially useful and beneficial. Eventually, individuals come to believe that their heritage language has less utility, importance, and prestige than the language of wider communication, triggering language shift."); Danielle N. Boaz, *Equality Does Not Mean Conformity: Reevaluating the Use of Segregated Schools to Create a Culturally Appropriate Education for African American Children*, 7 CONN. PUB. INT. L.J. 1, 8 (2007) ("Throughout years of oppression, and education that tells African Americans that they are worthless, minorities internalize this feeling and believe that they deserve to be ruled.").

76. LITTLE & MCCARTY, *supra* note 71, at ii-5, 25 ("[R]ights to language are fundamental to maintaining distinctive personal and tribal identities, and cannot be decoupled from larger struggles for Indigenous self-determination and cultural survival. . . . Heritage-language immersion contributes to positive child-adult interaction and helps restore and strengthen Native languages, familial relationships, and cultural traditions within the community. . . . Language is the primary means through which parents and grandparents socialize their children and grandchildren, imparting what a community and a people believe their children ought to learn and become. When that bond is broken, intergenerational ties and community relationships also are ruptured. Hence, rights to language are fundamental to collective and personal identity, and efforts to resist language loss are part of larger struggles for personal and communal well-being, self-determination, and cultural survival. . . . Heritage language programs enhance self esteem and cultural pride.").

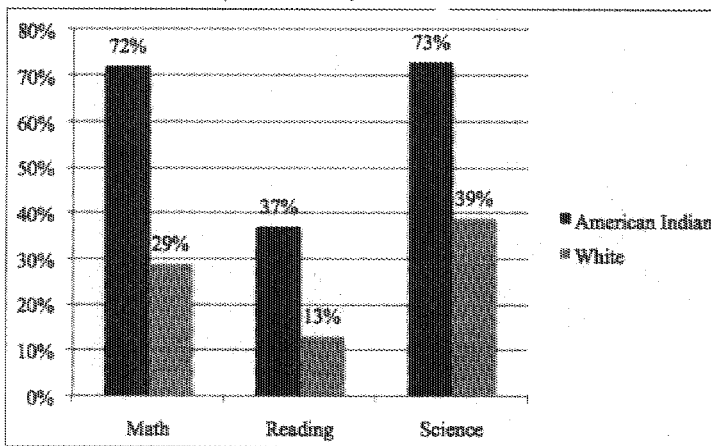
77. *Id.* at ii-iii ("These programs have had salutary effects on both language revitalization and academic achievement. In particular, data from school-based heritage-language immersion indicates that children acquire the heritage language as a second language without 'cost' to their English language development or academic achievement, as measured by local and national (standardized) tests. Conversely, comparable students in English mainstream programs perform less well than immersion students in some subject areas, including English writing and mathematics, and tend to lose whatever heritage language ability they had upon entering school. These programs highlight the benefits of 'additive' or enrichment approaches to language education, and stand in contrast to 'subtractive' programs aimed at eradicating or replacing non-English mother tongues. . . . Time spent learning a heritage/community language is *not* time lost in developing English, while the absence of sustained heritage-language instruction contributes significantly to heritage-language loss."). See also *id.* at 22-23 (citing statistics from studies indicating increased academic performance resulting from heritage language instruction). The elimination of heritage language instruction dates back to the troubling colonial education system of assimilationist boarding schools that were created by the U.S. government in the nineteenth century to suppress American Indian cultural practices. *Id.* at 7 ("A Hualapai elder, for example, remembers the government boarding school 'where I found that they were trying to knock out the Hualapai part of me . . . when we spoke our language, they used belts and hoses to really knock it out of us.' A Hualapai youth captures the personal and collective consequences of these practices: 'I don't feel complete Coming to terms with my identity and seeing my

B. Academic Achievement by Race

1. Montana's Racially Imbalanced Academic Achievement Levels

American Indian primary and secondary students in Montana suffer from poor academic achievement in comparison to their white peers. In the 2009–2010 school year, American Indian students across Montana were more than twice as likely as their white peers to be below proficiency in math.⁷⁸ As illustrated by the chart below, these numbers indicate a troubling pattern of underperformance on state exams by American Indian students compared to their white peers.

Percentage of Students Below Proficiency
(Statewide): 2009–2010⁷⁹



2. Wolf Point's Racially Imbalanced Academic Achievement Levels

Data from the Wolf Point School District similarly exemplify the disturbing academic achievement disparities separating Montana's white and American Indian children. In 2009–2010, Wolf Point High School was sixty-eight percent American Indian and thirty percent white.⁸⁰ As illustrated by the chart below, academic achievement statistics from that year show a striking demarcation in

deficiencies, I could tell kids today that if you don't know your language, you will feel [lost].").
See also *infra* Part II.A (discussing the boarding school system).

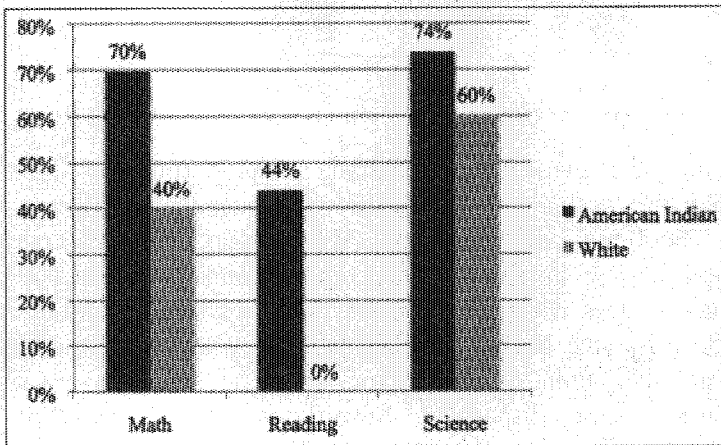
78. MONT. OFFICE OF PUB. INSTRUCTION, GEMS DATABASE, <http://gems.opi.mt.gov/StudentAchievement/Pages/CRTProficiencyComparisons.aspx> (last visited October 21, 2013) ("School Year" is "2009-2010"; "Grade" is "All"; "Alternate Assessment" is "All"; "State/District/School" is "State"; "Content Area" is "Math" then "Reading" then "Science").

79. *Id.*

80. MONT. OFFICE OF PUB. INSTRUCTION, *Enrollment for Select Schools: 2011, 2010 and 2009* (on file with author). In 2010, Wolf Point High School had 253 total students, of whom 171 were American Indian and seventy-six were white.

achievement rates along racial lines. The starkest divide is evident in the measurement of reading levels: while forty-four percent of American Indian students were below proficiency in reading, not a single white student at Wolf Point was below proficiency in that subject.⁸¹ Overall, thirty-three percent of American Indian students at that school were evaluated as “novice” readers, the lowest educational level, whereas no white students were novice.⁸² Science was the only area where white and American Indian students achieved near-parity.⁸³

**Percentage of Students Below Proficiency
(Wolf Point High School): 2009–2010⁸⁴**



In that same year, Wolf Point Middle School was plagued by similar statistical patterns. Out of a total school population of 132 students, seventy-nine percent were American Indian, and twenty percent were white.⁸⁵

81. MONT. OFFICE OF PUB. INSTRUCTION, GEMS DATABASE, <http://gems.opi.mt.gov/StudentAchievement/Pages/CRTProficiencyComparisons.aspx> (last visited October 21, 2013).

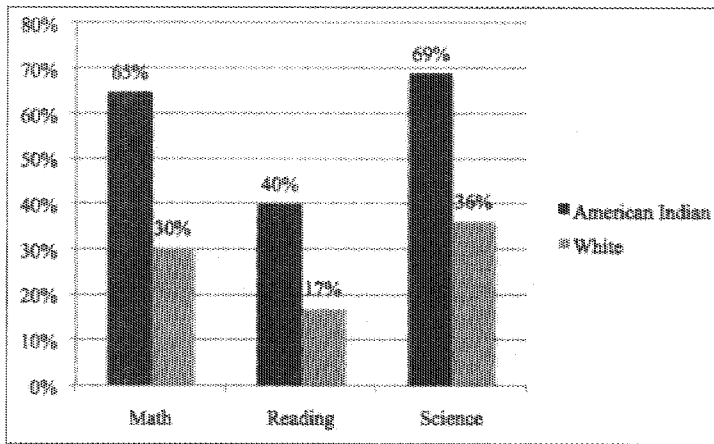
82. *Id.*

83. *Id.*

84. MONT. OFFICE OF PUB. INSTRUCTION, GEMS DATABASE, <http://gems.opi.mt.gov/StudentAchievement/Pages/CRTProficiencyComparisons.aspx> (last visited October 21, 2013) (“School Year” is “2009–2010”; “Grade” is “All”; “Alternate Assessment” is “All”; “State/District/School” is “Wolf Point H S – 0781”; “Content Area” is “Math” then “Reading” then “Science”).

85. MONT. OFFICE OF PUB. INSTRUCTION, ENROLLMENT FOR SELECT SCHOOLS (on file with author) (noting that Wolf Point Middle School had 117 total students, of whom ninety-two were American Indian and twenty-three were white).

**Percentage of Students Below Proficiency
(Wolf Point Middle School): 2009–2010⁸⁶**



These numbers evidence a troubling disproportionality in academic achievement within a single school district with only two elementary schools, one middle school, and one high school. The students examined here have the same per-pupil funding, the same teachers, and the same curricula. The Office of Public Instruction does not provide poverty statistics for students by race, and differences in economic background between the white and American Indian students in the Wolf Point School District could obviously have a significant impact on the testing disparities. Nevertheless, the patterns of varying performances based on race are stark and troubling.

C. Racially Disproportionate School Discipline

1. Statewide Discipline

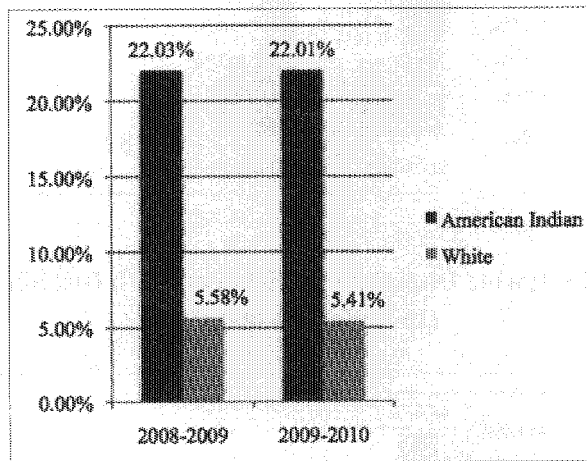
Statewide, American Indian students are disproportionately subjected to school-based discipline. During the 2008–2009 school year, eleven percent of all public school students in Montana, both general and special education, were American Indian, and eighty-four percent were white.⁸⁷ During that period, American Indian students were almost five times as likely to be expelled from

86. MONT. OFFICE OF PUB. INSTRUCTION, GEMS DATABASE, <http://gems.opi.mt.gov/StudentAchievement/Pages/CRTProficiencyComparisons.aspx> (last visited October 21, 2013) (“School Year” is “2009–2010”; “Grade” is “All”; “Alternate Assessment” is “All”; “State/District/School” is “Wolf Point 7–8 – 1532”; “Content Area” is “Math” then “Reading” then “Science”).

87. MONT. OFFICE OF PUB. INSTRUCTION, MONTANA PUBLIC SCHOOL ENROLLMENT DATA, FALL, 2008–09, 2, 4 (2010), <http://www.opi.mt.gov/pdf/Measurement/EnrollBook2009.pdf> (hereinafter 2008–09 ENROLLMENT DATA). A total of 141,899 students were enrolled in Montana public schools and state-funded schools (Pine Hills, Riverside, and Montana School for the Deaf and Blind). 16,198 were American Indian, and 118,812 were white.

school.⁸⁸ They were also four times as likely to be suspended.⁸⁹ Statewide in the 2009–2010 school year, American Indians were four times as likely to be expelled and four times as likely to receive out-of-school suspensions as white students.⁹⁰

Statewide Discipline (Suspensions)⁹¹



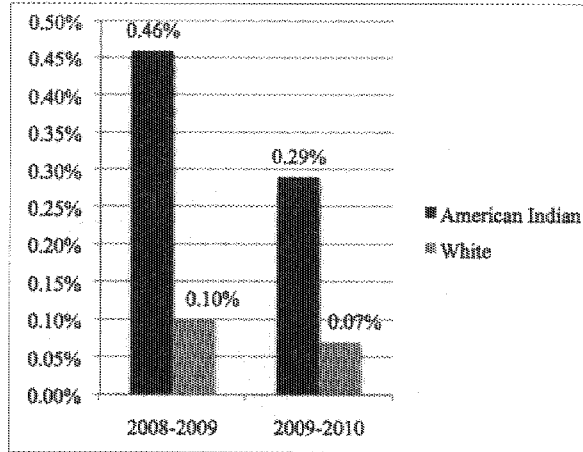
88. Compare MONT. OFFICE OF PUB. INSTRUCTION, *ACLU Data Request: Discipline Data* (hereinafter *Discipline Data*) (on file with author), with 2008–09 ENROLLMENT DATA. Seventy-five American Indian students were expelled (0.46% of the American Indian student population) and 114 white students were expelled (0.10% of the white student population).

89. Compare *Discipline Data*, Tab 1, with 2008–09 ENROLLMENT DATA. 3,569 American Indian students were suspended, or 22.03% of the American Indian student population. 6,634 white students were suspended, or 5.58% of the white student population.

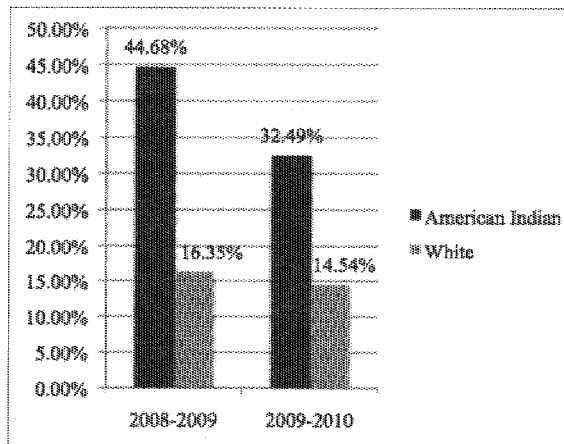
90. Compare *Discipline Data*, Tab 1, with MONT. OFFICE OF PUB. INSTRUCTION, MONTANA PUBLIC SCHOOL ENROLLMENT DATA, FALL 2009–10, 2, 4 (2010), <http://www.opi.mt.gov/pdf/MMeasurement/10Enrollment-Booklet-Grad-Tables.pdf> (hereinafter 2009–10 ENROLLMENT DATA) (showing that out of a total of 141,807 students enrolled in Montana public schools and state-funded schools, 16,724 were American Indian and 117,784 were white). Forty-eight American Indian students were expelled, or 0.29% of the American Indian student population. Eighty-three white students were expelled, or 0.07% of the white student population. 3,681 American Indian students were suspended, or 22.01% of the American Indian student population. 6,373 white students were suspended, or 5.41% of the white student population.

91. For 2008–09, see *supra* note 89. For 2009–10, see *supra* note 90.

Statewide Discipline (Expulsions)⁹²



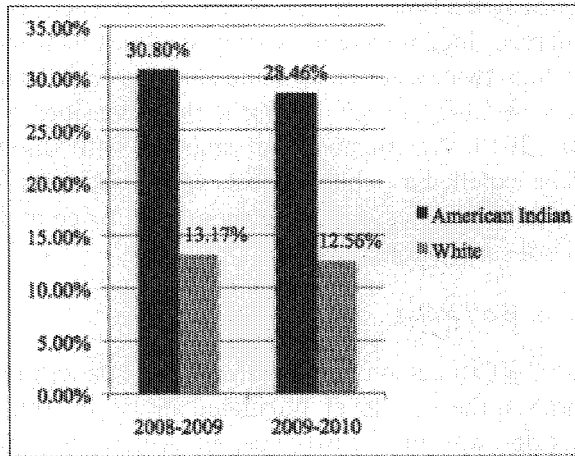
Statewide Discipline for Students with Disabilities (In-School Suspensions)⁹³



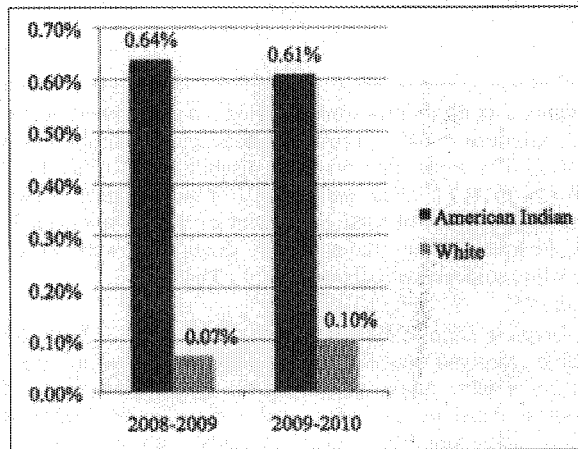
92. See *supra* notes 88 and 90.

93. For 2008–09, compare *Discipline Data*, Tab 7, with MONT. OFFICE OF PUB. INSTRUCTION, EDFACTS REPORTING SYSTEM, '09 CHILDCOUNT DATA <http://www.opi.mt.gov/pdf/speced/sedata/09ChildCountData.pdf> (hereinafter CHILDCOUNT DATA) 3, 18, 1,194 American Indian students with disabilities received in-school suspensions, out of a total population of 2,672 American Indian students with disabilities (44.68%). 2,302 white students with disabilities received in-school suspensions, out of a total population of 14,075 white students with disabilities (16.35%). For 2009–10, compare *Discipline Data*, Tab 7, with *ACLU Data Request: 2010 Count* (on file with author) (providing total number of students with disabilities by race/ethnicity). 847 American Indi-

**Statewide Discipline for Students with Disabilities
(Out-of-School Suspensions)⁹⁴**



**Statewide Discipline for Students with Disabilities
(Expulsions)⁹⁵**



-an students with disabilities received in-school suspensions, out of a total population of 2,607 American Indian students with disabilities (32.49%). 1,993 white students with disabilities received in-school suspensions, out of a total population of 13,705 white students with disabilities (14.54%).

94. For 2008–09, compare *Discipline Data*, Tab 7, with *CHILDCOUNT DATA 3*, 18. 823 American Indian students with disabilities received out-of-school suspensions, out of a total population of 2,672 American Indian students with disabilities (30.80%). 1,854 white students with disabilities received out-of-school suspensions, out of a total population of 14,075 white students with disabilities (13.17%). For 2009–10, compare *Discipline Data*, Tab 7, with *ACLU Data Request: 2010 Count*. 742 American Indian students with disabilities received out-of-school suspensions out of a total population of 2,607 American Indian students with disabilities (28.46%). 1,721 white students with disabilities received out-of-school suspensions, out of a total population of 13,705 white students with disabilities (12.56%).

95. For 2008–09, compare *Discipline Data*, Tab 7, with *CHILDCOUNT DATA 3*, 18. Seventeen

For American Indian children with disabilities, the situation is particularly acute. In the 2008–2009 school year, American Indian students with disabilities were expelled at nearly ten times the rate of their white peers with disabilities.⁹⁶ Additionally, American Indian students with disabilities incurred out-of-school-suspensions more than twice as often as white students with disabilities and were nearly three times as likely to serve in-school suspensions.⁹⁷ The following school year, 2009–2010, American Indian students with disabilities were six times as likely to be expelled as white students with disabilities.⁹⁸ The American Indian students with disabilities were also more than twice as likely to receive in- and out-of-school suspensions.⁹⁹

2. Discipline in Wolf Point

Data from 2008–2010 demonstrates a disciplinary pattern in Wolf Point that tracks the disparities at the state level, illustrated above. In 2008–2009, the Wolf Point School District was eighty-two percent American Indian and sixteen percent white.¹⁰⁰ All thirteen students expelled that year were American Indian. American Indian students were 1.5 times more likely than white students to incur out-of-school suspensions.¹⁰¹ In 2009–2010, the Wolf Point School District was

American Indian students with disabilities were expelled out of total enrollment of 2,672 American Indian students with disabilities (0.64%). Ten white students with disabilities were expelled out of a total enrollment of 14,075 white students with disabilities (0.07%). For 2009–10, *compare Discipline Data*, Tab 7, with *ACLU Data Request: 2010 Count*. Sixteen American Indian students with disabilities were expelled out of total enrollment of 2,607 American Indian students with disabilities (0.61%). Fourteen white students with disabilities were expelled out of a total population of 13,705 white students with disabilities (0.10%).

96. See *supra* note 95.

97. *Compare Discipline Data*, Tab 7, with *CHILDCOUNT DATA 3*, 18. 823 American Indian students with disabilities received out-of-school suspensions, out of a total population of 2,672 American Indian students with disabilities (30.80%). 1,854 white students with disabilities received out-of-school suspensions, out of a total population of 14,075 white students with disabilities (13.17%). 1,194 American Indian students with disabilities received in-school suspensions, out of a total population of 2,672 American Indian students with disabilities (44.68%). 2,302 white students with disabilities received in-school suspensions, out of a total population of 14,075 white students with disabilities (16.35%).

98. See *supra* note 95.

99. See *supra* notes 93–94. The author notes that the total number of suspensions of students with disabilities decreased between the 2008–2009 school year and 2009–2010 school year for both racial categories, which is to be commended, although the racial disparities in treatment remain.

100. MONT. OFFICE OF PUB. INSTRUCTION, *ACLU Data Request: Enrollment for Select Schools 2011, 2010, and 2009* (hereinafter *Enrollment for Select Schools 2009–11*) (on file with author). The Wolf Point School District had 650 American Indian students out of a total student population of 793.

101. *Compare Discipline Data*, Tab 2i (District Data Wolf Point), with *Enrollment for Select Schools 2009–11*. Eighty-two American Indian students were given out-of-school suspensions out of a total of 650 American Indian students in the district (12.62%). Eleven white students were given out-of-school suspensions out of a total of 130 white students (8.46%).

eight-one percent American Indian.¹⁰² Of twelve students expelled by the district, eleven were American Indian.¹⁰³

More than half of the American Indian students expelled during the two-year period from 2008 to 2010 were also special education students, and all of the district's special education students who received expulsions were American Indian.¹⁰⁴ The racially inconsistent treatment evident for all levels of discipline in Wolf Point is troubling. The large number of expulsions of American Indian special education students, who as a population have heightened needs for guidance intervention school support, is particularly problematic. While undoubtedly the American Indian students in Wolf Point suffer from higher rates of poverty as compared to the white students,¹⁰⁵ studies show that generally "although poverty status and race both put students at additional risk for being disciplined, low socioeconomic status cannot be used to explain away racial differences in referrals, suspension, or expulsion."¹⁰⁶ Further, as described below, there is no guarantee that suspended or expelled students in Montana will receive instruction or supervision during their exclusion from school, regardless of how long the exclusion. This creates problems for both children, who fall behind their peers in school, and parents, who struggle to find alternative child care arrangements.

102. *Enrollment for Select Schools 2009–11*. During this year, the school district had 694 American Indian students out of a total student population of 859.

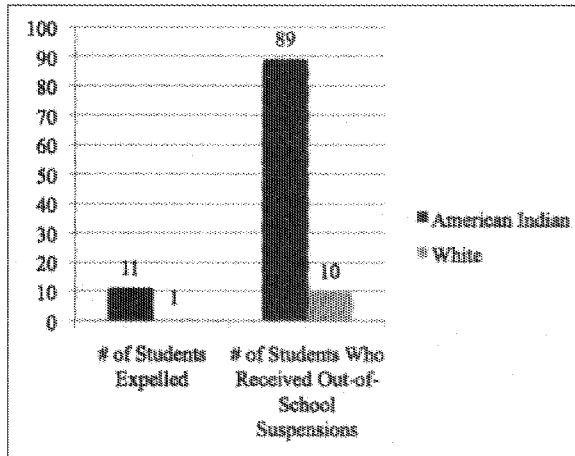
103. *Compare Discipline Data*, Tab 2i (District Data Wolf Point), with *Enrollment for Select Schools 2009–11*. Eleven American Indians of a total American Indian population of 694 were expelled in the Wolf Point District (1.59%). One white student out of a total white population of 148 (0.07%) was expelled. Eighty-nine American Indian students out of a total enrollment of 694 American Indian students in the Wolf Point District received out-of-school suspensions (12.82%). Ten white students out of a total enrollment of 148 white students in the Wolf Point District received out-of-school suspensions (8.11%). Forty-three American Indian students with disabilities received out-of-school suspensions out of a total of ninety-nine out-of-school suspensions district-wide.

104. *Id.* Between the 2008–2009 and 2009–2010 school years, there were twenty-four total expulsions of American Indian students in the Wolf Point School District. Fourteen of those expulsions were of special education students. All of the special education students who were expelled were American Indian.

105. Poverty data disaggregated by race is not available at the school district level.

106. Russell Skiba, *When Is Disproportionality Discrimination?: The Overrepresentation of Black Students in School Suspensions*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 176, 179 (William Ayers, Bernadine Dohm & Rick Ayers eds., 2001) (finding that controlling for socioeconomic status "made virtually no difference" to the significant racial disparity).

2009-2010 Wolf Point District Discipline¹⁰⁷



D. School Disciplinary Procedures

1. Minimum Disciplinary Procedural Due Process Required by the State

Nearly forty years ago, in *Goss v. Lopez*, the United States Supreme Court ruled that a school district must comply with certain minimum procedures in order to suspend a student for fewer than ten days, holding that “due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”¹⁰⁸ While the Court has not addressed the due process requirements for suspensions of more than ten days, it suggested that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”¹⁰⁹

States may add further due process protections to the *Goss* requirements. Montana is one of few states that have not done so, and there are no additional minimum guaranteed procedural protections for students subject to suspensions for fewer than ten days.¹¹⁰ The state legislature merely requires that school boards “adopt a policy defining the authority and procedure to be used by a teacher, superintendent, or principal in the suspension of a pupil,” without

107. See *supra* note 103.

108. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

109. *Id.* at 584.

110. Perry A. Zirkel & Mark N. Covelle, *State Laws for Student Suspension Procedures: The Other Progeny of Goss v. Lopez*, 46 San Diego L. Rev. 343, 349, 353–55 n.131 (2009) (showing that Montana does not mandate any procedures other than a record-keeping requirement, and that it is one of only ten states with merely “negligible” additions to the *Goss* requirements, while thirty-three other states have made substantial additions to *Goss*).

specifying the features an adequate procedure should entail.¹¹¹ At schools where there is no district superintendent or principal, even teachers may suspend students for “good cause” and are required only to notify the trustees and county superintendent.¹¹² Montana does not even provide procedural protections for students facing the more serious punishment of expulsion,¹¹³ and there is no uniform requirement that jurisdictions provide an alternative instruction mechanism for students serving suspensions or expulsions. Accordingly, students who are removed from school are often left without daily care or education. The state’s one gesture towards due process is a requirement that schools “maintain a record of any disciplinary action that is educationally related [including suspensions], with explanation, taken against the student.”¹¹⁴

2. Disciplinary Procedures Particular to Wolf Point

Personal accounts from the Wolf Point School District illustrate that even the minimal procedural protection afforded to Montana school students suffers from a lack of enforcement, and negatively impacts children caught in the school disciplinary system. The Wolf Point School District Policies provide that “a building administrator” may order up to a ten-school-day suspension for any student and may impose a suspension up to double that amount if an informal hearing is given to the student.¹¹⁵ The Policies also require that “a building administrator will report *any* suspension *immediately* to a student’s parent or legal guardian.”¹¹⁶

Unfortunately, many American Indian Wolf Point parents report that these policies are nominal. Angie K.’s son T.K. attended school in the Wolf Point School District and graduated in 2010. On each of five occasions that T.K. was suspended from Wolf Point High School, he was sent off school premises alone, and Angie was not alerted until hours or even days later, when she would receive a call or letter specifying a date when T.K. could return to school. In 2011, Angie had to stay in Billings to care for her dying mother and informed the school that T.K. would be staying with his uncle until she returned. During this period, school administrators met with T.K.—without a parent or guardian present—and informed him he was being permanently expelled. The principal later called Angie to inform her of the decision, and to suggest that T.K. spend his senior year at the Wolf Point Opportunity Learning Center (OLC). OLC is a

111. *Id.* at 355, n.130 (citing to relevant provisions of Montana legislation).

112. MONT. CODE ANN. §§ 20-4-302(5), 20-4-402, 20-4-403 (West 2013).

113. Expulsion in Montana includes any suspension without services beyond twenty school days. Only the school board of trustees may expel a student, but the board need not satisfy any procedural requirements before taking such action. MONT. CODE ANN. §§ 20-5-202.

114. MONT. ADMIN. R. 10.55.910 (2007). *See also* Zirkel, *supra* note 110, at 355 n. 1.

115. WOLF POINT SCH. DIST. POLICIES, SECTION 3 (STUDENTS) § 3300P, 1, *available at* http://wolfpoint.schoolwires.net/1979108412169213/lib/1979108412169213/Section_3_-_Students.pdf (last visited September 26, 2011).

116. *Id.* at 1 (emphasis added).

large class housed in a separate facility that serves a mix of special education students and those with disciplinary problems. Wolf Point parents report concerns about the OLC: it is a combination of varied grade levels doing different work with only one teacher, the academics lack rigor, and students pass classes with minimal work and instruction. T.K. passed his classes at the OLC and was able to graduate, but Angie does not believe he received an adequate education there.¹¹⁷

Bernadette J., another Wolf Point parent, reports a similar experience with suspensions at Wolf Point High School. On several occasions, administrators suspended her son and sent him home from school without informing her until after he had left the building. They did not ask for a meeting with her or discuss the incident that precipitated the suspension. The school simply told her to bring him back on a certain date.¹¹⁸

Patty McGeshick is Director of the Wolf Point Family Violence Resource Center, which provides counseling and services to families in crisis. McGeshick has, through her involvement with families at the Center, attended suspension hearings for some of those students in the Wolf Point School District who were actually afforded that procedural protection. She reports that the school shows little regard in these disciplinary proceedings for the backgrounds and circumstances of those students, many of whom have been neglected and abused. There is no opportunity for the student to present her account of the events that led to the suspension. The school administrator simply says, "This child is suspended," and provides a boilerplate reason. McGeshick believes that the whole system of discipline is flawed. She says, "They're looking at it as this child is bad, but it's not the child who is bad. The behavior is bad."¹¹⁹ McGeshick believes this is how the Wolf Point Schools "tag" children as discipline problems without addressing the underlying reasons for the "bad behavior." She says, "We are required to send our children to school by law. So they should do everything they can to keep the children safe." This includes calling parents frequently and working collaboratively to develop strategies to advance students' moral and educational development, not just excluding them from school.¹²⁰

E. Minimum Procedures Required for the Discipline of Students with Disabilities

Federal law mandates additional procedural protections for the suspension of special education students. Under 20 U.S.C. § 1414, state public schools must provide an "individualized education plan" (IEP) and special procedural protections to students with at least one of several classified disabilities, who are

117. Interview with Angie K. in Wolf Point, Mont. (Aug. 3, 2011).

118. Interview with Bernadette J. in Wolf Point, Mont. (Aug. 3, 2011).

119. Interview with Patty McGeshick, *supra* note 49.

120. *Id.*

in need of special education and related services.¹²¹ These protections include a thorough review of any decision to suspend a student with disabilities for more than ten school days. Within the first ten days of this suspension period, but ideally immediately, the school must conduct a “manifestation determination,” which consists of:

the local educational agency, the parent, and relevant members of the IEP Team shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.¹²²

If this group agrees that the behavior in question was a “manifestation” of the student’s disability, they must conduct a functional behavior assessment and implement a behavioral intervention plan, which are individualized methods the school and student will use to avoid future behavioral problems.¹²³ The school must also correct any deficiencies in the IEP services and return the child to his or her normal educational setting unless the parent agrees otherwise.¹²⁴ Parents must be notified about the school’s decision to seek a disciplinary change in placement¹²⁵ and must be given opportunity to take part in the manifestation determination and appeal any decisions they do not agree with.¹²⁶

Montana does not mandate that school districts provide alternative schooling to students with disabilities serving suspensions or expulsions. Individual school districts have discretion as to whether they want to allocate resources for this purpose. Students with disabilities removed from their regular classroom for disciplinary purposes are not guaranteed a minimum amount of instruction; the amount of instruction is determined on an individual basis by the IEP team.¹²⁷

In accordance with federal law, the Wolf Point School District Policies provide for a manifestation determination review meeting for students with

121. 20 U.S.C. §§ 1414(d)–(f), 1415 (2004). These disabilities may be physical, emotional, or cognitive in nature. 20 U.S.C. § 1401(3)(A) (2006).

122. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (2012).

123. 20 U.S.C. § 1415(k)(1)(D)(ii).

124. 20 U.S.C. § 1415(k)(1)(F)(iii).

125. 20 U.S.C. § 1415(k)(1)(H). A “disciplinary change in placement” includes any removal from the regular instructional environment for more than ten consecutive school days or a pattern of removals constituting more than ten school days total. 34 CFR §§ 300.530–300.535.

126. 34 C.F.R. §§ 300.530(h), 300.532.

127. Email from Tim Harris, Dir., Special Educ. Div., MONT. OFFICE OF PUB. INSTRUCTION, to author (July 11, 2011 10:28 RMT) (on file with author).

disabilities subject to suspensions of more than ten school days.¹²⁸ Schools are required to provide notice of the procedural protections due to students with disabilities both annually and whenever the school seeks to suspend or expel students for more than ten days.¹²⁹ However, American Indian parents in Wolf Point report that they are not informed of their student's entitlement to a manifestation determination, or their ability to challenge the manifestation determination.

Bernadette and Richard J. report that their daughter J.J. has been suspended without due process. Although J.J. has an IEP from Wolf Point High School, and has been classified with ADHD, Bernadette was never informed that J.J.'s status entitled her to procedural protections with regard to school discipline. When the school suspended J.J. for five days, they sent her home without informing Bernadette, and only called Bernadette later to let her know the suspension had occurred.¹³⁰ Richard notes that J.J. was also suspended from Wolf Point High School for an entire school year for an incident in which she was not involved. The school had video evidence that she entered a bathroom where other girls were setting off the fire alarm by holding a lighter to the alarm, and that she failed to report other students or exit the bathroom quickly enough. Despite J.J.'s IEP and ADHD classification, the school provided no manifestation determination review, and there was no discussion of the impact her disability may have had regarding her involvement in the incident, despite the fact that ADHD is known to contribute to negative behaviors in school.¹³¹ Wolf Point High School decided to suspend J.J. for a full year.¹³²

F. Dropping Out: At-Risk Youth Behaviors Statewide and on Fort Peck

For American Indian children in Montana, the correlation between risky adolescent behavior and failure in school is clear. Nearly three times as many American Indian students on reservations had sexual intercourse for the first time before age thirteen compared to the statewide average.¹³³ Nearly twice as many American Indian students in grades 7–12 on reservations smoke cigarettes daily as the statewide average.¹³⁴ Only 2.9% of Montana's white students in grades 7–12 drop out of school, but the dropout rate for American Indian

128. WOLF POINT SCH. DIST., *District Policies: Section 3* ("Students"), *supra* note 115, at § 3300P, 2.

129. 34 CFR 300.530(h).

130. Interview with Bernadette J., *supra* note 118.

131. See Gerald J. August, George M. Realmuto, Angus W. MacDonald III, Sean M. Nugent, and Ross Crosby, *Prevalence of ADHD and Comorbid Disorders Among elementary School Children Screened for Disruptive Behavior*, 24 *JOURNAL OF ABNORMAL CHILD PSYCHOLOGY* 5, 571–595 (1996).

132. Interview with Richard J. in Wolf Point, Mont. (Aug. 3, 2011).

133. MONT. OFFICE OF PUB. INSTRUCTION, 2009 MONT. YOUTH RISK BEHAVIOR SURVEY RESULTS 9, available at <http://opi.mt.gov/pdf/YRBS/09/Reports/09ComparativeReport.pdf>.

134. *Id.* at 5.

students is 8.8%.¹³⁵ At the Poplar School District on the Fort Peck Reservation, which is entirely American Indian, more than a third of middle school students tested positive for sexually transmitted diseases, twelve percent of high school girls are pregnant, and more than one-fifth of fifth-graders drink alcohol weekly.¹³⁶ There is a forty percent dropout rate.¹³⁷ These statistics demonstrate a clear need for heightened guidance intervention measures and mental health services in schools on reservations.

V.

SUICIDE AND SCHOOL FAILURE ON THE RESERVATION

A. The Fort Peck Reservation Suicide Crisis

Since early 2011, there has been growing media attention to a suicide crisis among school-age American Indians on Fort Peck. Troubling evidence links this suicide epidemic to the zero tolerance policies and harsh and arbitrary disciplinary practices at some of the public schools on the reservation. Additionally, the reservation's state-run public schools have not fulfilled the promise of the Indian Education for All Act,¹³⁸ which was intended to bring awareness and pride regarding the vibrant cultural heritage of Montana tribes into the public school system. High levels of discipline, frequent juvenile delinquency charges, a dearth of American Indian teachers and administrators, and a lack of instruction to promote pride in their heritage may all contribute to the increased risk of self-harm on the reservation. Accordingly, the high suicide rate can be characterized as yet another tragic symptom of the school-to-prison pipeline.

Sadly, Montana residents are at higher risk of suicide than the rest of the country. Montana ranks first in nationwide rates of suicide and has been in the top five for the past thirty years.¹³⁹ Forty-five percent of Montana counties are at or above the 80th percentile for suicide rates compared to the national rate.¹⁴⁰ This unfortunate distinction is even more extreme in Montana's American Indian communities.

135. MONT. OFFICE OF PUB. INSTRUCTION, MONT. STATEWIDE DROPOUT AND GRADUATE REPORT 2008–2009 6, available at http://opi.mt.gov/pdf/Measurement/DropoutReportFY08_09.pdf.

136. *Suicide Crisis Among Indian Children, Young Adults Baffles Communities*, MISSOULIAN, March 21, 2011, http://missoulian.com/news/local/article_3ecaba32-537a-11e0-8caa-001cc4c03286.html.

137. *Id.*

138. MONT. CODE ANN. § 20-1-501 (1999).

139. MONT. DEP'T OF PUB. HEALTH AND HUMAN SERVS., MONT. STRATEGIC SUICIDE PREVENTION PLAN 8, available at <http://prevention.mt.gov/suicideprevention/StateSuicidePlan.pdf>.

140. *Id.* at 11.

As of February 2011, 6.5% of all high school students in Montana reported attempting suicide one or more times in the past year.¹⁴¹ American Indian high school students on reservations attempted suicide at a much higher rate of 16.2%.¹⁴² Separate statistics for rates of suicide among white children are unavailable, but they are undoubtedly lower even than the percentages provided for all children, given the degree to which American Indian students raise the total percentage. In Roosevelt County, which contains the Poplar and Wolf Point School Districts, 71.3% of the middle school student body is American Indian. Twenty-eight percent of middle-schoolers in Roosevelt felt “so sad or hopeless almost every day for more than two weeks” that they “stopped doing some usual activities,” and, stunningly, 21.5% actually made a plan for how they would kill themselves.¹⁴³

Five out of only 153 students at Poplar Middle School committed suicide in the 2009–2010 school year. Twenty more attempted suicide. In response, the United States Public Health Service (PHS) deployed emergency teams for ninety days in 2010 to Fort Peck to provide counseling and mental health services, supplementing the “overworked counselors and strained resources of the reservation.”¹⁴⁴ Based on these experiences, PHS produced a report citing several community-based factors that contributed to the suicide crisis, including broken homes, violent crime, and poverty.¹⁴⁵ While there were no suicides during the ninety-day period of the federal response team’s presence on the reservation, at least four more teenagers on the reservation have committed suicide since the team left in October 2010.¹⁴⁶ One was an eight year-old child.¹⁴⁷

Many parents were frustrated that the report simply outlined “problems at the reservation that most everybody already knew” without providing assistance in fixing these problems in the long term.¹⁴⁸ For example, the PHS report suggested creating a safe house for suicidal children to replace the existing practice of locking them up in the local jail, but there is inadequate funding to implement the suggestion. In contrast, the tribal court created a new criminal

141. MONT. OFFICE OF PUB. INSTRUCTION, 2011 MONT. YOUTH RISK BEHAVIOR SURVEY HIGH SCHOOL RESULTS 32, available at http://www.opi.mt.gov/pdf/YRBS/11/Reports/11YRBS_HSResults.pdf.

142. *Id.* See also MONT. OFFICE OF PUB. INSTRUCTION, 2011 MONT. YOUTH RISK BEHAVIOR SURVEY, AM. INDIAN STUDENTS ON OR NEAR A RESERVATION 6, available at <http://www.opi.mt.gov/pdf/YRBS/11/Reports/11AmIndReservation.pdf>.

143. MONT. OFFICE OF PUB. INSTRUCTION, 2011 ROOSEVELT COUNTY YOUTH RISK BEHAVIOR SURVEY MIDDLE SCHOOL STUDENT FREQUENCY DISTRIBUTIONS (on file with author).

144. Volz, *Tragic Suicide*, *supra* note 56.

145. *Id.*

146. *Id.* See also Cindy Uken, *Montana Tribes Seek Solutions to Reducing Suicides*, THE MISSOULIAN, Apr. 7, 2013, <http://missoulian.com/news/local/montana-tribes-seek-solutions-to-reducing-suicides/article>.

147. Uken, *supra* note 146.

148. *Id.*

charge that allows prosecutors to detain persons threatening suicide.¹⁴⁹ The new charge, “aggravated disorderly conduct,” enables local prosecutors to lock up children at high risk of self-harm.¹⁵⁰ Barry Bighorn, the Fort Peck Juvenile Court Judge, estimates that the charge was been brought against 20–30 juveniles during the first few months of its enactment.¹⁵¹ Judge Bighorn is dismayed by the use of the charge and regrets that the courts are involved in situations where the primary concern is providing mental health services to children.¹⁵² He does not want children at imminent risk of suicide to be given a juvenile record and put in detention as though they are criminal offenders, and believes the various tribal authorities and federal agencies responsible for children’s well being have failed to coordinate services and ensure a speedy response to suicide threats.¹⁵³

The integration of mental health services and the criminal system in this way likely discourages children in crisis from reaching out for help. Stacie Crawford, the reservation’s chief tribal prosecutor, notes that incarceration of suicidal persons is not a viable long-term solution, but states that there are no alternative mental health services available to the tribe. “We’re not trying to criminalize them. But nobody else is offering any other alternative.”¹⁵⁴ This raises serious concerns that children who are in crisis will be deterred from asking for help out of fear that they will be locked up. As noted by Fort Peck Family Court Judge Roxeanne Gourneau, this punitive approach “takes away a child’s voice to ask for help.”¹⁵⁵

B. Narratives from Fort Peck: On School Sports, Discipline, and Suicide on the Reservation

While the data are chilling, the numbers alone cannot convey the depth of the tragedy of the Fort Peck suicides. The stories of the families and other observers serve to illuminate the heartbreak. Tribal Prosecutor Stacie Crawford reports that some of the youth suicides on the Fort Peck reservation were in part the result of “bullying” by school staff and overly punitive discipline practices.¹⁵⁶ Zero tolerance discipline policies not only push children into the juvenile and criminal justice systems, they also contribute to feelings of low self-worth that precipitate self-harm and suicidal ideation among youth.

149. FORT PECK TRIBAL CODE § VI-4-D-445, available at http://www.fptc.org/ccoj/title_vii/title_vii.pdf.

150. *Id.*

151. Interview with Barry Bighorn, Juvenile Court Justice of Fort Peck Tribal Court, in Poplar, Mont. (Aug. 3, 2011).

152. *Id.*

153. *Id.*

154. Volz, *Tragic Suicide*, *supra* note 56.

155. Interview with Roxanne Gourneau, Family Court Justice of Fort Peck Tribal Court, in Wolf Point, Mont. (Aug. 4, 2011).

156. Volz, *Tragic Suicide*, *supra* note 56.

One of the reservation's teens who committed suicide last year did so following an incident of school discipline that was, his mother believes, improperly handled. Dalton Gourneau, aged seventeen, was allegedly caught with a can of chewing tobacco in a Wolf Point High School hallway. He claimed it belonged to his friend, but his mother Roxanne Gourneau, the Fort Peck family court judge, says the school made no further investigation into the matter and told him he would be suspended from all activities for sixty days. No counseling was offered and the decision was final.¹⁵⁷ The school imposed a zero tolerance punishment even though official school policies for the discipline of tobacco offenses are discretionary, allowing school officials to simply refer students for counseling.¹⁵⁸ Judge Gourneau says the school sent Dalton home alone in tears without even contacting a guardian.¹⁵⁹

By all accounts Dalton was a beloved member of the community, popular among all students, and always ready to help a friend or elder.¹⁶⁰ Family and friends say he was a very happy young man—a gifted wrestler, in a community where sports are vitally important, and students care deeply about their athletic competitions.¹⁶¹ Dalton had qualified for the state championship competition, and was looking forward to it eagerly.¹⁶² His suspension from activities meant that he would miss the competition.¹⁶³ Friends and family believe that Dalton was so depressed by being unable to challenge this suspension or prove his innocence that he immediately went home and shot himself.¹⁶⁴

Dalton's mother blames the school district and state for his death.¹⁶⁵ The suicide epidemic among youth was widely known throughout the reservation when Dalton killed himself. She believes the school should have hired and trained staff who were equipped to deal with children in crisis.¹⁶⁶ Instead of rushing to discipline a youth who is part of a population that has experienced the deep trauma of the suicide trend, administrators should have taken a moment to see whether Dalton was emotionally stable before expelling him unaccompanied from the building. Roxanne Gourneau believes that “a small moment of

157. Interview with Roxanne Gourneau, *supra* note 155.

158. “[U]se” or “possession of tobacco” is a “level 3” offense, to which a response can be counselor referral or a suspension for as little as one day. *Wolf Point High School Handbook 2009–2010* at 18 (on file with author). *But see* Gourneau ex rel. Gourneau v. Hamill, 2013 MT 300 (Mont. 2013) (denying Judge Gourneau's appeal and holding that there was a mandatory one-day suspension for “level 3” offenses).

159. *Id.*

160. Interviews with several Wolf Point community members and high school students (Aug. 4-6, 2011).

161. *Id.*

162. Interview with Roxanne Gourneau, *supra* note 155.

163. *Id.*

164. *Mom Files Lawsuit in Indian Suicide Outbreak*, BILLINGS GAZETTE, June 1, 2011, http://billingsgazette.com/news/state-and-regional/montana/article_67b1a76e-8c6c-11e0-a8a6-001cc4c03286.html.

165. Interview with Roxanne Gourneau, *supra* note 155.

166. *Id.*

kindness” would have made a difference in her son’s fate.¹⁶⁷ Nobody gave Dalton the chance to explain what happened in the hallway.¹⁶⁸ He was simply told that the decision was binding and there was no ability to appeal.¹⁶⁹

While Wolf Point high school policies require contacting a parent when children are disciplined for anything above a “level one” offense,¹⁷⁰ the school never called or contacted Roxanne Gourneau in any way to let her know that Dalton was found with tobacco, a “level three” offense.¹⁷¹ Judge Gourneau learned about the disciplinary action only after Dalton was already dead, and only when she requested his school records. Zero tolerance policies, and failing to notify parents when students are disciplined, are particularly inappropriate in a school district that has a clearly vulnerable student population that has experienced intense tragedy recently. Judge Gourneau has filed suit to address her son’s death, in the hope that she can call attention to the school’s insensitivity and the failure to meet even the minimal standards of parent contact required by the school’s policies.¹⁷² Years later, she is still waiting for an apology from the school for failing to notify her of the suspension or for an explanation as to why Dalton was told to leave the premises alone, in tears, and in need of guidance.¹⁷³

Many other Wolf Point parents also complain of a lack of communication from the school regarding their children’s academic and emotional performance. They believe that schools and parents should be partners in educating children, and parents should at least be told when their children appear emotionally unstable in school. Angie K’s daughter, B.K., is an American Indian student at Wolf Point High School. She was on the basketball team in 2010 at age fourteen, and loved it. She was looking forward to an away game that her parents would be able to attend until one evening, the week before the game, she returned home in tears, devastated that she would not be able to play. The team coach had informed B.K., in front of the entire varsity and junior varsity basketball squads, as well as all the coaches, that she was failing math and would be ineligible to play. B.K. asked her mother if she could stay home from school the following day. Unaware of the humiliation her daughter had experienced the evening before, and not informed by the school of the failing grade, Angie agreed. B.K.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Wolf Point High School Handbook 2009–2010*, *supra* note 158, at 18.

171. *Id.*; Interview with Roxanne Gourneau, *supra* note 155.

172. In February of 2013, Roosevelt County District Judge David Cybulski dismissed Judge Gourneau’s lawsuit against the school district, state, and school district superintendent Henry Hamill. As of the publication of this article, her attorney has filed an appeal with the Montana Supreme Court. See Cindy Uken, *Mother: ‘I Heard Him Cry Like I’ve Never Heard Him Cry,’* BILLINGS GAZETTE, Mar. 31, 2013, http://billingsgazette.com/news/state-and-regional/montana/mother-i-heard-him-cry-like-i-ve-never-heard/article_1323d42f-1fd4-57d1-9592-fec5c3015c67.html.

173. Interview with Roxanne Gourneau, *supra* note 155.

proceeded to take a bottle of ibuprofen and attempted to hang herself. When this attempt failed, B.K. called Angie and told her mother that she had hurt herself. Angie returned home to find her daughter with broken capillaries covering her face, her eyes bloodshot, and abrasions on her neck. After rushing her to the hospital, Angie learned that her daughter had lethal levels of ibuprofen in her system. Luckily, B.K. survived. But Angie wonders why it took a suicide attempt for her to learn from the school that her daughter's grade had fallen from a B to an F in math. She wonders why she was not contacted privately about her daughter's athletic ineligibility. And she wonders why nobody from the school bothered to apologize to her following the incident, even though they knew about B.K.'s suicide attempt and the subsequent hospitalization.¹⁷⁴

Sharon H. also reports serious communication problems with Wolf Point High School. Sharon's granddaughter, for whom she is a legal guardian, was being bullied a lot by some other students. She had shoes thrown at her and graffiti written about her on bathroom walls. Her coach also told her that she was not good enough to play basketball. Sharon, knowing her granddaughter was suffering, called the school every day trying to reach someone who would help. Sharon says she "punched every number" on their phone system, but got nowhere.¹⁷⁵ One day Sharon's granddaughter announced to a teacher that she wished she were dead. Finally, she got some attention. But Sharon was offended when she walked into the school for a meeting following this cry for help only to find the same teacher she had been trying to reach out to for the entire year stroking her granddaughter's back. Why did it take a suicide threat to get attention? To Sharon, it seemed like the school lacked sympathy or concern in a time of collective trauma on the reservation. That year, instead of being told to practice harder and get better at basketball, her granddaughter was simply "knocked down" by other students, teachers, and coaches. She gave up on basketball.¹⁷⁶

Indeed, some parents note there is a pattern of students being discouraged from sports at Wolf Point High School. As a freshman, B.J. was told that he would never be a good enough basketball player to play on the team. After academic and athletic difficulty in Wolf Point, B.J.'s parents transferred him to Frazer. He became a star pupil and a starting player on a team that won state championships.¹⁷⁷ Sharon H's granddaughter's coach also told her that she wasn't good enough to play basketball, and should just find something else.¹⁷⁸ There is no need to discourage any student from athletics, even ones that lack talent, when they are only freshmen. Engagement in after-school sports helps young people stay out of trouble; "[w]ith less idle time, students have fewer

174. Interview with Angie K., *supra* note 117.

175. *Id.*

176. Interview with Sharon H. in Wolf Point, Mont. (Aug. 3, 2011).

177. Interview with Bernadette J., *supra* note 118.

178. Interview with Sharon H., *supra* note 176.

opportunities to engage in behavior that may be harmful to themselves or others.”¹⁷⁹ Notably, while Wolf Point High School is predominantly American Indian, parents report that the starting lineups for most of the teams tend to be all white.¹⁸⁰

Outsiders often wonder why high school sports, particularly basketball, are so important to Wolf Point residents: “why would a child kill [herself] over sports?”¹⁸¹ Angie believes that for her daughter, sports were her whole life. James Melbourne, Fort Peck Tribal Health Director and himself a basketball star in high school, agrees that sports take on a deep importance for adolescents on the reservation. He says that, as in a classic Sherman Alexie¹⁸² story, former high school basketball heroes remain the reservation’s heroes for life.¹⁸³ The poverty on the reservation forecloses many options for extracurricular activities and other opportunities to excel. As a result, school sports can dominate young peoples’ lives and dreams.

There are other, more subtle ways in which the tribal community feels it is being overlooked by the school districts on Fort Peck. For example, Tribal Council member Tom Christian notes that the Poplar School District locks the school playground for the summer. While the District may be worried about liability, he feels that this action symbolically displays a lack of sensitivity to the community’s needs. Poplar is an entirely American Indian school and the children in the area, most living below the poverty line, have few opportunities for recreation or programming of any kind in the summer.¹⁸⁴ There are no other local playgrounds, and access to the school playground would make a big difference in the daily lives of children in the District. Angela Urbanic, a former nurse at Wolf Point High School, resigned out of frustration after school administrators refused to work with her to address the dangerously high levels of obesity and diabetes among American Indian students. She tried unsuccessfully to alter the menu to be more diabetic friendly because many of the students eat all of their meals at school. Angela also disapproved of the way in which the school returned to “business as usual” after student suicides instead of addressing the crisis and trauma.¹⁸⁵

179. Pedro A. Noguera, *Finding Safety Where We Least Expect It*, in *ZERO TOLERANCE*, at 213.

180. Interview with Bernadette J., *supra* note 118.

181. Interview with Angie K., *supra* note 117.

182. Sherman Alexie is a novelist, poet, and Spokane/Couer d’Alene tribal member. See THE POETRY FOUNDATION, *Sherman Alexie*, <http://www.poetryfoundation.org/bio/sherman-alexie> (last visited Sep. 24, 2013). Alexie’s novels portray American Indian reservation life and the central importance of high school sports in such communities.

183. Interview with James Melbourne, Fort Peck Tribal Health Dir., in Poplar, Mont. (Aug. 3, 2011).

184. Interview with Tom Christian, Fort Peck Tribal Council Member, in Poplar, Mont. (Aug. 4, 2011).

185. Interview with Angela Urbanic in Wolf Point, Mont. (Aug. 4, 2011).

Patty McGeshick is likewise frustrated with Wolf Point High School's low levels of communication with parents and community members. As director of the local Family Violence Resource Center, she tries to be involved with the school because teachers and administrators are mandatory reporters of child abuse and neglect. McGeshick reports that the school used to be receptive to trainings on how to identify abuse and how to comply with state and federal laws, but that involvement has been declining.¹⁸⁶ Identifying abuse is crucially important on the reservation because victims of abuse are at far greater risk of suicide.¹⁸⁷

McGeshick, like Sharon H., is also frustrated by seemingly trivial but consequential problems like the school's phone system. When McGeshick calls the school, she is rarely able to reach a human being—which is especially problematic since McGeshick must be able to inform the school about orders of protection students may have against certain adults. McGeshick laments, "I don't think they believe we are important enough to speak with. But they are in charge of our children for six to seven hours a day, so I would think you would want to know what is going on in their lives. Particularly if it's a child at risk."¹⁸⁸ Many American Indian parents—even those who are prominent and successful—report feeling that white parents do not face these same barriers. Richard K. Jackson, Chief Judge of the Fort Peck Tribal Court, notes a marked difference between the dismissive manner in which he is treated by school officials and the respectful way white parents are addressed.¹⁸⁹

The tribal community is also concerned about the school district's decision to switch to a four-day school week in 2011.¹⁹⁰ This seems an odd choice for an impoverished community with little resources for recreation, and where students rely on the school for regular meals. Additional unstructured and unsupervised time is also ill-advised for a school population that is at high risk of self-harm and suicide. Local parent Ed Bauer believes that "it's a way to save money, it's not about the kids."¹⁹¹ Suspending children from school and decreasing the

186. Interview with Patty McGeshick, *supra* note 50.

187. See Deborah Fry, Amalee McCoy & Diane Swales, *The Consequences of Maltreatment on Children's Lives*, 13 TRAUMA, VIOLENCE, AND ABUSE 4, 209 (2012). Several longitudinal studies in the East Asia and Pacific region have shown that "[a]dolescents and adults in the region who have experienced child sexual and/or physical abuse have a median fourfold increased risk of suicide ideation and attempts than children without a history of these types of maltreatment." *Id.* See also The Coalition to End Violence, *Children and Domestic Violence*, <http://www.thecoalition.org/Children%20and%20Domestic%20Violence.htm> (last visited Oct. 22, 2011); *Get Educated: Abuse in America*, THE HOTLINE, (Oct. 22, 2011, 1:00 PM), <http://www.thehotline.org/get-educated/abuse-in-america>.

188. Interview with Patty McGeshick, *supra* note 49.

189. Interview with Richard K. Jackson, Chief Justice, Fort Peck Tribal Court, in Wolf Point, Mont. (Aug. 4, 2011).

190. *Wolf Point Schools Adopt Four-Day School Week*, MISSOULIAN, (Apr. 13, 2011, 11:30 PM), http://missoulian.com/news/state-and-regional/article_c2f7ad80-65c5-11e0-9df6-001cc4c002e0.html. This was largely a cost-cutting measure.

191. Interview with Ed Bauer in Wolf Point, Mont. (Aug. 3, 2011).

length of the school week is particularly problematic for a population at risk of suicide.¹⁹²

VI.

DISPROPORTIONATE AMERICAN INDIAN CONTACT WITH THE JUVENILE JUSTICE SYSTEM

Suspending children from school for even a few days disrupts their education and may escalate poor behavior by removing them from a structured environment and increasing opportunities to get into trouble.¹⁹³ A study published in the *Journal of School Psychology* demonstrated that suspended students are twenty-six percent more likely than students who have not been suspended to be involved with the legal system.¹⁹⁴ Schools contribute to racial disparities in the juvenile justice system by suspending students of color more frequently, which makes those students more likely to fall behind in school and to engage in behaviors labeled as delinquent. Additionally, by using police officers to facilitate school discipline—either by calling officers in the event of an incident or having police officers regularly on site—schools move students directly into the juvenile justice system rather than affording them the opportunity to first correct their behavior. The below data show that often tribal children in Montana are subject to the worst aspect of the school-to-prison pipeline—an ultimate fate of incarceration.

A. Statewide Racial Disproportionality in Juvenile Justice

Racial disparities among youth involved in criminal justice in Montana are stark. American Indian youth are more likely than white youth to be arrested and once arrested are more likely to serve time in detention. Statewide in 2009, American Indian juveniles were arrested at a relative rate (adjusted for population totals) of 1.66 times the number of white juveniles.¹⁹⁵ Further levels of involvement in the juvenile justice system after arrest reveal more troubling patterns, especially considering that the cases against white and American Indian youth involved roughly equivalent percentages of misdemeanors versus felonies

192. Noguera, *supra* note 179, at 207 (noting that the risk of suicide may be linked to individualism, social isolation, and alienation).

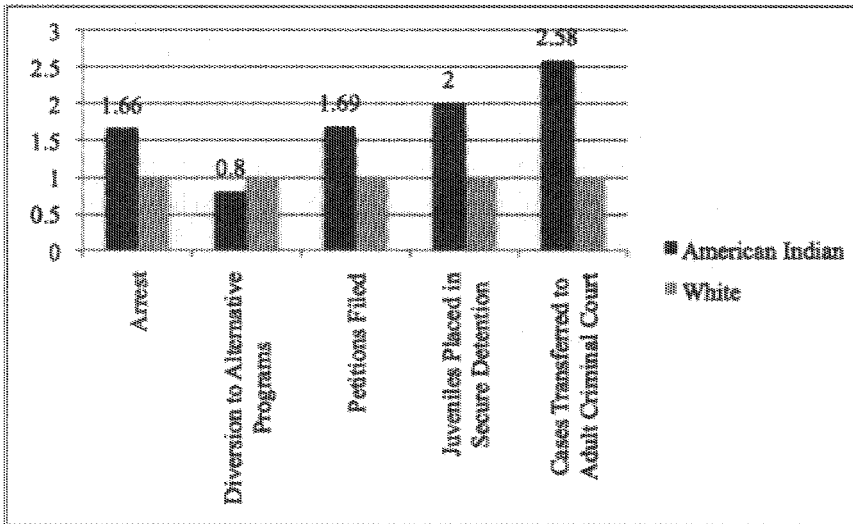
193. JOHANNA MILLER, UDI OFER, ALEXANDER ARTZ, TARA BAHL, TARA FOSTER, DEINYA PHENIX, NICK SHEEHAN & HOLLY A. THOMAS, NEW YORK CIVIL LIBERTIES UNION, *Education Interrupted: The Growing Use of Suspensions in New York City's Public Schools* 7 (2011), http://www.nyclu.org/files/publications/Suspension_Report_FINAL_noSpreads.pdf.

194. *Id.* (citing Virginia Costenbader and Samia Markson, *School Suspension: A Study with Secondary School Students*, J. OF SCHOOL PSYCHOLOGY 36 (Spring 1998)).

195. MONT. BD. OF CRIME CONTROL, Montana2009_Non-Status.xls, <http://mbcc.mt.gov/JuvenileJustice/DMC/DMC.asp> (click on "RRI for the state.") (last visited Nov. 7, 2011). Of the 88,153 white children in the at-risk age population (10–17 years of age), 4,809 were arrested, or 5.45% of the population. Meanwhile, of the 9,926 American Indian/Alaska Native children in that age range, 897 were arrested, or 9.04% of the population of American Indians. The Board of Crime Control does not provide data that is disaggregated by type of arrest.

for both populations.¹⁹⁶ American Indian juvenile arrestees are far less likely to have their cases diverted into alternative out-of-court programs. American Indians' cases were diverted to these alternative programs at a relative rate of only 0.80 for every white juvenile diversion, making them more likely to remain in the court system with continued monitoring and a greater likelihood that they will be locked up.¹⁹⁷ These racial disparities are also visible in the comparative rate of petitions filed,¹⁹⁸ placement in secure detention,¹⁹⁹ and transfer to adult criminal court of American Indian versus white juveniles.²⁰⁰

**2009 Rate of Involvement in Juvenile Justice System
(Statewide)²⁰¹**



The Board of Crime Control does not provide data on the relative poverty levels and types of crimes for which white and American Indian juveniles are arrested and adjudicated, so any correlation between those factors and the

196. MONT. BD. OF CRIME CONTROL, *DMC Three Year Plan, 2013 Update*, 20, available at <http://mbcc.mt.gov/JuvenileJustice/DMC/DMC3-YrPlan12-14Update.pdf>. Felonies among white youth in the system occurred at a rate of 17%; for American Indians, the rate was 17.5% from January 1, 2009 to December 31, 2010.

197. MONT. BD. OF CRIME CONTROL, *supra* note 195. While only 64.77% of American Indian youth arrestees' cases were diverted away from juvenile court, 81.16% of white youth arrestees' cases were diverted. 24.08% of American Indian arrestees' cases involved secure detention, while only 14.87% of white arrestees' cases involved secure detention.

198. *Id.* Of the total arrests of American Indian youths, 20.18% resulted in petitions being filed, while only 11.96% of white youths arrested had petitions filed against them.

199. *Id.* While 25.41% of American Indian youth with delinquent findings are confined in juvenile correctional facilities, only 12.70% of white youth petitioned are confined.

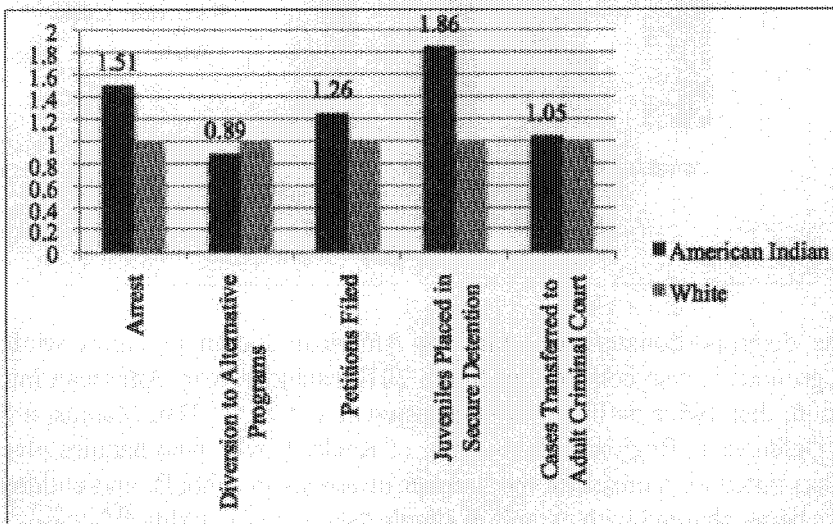
200. *Id.* While 7.28% of American Indian youth petitioned have their cases transferred to adult court, only 2.78% of white youth petitioned have their cases transferred.

201. *See supra* notes 197–200 and accompanying text.

subsequent racially disparate treatment in sentencing and transfer to adult court cannot be deduced. However, it's quite clear that there is vast inequality, and a charged or adjudicated youth is more likely to be locked up and more likely to be placed with adult criminal offenders if she is American Indian than if she is white.

In 2010, racial disparities in the Montana juvenile justice system improved. This is likely due in part to efforts by the Board of Crime Control's Disproportionate Minority Contact (DMC) Committee, which included collecting comprehensive data on and analysis of minority interactions with the state's juvenile justice system, and making recommendations to local law enforcement and court systems.²⁰² Nevertheless, the problem remains pronounced.

2010 Rate of Involvement in Juvenile Justice System (Statewide)²⁰³



B. Disproportionate Contact of Hill County American Indians with the Juvenile Justice System

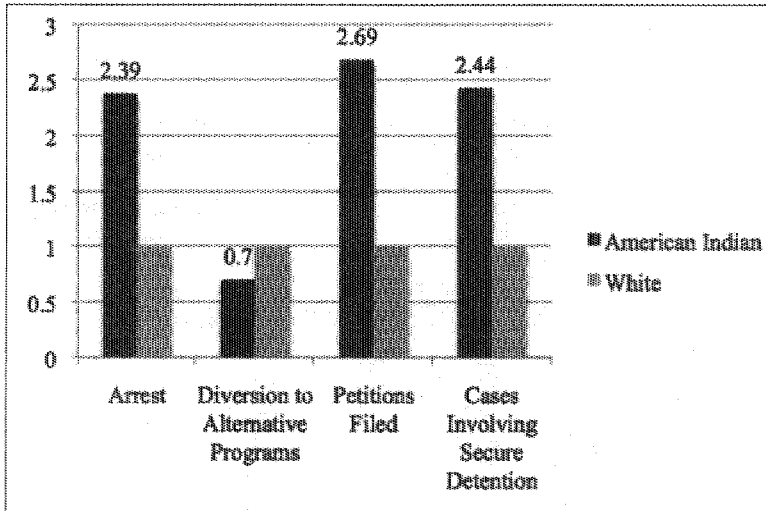
Hill County, the location of Rocky Boy's Reservation, is in the same area of Montana as Fort Peck. Data from Hill County provide important illustrative information about the disproportionate involvement of American Indian children

202. See generally MONT. BD. OF CRIME CONTROL DMC COMMITTEE, *Assessing the Mechanisms that Contribute to Disproportionate Minority Contact with the Juvenile Justice System*, December 2012, available at <http://mbcc.mt.gov/Data/SAC/RAI/DMCAssessRep.pdf>.

203. MONT. BD. OF CRIME CONTROL, *2010 RRI for Juveniles* (on file with author). Of 82,379 white children in the at-risk age population (10–17 years of age), 5,219 were arrested, or 6.34% of the population. Meanwhile, of 9,178 American Indian/Alaska Native children in that age range, 879 were arrested, or 9.58% of the population of American Indians.

in the juvenile justice system. In 2009, the county arrest rate for American Indian youth was 2.39 times the arrest rate for white youth,²⁰⁴ and American Indian youth were thirty percent less likely to have their case diverted from the justice system.²⁰⁵

2009 Rate of Involvement in Juvenile Justice System (Hill County)²⁰⁶



The disproportionate arrest rate for American Indian juveniles while on school grounds is also concerning. In the 2010 calendar year, American Indians were more than twice as likely to be arrested at school.²⁰⁷ Dan Mannis, a State Public Defender in Region 6, the vicinity of Rocky Boy's, who handles juvenile cases, has noted an increase in the number of arrests in schools, and children of all races being charged with assault in simple "schoolyard" fights.²⁰⁸

204. MONT. BD. OF CRIME CONTROL, *2009 RRI for Juveniles in Hill County* (on file with author).

205. *Id.*

206. *Id.*

207. MONT. BD. OF CRIME CONTROL, Mont. Incident-Based Reporting System, *Juvenile Arrests (Age 10-17) with a Location Type of '22' School/College, January 1, 2010 to December 31, 2010* (on file with author). Nineteen American Indian juveniles were arrested at school, while twenty-one white juveniles were arrested on school grounds. The population of juveniles in Hill County for 2010 is not available from the Board of Crime Control or the Census, but in 2009, there were 519 American Indians between ages 10-17, and 1,299 white 10-17 year olds. See Mont. Bd. of Crime Control, *Montana2009_Non-Status.xls*, <http://mbcc.mt.gov/JuvenileJustice/DMC/DMC.asp> (click on "Hill County" in the section labeled "for each DMC site within the state") (last visited Nov. 7, 2011). Thus, although American Indian juveniles were less than half of the population of white juveniles, roughly the same number of both groups were arrested at school.

208. Interview with Dan Mannis, State Pub. Def. for Region 6, by telephone (July 12, 2011).

C. American Indian Youth Involvement in Tribal and Federal Courts

The statistics provided above cover only state prosecutions and do not account for situations where American Indian youth are (1) arrested on reservations by the tribal police or adjudicated in tribal courts, or (2) arrested by federal authorities, sentenced in federal court, or committed to custody in federal courts. Adding in the figures for these arrests would make the disparities even more pronounced. In 2008, twenty-one American Indian youths under the age of twenty-one were arrested by federal authorities in Montana.²⁰⁹ During that period, Montana had the highest percentage of federal arrests of American Indian youths in the nation.²¹⁰ Eighteen of twenty-four criminal cases filed against juveniles in Montana's federal district court were against American Indians.²¹¹ Additionally, nineteen of twenty-one youths in Montana committed to federal custody were American Indian.²¹² The data for arrests, adjudications, and sentencing in tribal courts statewide were not available, but the *Fort Peck Journal* reported that in 2010 Fort Peck Tribal Court considered 997 juvenile delinquency charges.²¹³

VII.

POLITICAL APPROACHES TO STEMMING THE PIPELINE FLOW

The dire situation of the children of Fort Peck and other Montana reservations should be addressed in the first instance through the political process. Both state and federal legislatures have the power to devise possible remedies. First, as detailed in Part VII.A–C, Montana should authorize the creation of charter schools for the limited purpose of providing tribes with the opportunity to control and direct the schooling of American Indian students. Charter schools could benefit on-reservation American Indian students by increasing tribal autonomy on matters of curriculum, hiring, and discipline in the

209. WILLIAM ADAMS, JULIE SAMUELS, JANEEN BUCK WILLISON, HANNAH DODD, MEREDITH DANK, BARBARA PARTHASARATHY, KAMALA MALLIK-KANE, JESSICA KELLY, SYBIL MENDONCA & KiDEUK KIM, U.S. DEPARTMENT OF JUSTICE, *Tribal Youth in the Federal Justice System*, Appendix A: Arrest and Booking Stage, July 2011, Table AA.13a, "Number of arrestees under age 21 and Indian Country cases, by district of arrest," <https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf>.

210. *Id.* at Table AA.13b, "Percentage of arrestees under age 21 with juvenile legal status and Indian Country cases, by district of arrest." In Montana, 24.14% of all federal arrests of American Indians were of individuals under age twenty-one. This percentage is the same as the arrests in Montana's neighboring state, South Dakota. The next highest total percentage of federal arrests of American Indian youth was in Arizona, which had 17.24%.

211. *Id.* at Appendix D, Table D9, "Indian Country Juvenile Defendants in Criminal Cases Filed in U.S. District Court, by Judicial District"; *id.* at Appendix D, Table D4, "Juvenile Defendants in Criminal Cases Filed in U.S. District Court, by Judicial District."

212. *Id.* at 61, 65. *Id.* at Appendix G, 13, Table G15, "Indian Country Juveniles committed to BOP custody, by Judicial District (Court of Jurisdiction)"; *id.* at Appendix G, 5, Table G5, "Juveniles Committed to BOP custody, by Judicial District (Court of Jurisdiction)."

213. Louis Montclair, *More DC Committed in 2010 Than Other Crimes*, FORT PECK JOURNAL (June 15, 2011) (on file with author).

schools. Second, as set out in Part VII.D, Congress should immediately restore the critical federal funding that has been lost to existing reservation schools as a result of the recent “sequester” of the federal budget.

A. Charter Schools: The Background

Although charter schools are technically public schools, they are managed by private entities under a “charter” with the state in which they are located.²¹⁴ Generally independent from the traditional state-run public school system and local school districts, they operate under reduced supervisory control from public education officials.²¹⁵ The degree of autonomy enjoyed by charters varies from state to state.²¹⁶ Charters allow private persons, non-profit organizations, and other institutions to manage schools that receive public funding.²¹⁷ They often serve at-risk student populations, have smaller student bodies, and present thematic curricula.²¹⁸ Charter schools were established in part to serve as laboratories where new educational techniques and innovation are developed.²¹⁹ Because they are permitted to develop unique local missions, charters can address the particular needs of racial and ethnic minorities by offering parents more autonomy and control of their children’s educations, and the opportunity to choose schools based on curricula that encompass their own backgrounds.²²⁰

B. Racially and Culturally Distinct Charter Schools

There is growing support for the development of racially- and ethnically-based charter schools, designed to serve groups that have been socially and culturally marginalized in traditional public education.²²¹ The perceived need for such institutions is a consequence of the evidence that integration efforts in the wake of *Brown v. Board of Education*²²² failed to equalize educational opportunities for students of color in *de jure* integrated public school systems, and that these public schools pay insufficient attention to the social and cultural

214. Mary E. Wright, *Single/Majority Race Charter Schools: Charting A New Course in the Aftermath of the Failed Mandates of Brown v. Board of Education*, 9 RUTGERS RACE & L. REV. 1 (2007).

215. Kevin Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 58 (2006).

216. *Id.*

217. *Id.*

218. Wright, *supra* note 214, at 1.

219. Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, *supra* note 215, at 59.

220. *Id.* at 58 (“Charter schools encourage experimentation and the adoption of alternative educational programs, which can be structured to address the different sociocultural environments of black and Latino youth.”).

221. See *id.* See also Danielle N. Boaz, *Equality Does Not Mean Conformity: Reevaluating the Use of Segregated Schools to Create a Culturally Appropriate Education for African American Children*, 7 CONN. PUB. INT. L.J. 1 (2007).

222. 347 U.S. 483 (1954).

accomplishments and history of racial and ethnic minorities.²²³ Advocates of minority-dominant charter schools argue that the assimilation towards white, Eurocentric “American” culture causes a loss of vital, diverse cultural heritages and undermines minorities’ senses of self-worth.²²⁴

Curricula that lack instruction on minority groups’ cultures and history can have negative consequences on the ability of students from these groups to learn and thrive in school.²²⁵ However, the integration of minority culture instruction in mainstream public schools, where there is limited instructional time and resources, is difficult. Most schools, especially those whose curriculum is directed by statewide education agencies, must teach to and about the majority culture.²²⁶ Accordingly, students whose cultures have been subjected to white oppression—including efforts to eradicate their languages, religion, and traditions through assimilationist education—may especially benefit from charter schools. The charter system would allow individuals from affected cultural groups to create schools that restore or celebrate their cultures.²²⁷ Advocates for charter schools argue that these institutions can fill this gap for minority students by focusing discretionary curriculum on minority cultures, histories, and issues.²²⁸

223. These arguments are often made in support of creating primarily black, and specifically African-American, charter schools. See Boaz, *supra* note 221, at 2–3. Integration has “been unsuccessful in eliminating the disparities between the educational institutions of primarily white students and those of primarily black students. African American children experience a largely inadequate education that places them at a disadvantage in terms of job competition and admission into higher education. Meanwhile, integration has caused African American children to be subjected to an education that focuses on Euro-Centric history and culture. American education also disregards the contributions of Africans to the development of the U.S. and the world.” *Id.* See also Wright, *supra* note 214, at 16–25.

224. Boaz, *supra* note 221, at 4 (“[T]here are numerous relationships between culture and the development of self that require one’s culture to be preserved. Current educational systems in Western schools with Eurocentric ideologies are often demeaning at best, teaching minorities that their existence is inconsequential and their traditions are barbaric, and revering slaveholders and other great oppressors of minority rights.”).

225. *Id.* at 8. Boaz argues that the “adjustment problems” that African American students face in schools can be attributed to the legacy of forced migration and assimilation to Euro-centric cultural ideals and that education of African American students cannot proceed in a traditional school environment if there is no attention to black culture: “it is useless to try to teach African American children such fundamental topics as math and science if their minds are clouded by inferiority based on stereotypes from the media and textbook propaganda.” *Id.*

226. *Id.* at 15.

227. *Id.* at 5–11. Boaz posits that American education during slavery involved the forced eradication of African culture and language, in much the same ways the white majority attempted to eliminate American Indian culture as described *infra* in Part II.B.

228. See *id.* See also Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, *supra* note 215.

C. Charter Schools in Montana: A Remedy for Failing Indian Schools?

Montana is among only eight states that do not authorize charter schools.²²⁹ In the spring of 2013, the state Senate endorsed a bill that would allow for charter schools with significant state oversight, allowing them where existing public school districts approved,²³⁰ but the bill failed to pass in the legislature. The controversy mirrored much of the national debate over charter schools: proponents argued that the state education system needed innovation, that students for whom the system was not working could benefit from an alternative, and that existing public schools would only improve in the face of competition;²³¹ opponents countered that those students who most needed an alternative had parents who would not take the initiative to seek the alternative²³² and that charters would put control over education into the hands of private corporations.²³³ The charter school movement in Montana has been pushed largely by conservative groups interested in private enterprise taking over schools or promoting religious choice in school selection.²³⁴ The potential of charter schools as an alternative to on-reservation state-run public schools did not figure in the debate.²³⁵

The Harvard Graduate School of Education recently published a study of three tribal-governed charter schools.²³⁶ The schools in the study were affiliated

229. Mike Dennison, *Montana Legislators Endorse Bills on Charter Schools, 'School Choice,'* THE MISSOULIAN, Apr. 3, 2013, http://missoulian.com/news/state-and-regional/montana-legislature/montana-legislators-endorse-bills-on-charter-schools-school-choice/article_1d30f7c4-9cc0-11e2-8199-0019bb2963f4.html.

230. *Id.*

231. *Id.*

232. *Id.*

233. Ron Carlett, *Denise Juneau Says No to Charter Schools in Montana,* MEDIATRACKERS (Oct. 10, 2012), <http://mediatrackers.org/montana/2012/10/10/denise-juneau-says-no-to-charter-schools-in-montana>.

234. Mike Dennison, *Who's Behind Montana's School Choice Movement?*, HELENA INDEP. REV., March 17, 2013, http://helenair.com/news/legislature/who-s-behind-montana-s-school-choice-movement/article_0b204b88-8f8d-11e2-b63a-0019bb2963f4.html.

235. Brian Bielenberg, *Charter Schools for American Indians*, in LEARN IN BEAUTY: INDIGENOUS EDUCATION FOR A NEW CENTURY, 135, 2 (pdf pagination) (John Reyner, Joseph Martin, Louise Lockard & W. Sakiestewa Gilberd eds., 2000), available at www2.nau.edu/~jar/LIB/LIB11.html ("The educational system that for so many decades sought to destroy Indian cultures, languages, values, and people must now help to undo the damage of the past. It must be transformed in such a way as to provide a means by which to help American Indians overcome the great social injustices of the past and those still encountered on a daily basis today. [. . .] The charter school movement is one current reform that offers great potential to accomplish these things in American Indian and Alaska Native communities by allowing for the relocation of the seat of power and control of education into the hands of the community, free of the rules and regulations determined by outside agencies.").

236. EVE L. EWING & MEAGAN A. FERRICK, HARVARD UNIVERSITY & NATIONAL INDIAN EDUCATION ASSOCIATION, FOR THIS PLACE, FOR THESE PEOPLE: AN EXPLORATION OF BEST PRACTICES AMONG CHARTER SCHOOLS SERVING NATIVE STUDENTS June 2012, available at <http://www.niea.org/data/files/research/ewing.ferrick.2012-charter%20schls%20%5Bfinal%5D.pdf>.

with specific tribes, located on reservations, and served low-income student populations. According to the study, these schools successfully improved student outcomes as compared with the public schools available to the tribe's schoolchildren.²³⁷ The schools also integrated tribal curricula, empowered students, and fostered good relationships with the local tribal communities and parents.²³⁸ According to national data, tribal-run charter schools also perform better than those tribal schools administered by the Bureau of Indian Education,²³⁹ the federal agency that oversees the non-state public schools on Indian lands.²⁴⁰ Charter schools have accordingly been growing in popularity as an on-reservation schooling option.²⁴¹

Charter schools run by tribes could give tribes and American Indian parents in Montana three key areas of control over education: (1) curricular choice, including the ability to incorporate more tribal culture and heritage, (2) the ability to increase hiring of American Indian educators and staff, and (3) more autonomy and discretion with respect to student discipline.

1. Charters Can Create an Opportunity for Tribal Cultural Curricula

The *Brown* decision, calling for desegregation of public schools, did not rely on the argument that black schools were physically inferior, but rather on the fundamental "badge of servitude" that accompanied segregation, and the right of black students to access the same education as white students (which, the Supreme Court concluded, can only be accomplished through an assimilated education).²⁴² *Brown* and its progeny do not extend the meaning of the right to

237. *Id.* at 61–63.

238. *Id.*

239. Anna Nicotera, *Public Charter Schools on Bureau of Indian Affairs Land*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS 7, Aug. 15, 2013, http://www.publiccharters.org/data/files/Publication_docs/NAPCS%20BIA%20Details%20from%20the%20Dashboard_20130815T104915.pdf (thirty-nine percent of public charter schools on reservation lands met Adequate Yearly Progress (AYP) (twelve schools out of thirty-one) while BIE-run public schools on reservations made AYP at a rate of thirty-two percent (fifty-one of 159 schools)).

240. The Bureau of Indian Education (BIE), a division of the U.S. Department of the Interior under the Assistant Secretary for Indian Affairs, oversees a total of 183 elementary, secondary, residential and peripheral dormitories across twenty-three states. BUREAU OF INDIAN EDUCATION, <http://www.bie.edu/Schools> (last visited Nov. 8, 2013). In 1995, Congress put a temporary moratorium on new educational programs funded by the BIA which has yet to be lifted. The moratorium prohibits the opening of new BIE-operated schools or the expansion of grade levels offered in existing BIE-operated schools. See *Number of Charter Schools Growing on BIA Lands*, NAVAJO TIMES, Aug. 13, 2013, <http://navajotimes.com/education/2013/0813/082213bri.php>.

241. Nicotera, *supra* note 239 at 4 ("Between 2005 and 2010, six charter schools opened on reservations without an existing public school, and by 2010, 15 reservations had charter schools as the only available public school option. In 2010, there were five reservations with at least one charter school and traditional public school, and 46 reservations with only traditional public schools.").

242. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) ("[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to

“equal” public education to include a requirement that the education be sensitive to one’s own cultural background.²⁴³ As discussed in Part III.A., it is important for American Indian students to receive instruction on their tribal culture, language, and heritage in addition to mainstream instruction, and research demonstrates that culturally relevant instruction improves the academic performance of American Indian students.²⁴⁴ A charter school run by local tribes would be free to design curricula to meet these needs and would be less tethered to control by the local (usually white-controlled) public school board and state.

2. Charters Can Create Opportunity for Increased Hiring of American Indian Teachers and Staff

Montana’s public schools do not adequately recruit and place American Indian teachers in on-reservation schools. The most recent statistics available on the number of American Indian educators in the state’s public school system are from the 1999 Equal Educational Opportunity for Native American Students in Montana Public Schools Report. At that point, there were a total of nineteen American Indian teachers on all of the Fort Peck reservation schools while there were 185 non-American Indian teachers.²⁴⁵ The Office of Public Instruction does not track the racial composition of school staff. However, Tribal Education Director Dale Four Bear reports that administrators in all of the on-reservation public schools are overwhelmingly white.²⁴⁶ This is particularly true for Wolf Point; Four Bear could not identify a single American Indian school administrator in the Wolf Point School District.²⁴⁷ It is important for young American Indian students to work with teachers and administrators who come from their community, know their tribal upbringing, understand their culture, and are able to teach their native history.²⁴⁸

cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

243. Boaz, *supra* note 221 at 38. *But see* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (where the Court found that parents have a substantive due process right to educate their children in certain religious and cultural traditions). *See also* Boaz, *supra* note 221 at 38–43 for a discussion of the international agreements that the U.S. is a party to which suggest the right of racial, ethnic, and cultural minorities to preserve and dignify their culture and religion through primary and secondary education.

244. Marsha Riddle Buly & Chris Ohana, *Back to Heritage: A Different Kind of School for American Indian Adolescents*, 12 MULTICULTURAL EDUCATION 1, 30–31 (2004).

245. Mont. Advisory Comm. to U.S. Comm’n on Civil Rights, *Equal Educational Opportunity for American Indian Students in Montana Public Schools*, ch. 4, available at <http://www.usccr.gov/pubs/sac/mt0701/ch4.htm>.

246. Interview with Dale Four Bear, Dir., Fort Peck Tribal Educ. Dept., in Poplar, Mont. (Aug. 3, 2011).

247. *Id.*

248. Bryan McKinley, Jones Braboy & Angelina E. Castagno, *Self-determination Through Self-education: Culturally Responsive Schooling for Indigenous Students in the USA*, 20 TEACHING

Following work on this article in Montana in 2011, the ACLU of Montana made inquiries into the Wolf Point school board and recently filed suit against the school district, alleging voting rights violations which afford disproportionate voting power to predominantly white neighborhoods in school elections.²⁴⁹ By removing control from white-dominated school boards, tribal-controlled public schools could have more control over curriculum and hiring of the people who teach and control their children's educations.

3. Charters Can Facilitate Better, More Culturally Sensitive Disciplinary Practices

Tribal-run and operated charter schools can also develop disciplinary practices that incorporate tribal culture²⁵⁰ and reverse some of the gross racial disparity of student suspensions and expulsions in Montana. Suspension in mainstream public schools tends to remove students from school who "most benefit from a supportive school environment," including students who are over-age and under-credited and students with emotional and/or learning disabilities.²⁵¹ Studies also show that the degree to which schools rely on suspensions and expulsions bears more of a relationship to the disciplinary philosophy of school administrators than it does to the actual level of student misbehavior.²⁵² While students in charter schools are often afforded fewer due process protections before removal from school,²⁵³ charter schools can innovate around student discipline in ways that mainstream public schools cannot due to centralized guidelines on zero tolerance policies and permissible disciplinary responses to infractions. They can employ alternatives to suspension, expulsion, and zero-tolerance policies. These alternatives include multisystemic therapy, restorative justice,²⁵⁴ "positive behavioral supports,"²⁵⁵ and the "Resolving

EDUCATION 31 (2009).

249. For a copy of the complaint filed in this suit, *Jackson v. Wolf Point Sch. Dist.*, see <http://www.aclumontana.org/images/stories/documents/litigation/wolfpoint08072013.pdf> (Aug. 7, 2013). The suit alleges violations of the federal Voting Rights Act (42 U.S.C. § 1973).

250. See EWING & FERRICK, *supra* note 236, at 20.

251. *Education Interrupted*, *supra* note 193, at 7.

252. Judith A. Browne, *The ABCs of School Discipline: Lessons from Miami-Dade County*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 189 (William Ayers, Bernadine Dohrn & Rick Ayers eds., 2002).

253. This is because charter schools are "alternatives" to state-provided public education.

254. Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies As Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 315, 317 (2011). The American Psychological Association has endorsed multisystemic therapy and restorative justice as ideal disciplinary techniques. Restorative justice programs ask all those involved in an incident to discuss at length what happened and how to address problem behavior. When a consensus is reached, a contract is signed outlining provisions the so-called offender must fulfill. Restorative justice programs are "significantly more effective at preventing recidivism than non-restorative programs." *Id.*

255. See *infra* note 258.

Conflict Creatively Program.”²⁵⁶ Charter schools that have employed such programming in low-income areas with a majority student population of children of color have experienced successes.²⁵⁷

Of these programs, positive behavioral support (PBS) is potentially most suited to American Indian students. PBS is not a static approach to disciplinary and behavioral issues, but rather targets each individual student in a highly specialized way.²⁵⁸ The theory is that problematic behaviors serve a function for children. Thus, by removing the functionality of the problem behavior and changing the context, school staff can remedy the behavior patterns. PBS emphasizes the use of culturally appropriate interventions and its approach to discipline is particularly useful for schools with American Indian students, whose tribal background may give them different values with respect to education and behavior. Indeed, “teacher training in appropriate and culturally competent methods of classroom management is likely . . . to be the most pressing need in addressing racial disparities in school discipline.”²⁵⁹ In American Indian cultures, discipline is rarely “personally demeaning,” and is more often focused on modeling appropriate behaviors and peer pressure.²⁶⁰

4. *The Promise of Charters in Native Communities*

Critics of single or majority-race charter schools argue that they are regressive, reverse the post-*Brown* desegregation efforts, and will inhibit cross-

256. Bloomenthal, *supra* note 254, at 315–16. RCCP focuses on changing school culture “by training adults in the school, including those in non-teaching positions such as office staff and lunchroom aides, to model appropriate behavior, while teachers provide regular direct instruction” and giving workshops where differences are discussed. It has been found effective in many urban and rural schools. *Id.*

257. Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 312 (2012). The Baltimore Curriculum Project, a non-profit, “implemented restorative practices in three Baltimore County School District charter schools. At City Springs School, where 99% of students are from families living below the poverty line, restorative practices implemented in 2007 have been embraced school-wide. In addition to hiring an on-site restorative practices facilitator, the entire school staff was trained, including cafeteria workers. From the 2008-09 to the 2009-10 academic year, the suspension rate decreased by 88%, the Maryland state assessment score increased, and the number of students functioning at grade level tripled.” *Id.*

258. See generally George Sugai, Robert H. Horner, Glen Dunlap, Meme Hieneman, Timothy J. Lewis, C. Michael Nelson, Terrance Scott, Carl Liaupsin, Wayne Sailor, Ann P. Turnbull, H. Rutherford Turnbull III, Donna Wickham, Brennan Wilcox & Michael Ruef, *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools*, http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=gse_fac&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fq%3DPositive%2BBehavior%2BIntervention%26ie%3Dutf-8%26oe%3Dutf-8%26aq%3Dt%26rls%3Dorg.mozilla%3Aen-US%3Aofficial%26client%3Dfirefox-a#search=%22Positive%20Behavior%20Intervention%22 (last visited Oct. 31, 2011).

259. Skiba, *supra* note 106, at 183.

260. Bielenberg, *supra* note 235, at 9 (pdf pagination).

cultural exchange.²⁶¹ Proponents may counter that segregation is still a *de facto* reality and that charter schools give minority parents a degree of autonomy that did not exist pre-*Brown* because “[i]t was this legally sanctioned or mandated policy of racial separation by Caucasian-controlled school boards and governmental entities that created a sense of inferiority in children of African descent and prompted the *Brown* Court to conclude that separate educational facilities were inherently unequal.”²⁶²

Tribal-oriented or controlled charter schools will not alone cure the disastrous educational system in place on reservations. There are many geographical areas where they would not likely be as successful for American Indian student populations, such as in off-reservation urban schools with mixed tribe American Indian student populations.²⁶³ There is also reason to doubt that charter school legislation alone, without a transformation of the relationship and respect between states and sovereign tribal nations, would actually enable tribes to take control of the schools created because charters must be authorized by the state local school districts.²⁶⁴ There must also be an intense focus on developing effective strategies for teaching American Indian students and redesigning school structure and management rather than simply introducing tribal-based curricula.²⁶⁵ However, it is clear that reservation school districts in Montana are in grave need of reform and innovation and that these are unlikely to be accomplished by the centrally controlled state public school system. Charter schools are one available option for positive change.

D. Demand Restoration of Recently Reduced Federal Funding

Reservations like Fort Peck have been particularly vulnerable to the spending cuts associated with the recent federal sequester.²⁶⁶ Since March 2013, automatic across-the-board cuts (known as “sequestrations”) in federal spending have been in effect, split evenly between defense and domestic spending.²⁶⁷ The

261. Dave Webber, *Florida Charters Less Diverse Than Other Public Schools*, ORLANDO SENTINEL, Apr. 30, 2011, http://articles.orlandosentinel.com/2011-04-30/news/os-charter-schools-segregation-20110430_1_florida-charters-charter-schools-single-race-or-ethnicity.

262. Wright, *supra* note 214, at 47.

263. See Bielenberg, *supra* note 235, at 10 (pdf pagination).

264. EWING & FERRICK, *supra* note 236, at 67–68.

265. See Bielenberg, *supra* note 235 (“Simply providing community control and incorporating Indian content in a charter school does not ensure innovation in education. To do this, to achieve ‘true Native education,’ educators most look to change not only what is taught, but also how it is taught, where it is taught, and how the school is structured and managed.”).

266. Lindsey Layton, *In Montana, an Indian Reservation’s Children Feel the Impact of Sequester’s Cuts*, WASH. POST, March 21, 2011, http://articles.washingtonpost.com/2013-03-21/local/37904086_1_sequester-tribal-leaders-million-in-additional-cuts.

267. See Budget Control Act of 2011, Pub.L. 112–25, S. 365 (125 Stat.) 240 (enacted August 2, 2011). The start of the sequestration was delayed from January 2, 2013 to March 1, 2013 by the American Taxpayer Relief Act of 2012, which was passed by both houses of Congress on January 1, 2011. Pub.L. 112–240, H.R. 8 (126 Stat.) 2313 (enacted January 2, 2013).

effects of sequestration on education are severe nationwide,²⁶⁸ but reservation schools, which cannot rely on the state's taxation of local individuals and property, have been particularly impacted.²⁶⁹ While federal funds make up about only about ten percent of the budget for a typical U.S. public school district, federal funding contributes as much as sixty percent of schools budgets on reservation land.²⁷⁰

Because of the sequester, the Poplar School District on Fort Peck is now struggling to deal with \$1.2 million in cuts. The district is unable to hire a reading teacher or guidance counselor for a school where fifty percent of the students cannot read and five students committed suicide in a single school year.²⁷¹ They are also unable to offer a vocational training program designed to provide basic job skills to local students in order for them to take advantage of the oil boom employment in nearby North Dakota.²⁷²

The Montana Congressional delegation, in common cause with state and tribal officials and with other legislators whose states include reservation land, should make every effort to restore the already-inadequate funding for all reservation-based schools regardless of the status of the bulk of the sequestration.

VIII.

PROPOSED LITIGATION STRATEGIES

In addition to these legislative solutions, lawyers representing American Indian students who are suffering the effects of the school-to-prison pipeline can explore a number of state and federal statutory schemes to provide broad remedies in addition to the individual relief particular students may be entitled to. These include working for favorable constructions of Montana's unique constitutional provisions providing for an equitable quality education, and for Indian education curricula and targeted services. In addition, federal constitutional and statutory guarantees, including most importantly the right to due process in public school disciplinary hearings, can also provide relief for Montana's American Indian children.²⁷³ Each of these is described briefly below. Although some of these claims have yet to be tried in the state, new

268. Nat'l Educ. Ass'n, *Impact of Sequestration on Federal Education Programs - State-by-State*, <http://www.nea.org/home/52610.htm> (last visited Oct. 20, 2013).

269. Layton, *supra* note 266.

270. *Id.*

271. *Id.* The sequester's reduction of \$800,000 exacerbates this year's other federal budget cuts to Poplar schools which resulted in a loss of \$425,000 to the district. Layton also reports that "The Indian Health Service, the reservation's main source for health care, will also be cut by 8 percent, and Head Start, which serves 240 toddlers, will be cut by 5 percent."

272. *Id.*

273. See generally Davin Rosborough, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663 (2010) (exploring litigation strategies to challenge push-out of black and Latino students in America's schools).

approaches are necessary considering the dire state of affairs for American Indian children.

A. Legal Challenge Based on Fiscal Inequity as a Violation of Montana Students' Constitutional Right to a "Quality" Education

The Montana State Constitution guarantees each citizen the right to a "quality education."²⁷⁴ This provision specifies that the legislature "shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system."²⁷⁵ In *Columbia Falls Elementary School District No. 6 v. State*, the Montana Supreme Court concluded this language created a mandate for the legislature, and that the issue of school financing was justiciable because "as the final guardian and protector of the right to an education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right."²⁷⁶ This decision stands in contrast to decisions in Georgia and Illinois, "where the issue was determined a non-justiciable political question when the state constitutions did not guarantee a right to education" and highlights the unique strength of Montana's constitutional guarantee to a free and equal education for all its students.²⁷⁷

Furthermore, the court in *Columbia Falls* found that Montana's education finance system was in violation of art. X §1 cl.2 and the principles of the Indian Education for All Provision.²⁷⁸ First, the court noted that the legislature had failed to define what a "quality" education meant and therefore could not construct a funding scheme that fulfilled this requirement.²⁷⁹ The court also ruled that "whatever legitimate definition of quality that the Legislature may devise, the educational product of the present school system is constitutionally deficient and . . . the Legislature currently fails to adequately fund Montana's public school system."²⁸⁰ Evidence of the funding scheme's constitutional deficiency included:

school districts increasingly budgeting at or near their maximum budget authority; growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits offered elsewhere; the cutting of programs; the deterioration of school buildings and inadequate funds for building repair and for new construction; and increased

274. MONT. CONST. art. X §1 cl.3.

275. *Id.*

276. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005).

277. Matt Brooker, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 220 (2006).

278. *Columbia Falls*, 109 P.3d at 263; Mont. Code Ann. § 20-1-501 (1999).

279. *Columbia Falls*, 109 P.3d at 262. See also Brooker, *supra* note 277, at 220.

280. *Columbia Falls*, 109 P.3d at 262.

competition for general fund dollars between special and general education.²⁸¹

The court noted that “[u]nless funding relates to needs such as academic standards, teacher pay, fixed costs, costs for special education, and performance standards, then the funding is not related to the cornerstones of a quality education.”²⁸²

The court also found that the state was in violation of the constitution by failing to address the Indian Education for All Provision when distributing school funds.²⁸³ This decision built on the court’s earlier decision in *Helena Elementary School District No. 1 v. State*, which held the state’s education finance system, in neglecting to adequately fund schools with American Indian populations, violated art. X §1 cl.2, which “establishes a special burden in Montana for the education of American Indian children which must be addressed as part of the school funding issues.”²⁸⁴

Following the *Columbia Falls* decision, the Legislature held a special session in 2005 to fund Indian Education for All by appropriating \$68 for every K–12 student in public schools and \$4.3 million to the OPI to “develop curriculum, provide training, and distribute grants.”²⁸⁵ This funding has taken a dramatic dive since 2005, however, and the amount appropriated has decreased to \$20.40 per student as of 2009.²⁸⁶ Also, \$10 million, which was in the state budget before 2009 for at-risk students, was reduced to just \$1 (yes, \$1 and not \$1 million) and many of the students who had previously benefited were American Indians.²⁸⁷ Notably, the Indian Education for All funds were put into school districts’ general funds, not into a special separate fund.²⁸⁸

In light of its serious suicide crisis and the low academic achievement, the absence of guidance and mental health resources in the Wolf Point School District indicates that American Indians are not receiving a “quality” or “equal” education, and that the promises of the Indian Education for All provision are not being fulfilled. As *Columbia Falls* demonstrates, these deficiencies may violate the state constitution, providing grounds for a claim based on failure to adequately fund those schools and provide minimum quality education. It is also

281. *Id.* at 263.

282. *Id.* at 262.

283. *Id.* at 263.

284. 769 P.2d 684, 693 (Mont. 1989).

285. Carol Juneau & Denise Juneau, *Indian Education for All: Montana’s Constitution at Work in Our Schools*, 72 MONT. L. REV. 111, 119 (2011).

286. Mont. Indian Educ. Ass’n, Bd. of Dirs., *Report to Membership 2009–2010 3*, available at http://www.mtiea.org/downloads/report_to_membership_10.pdf.

287. *Id.* at 4. Legislators will sometimes keep an act “alive” by defunding it to \$1, so the funding doesn’t completely disappear.

288. Linda McCulloch, *K–12 Public Education*, in Mont. Indian Educ. Ass’n Summit on Indian Educ. Pol’y & Budget Issues, *Report to Membership 2009–10 9*, available at <http://www.mtiea.org/downloads/finalreportsummitonindianeducationpolicy.pdf>.

important that the legislature recognize the importance of funding Indian Education for All and providing instruction on tribal culture and heritage.

B. “Different Treatment” Discrimination Claim

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits discrimination by state actors on the basis of race.²⁸⁹ Title VI of the Civil Rights Act of 1964 also forbids racially discriminatory practices in public schools.²⁹⁰ However, race discrimination challenges based on the Equal Protection Clause or brought under Title VI require proof of intent by a government actor to discriminate.²⁹¹ These are known as “disparate treatment” discrimination claims, as opposed to “disparate impact” claims, which involve allegations of discrimination without proof of a discriminatory animus.²⁹² While disparate treatment claims do not require “smoking gun” evidence of discrimination, and allow for the consideration of circumstantial evidence,²⁹³ plaintiffs must show that minority students are punished differently than “similarly situated” white students and that this difference is intentional.²⁹⁴ In some courts, the evidence that students are “similarly situated” must meet a very high threshold.²⁹⁵ Accordingly, it is typically very difficult for individual parents to demonstrate sufficient proof of disparate treatment. This is why it is good for

289. U.S. CONST. amend. XIV, § 1.

290. 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

291. Precedent from the Supreme Court has made it difficult to pursue racial discrimination claims at the federal level without proof of discriminatory purpose. The Court has ruled that claims of discrimination under the Equal Protection Clause require proof of intent to discriminate. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”) (internal citations omitted). The Court later clarified that “intent” requires a showing that the discriminatory action was taken “because of,” and not merely “in spite of,” the plaintiff’s membership in a particular group. *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

In *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), the Supreme Court rejected the possibility of a private right of action for victims of discrimination to sue under a theory of disparate impact using Title VI, and required that such suits allege discriminatory intent. The Court held: “[W]e have since rejected Lau’s interpretation of § 601 as reaching beyond intentional discrimination. It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these [disparate impact] regulations.” *Id.* (internal citations omitted).

292. For a detailed discussion of the treatment of disparate impact claims originating in public schools and brought under Title VI, see Dan McCaughey, *The Death of Disparate Impact Under Title VI: Alexander v. Sandoval and Its Effects on Private Challenges to High-Stakes Testing Programs*, 84 B.U. L. REV. 247, 258–66 (2004).

293. KIM, *supra* note 5, at 236.

294. *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989).

295. KIM, *supra* note 5, at 236.

communities to join forces and establish “patterns” of different treatment and file joint lawsuits.²⁹⁶

In 2006, the National Office of the American Civil Liberties Union filed a class action lawsuit in federal court against the Winner School District in South Dakota for disciplining the area’s American Indian students more harshly than white students, and maintaining a hostile learning environment for the American Indian population.²⁹⁷ The principal at Winner was found to be coercing written confessions from students, disproportionately American Indian students, which were then used to file petitions against them in court.²⁹⁸ In addition to selective enforcement of school policies, the suit alleged inadequate representation of American Indians in school staff and under enforcement of racial harassment by white students against American Indian peers, with high dropout rates by American Indian students resulting.²⁹⁹ That lawsuit culminated in a settlement consent decree in which these issues were addressed by ordering the school to cease requiring students to write statements that could be used in juvenile or criminal court, establishing an American Indian community-hired ombudsman position, and creating a board of American Indian parents and school officials to review all disciplinary decisions for patterns of racial animus.³⁰⁰ Similar lawsuits could be brought in Montana to challenge racially discriminatory discipline practices and harassment. As of yet, this avenue has been unexplored.

C. Procedural Due Process Challenge

As discussed above, there are minimal procedural due process requirements for suspensions under ten days.³⁰¹ However, claims that disciplinary policies are a deprivation of educational rights are analyzed under the balancing test established by the Court in *Mathews v. Eldridge*.³⁰² This test weighs “the private interests that will be affected by the official action; the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards” against “the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements

296. *Id.* at 235.

297. American Civil Liberties Union, *ACLU Fights to End Discriminatory Prosecution of American Indian Students: National ‘School-to-Prison Pipeline’ Trend Exemplified in South Dakota*, March 28, 2006, <http://www.aclu.org/racial-justice/aclu-fights-end-discriminatory-prosecution-native-american-students>.

298. *Id.*

299. Complaint, *Antoine v. Winner School District*, 06 Civ. (D. S.D. March 2006), available at <https://www.aclu.org/files/pdfs/antoinevwinner03282006.pdf>.

300. American Civil Liberties Union, *American Indian Families and Winner School District Announce Settlement in Case Alleging Discrimination*, June 18, 2007, <http://www.aclu.org/racial-justice/native-american-families-and-winner-school-district-announce-settlement-case-alleging>.

301. See *supra* Part III.D.1.

302. 424 U.S. 319 (1976).

would entail.”³⁰³ Professor Catherine Kim points out that the *Mathews* test affords little protection to children given time-outs, in-school suspensions, and short suspensions, but “advocates have enjoyed some success in systemic challenges to the failure to provide for adequate protections to challenge long-term suspensions and expulsions.”³⁰⁴

The procedures used to expel and suspend American Indian students in Montana are ripe for due process challenges under both the federal and state constitutions. The Supreme Court has not addressed the procedural protections required for schools seeking suspensions beyond ten days. However, the Ninth Circuit held in 1973 that due process requires that students facing expulsion or “prolonged or indefinite” suspension have the right to representation by counsel, to present witnesses, and to cross-examine adverse witnesses.³⁰⁵ Although Montana is under the jurisdiction of the Ninth Circuit, Montana courts have not invoked *Black* as relevant precedent. Still, it remains available to litigators. State courts have not yet ruled on state constitutional due process requirements with regard to short or long-term suspensions. As a question of first impression, the door is open for litigators to set valuable precedent regarding due process requirements.

D. Substantive Due Process Challenge

Cases challenging school discipline on the ground that it has deprived students of a fundamental right secured to them under the “liberty” provision of the due process clause³⁰⁶ have had limited success.³⁰⁷ The Constitution does not provide an explicit right to an education, and the Supreme Court has held that education is not a “fundamental right.”³⁰⁸ The Supreme Court is notably unwilling to overturn the disciplinary decisions of school administrators, especially if the decision is merely “lacking a basis in wisdom or compassion.”³⁰⁹ To be unconstitutional, school discipline must transgress the

303. *Id.* at 335.

304. KIM, *supra* note 5, at 81.

305. *Id.* at 183 n. 26 (citing *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F. 2d 1040 (9th Cir. 1973)).

306. U.S. CONST. amend. XIV, § 1.

307. *See, e.g., C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 389 (11th Cir. 1996) (finding no substantive due process violation in the school disciplinary context); *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp. 2d 421, 434 (N.D.N.Y. 2005) (substantive due process does not apply to local governmental action, like school suspension, that is merely arbitrary and capricious, and is triggered only where suspension “shocks the conscience”). *See also Dunn v. Fairfield Cmty. High Sch. Dist. No. 225*, 158 F.3d 962, 965 (7th Cir. 1998) (denying substantive due process claim of two high school students based on a comparison to the *Lewis* case, finding that “if a police officer’s ‘precipitate recklessness,’ which caused the deprivation of someone’s life, was not sufficiently shocking to satisfy substantive due process standards, then it would be nearly absurd to say that a school principal’s decision effectively to give two students an ‘F’ in Band class did”).

308. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

309. *Wood v. Strickland*, 420 U.S. 308, 326 (1975). The Court further recognized that while “students do have substantive and procedural rights while at school . . . [section] 1983 was not

“outer limit’ of legitimate governmental action,” and be “arbitrary, conscience-shocking, or oppressive,” not merely “incorrect or ill-advised.”³¹⁰ However, some courts have found unreasonably harsh suspensions fail to meet the rational basis standard.³¹¹ These challenges usually prevail when there is no evidence of knowledge or intent on the part of the disciplined student.³¹² Litigation including a substantive due process claim can be considered in particularly egregious cases.

IX. CONCLUSION

The statistical evidence and tragic stories recounted in this report demonstrate beyond doubt that American Indian children on the reservations and elsewhere in Montana are moving into the school-to-prison pipeline at an alarming and tragic rate. The suicides of so many children is cause for despair, and the complicity of the education system in those deaths, whether through deliberate actions or through inattention, is cause for serious self-reflection and remediation. This article has been written in the hope that the people of Montana, government officials at all levels, teachers and school administrators, and public interest lawyers will have some of the information they need to take action. Despair, prison, and untimely death should not and need not be the ending places of public education for our most vulnerable children.

intended to be a vehicle for federal-court corrections of [school administration’s discretionary errors] which do not rise to the level of violations of specific constitutional guarantees.” *Id.*

310. *Cohn.*, 363 F. Supp. 2d at 434. *See also* Bell v. Ohio State Univ., 351 F.3d 240, 250 (6th Cir. 2003) (“Interests protected by substantive due process . . . include those protected by specific constitutional guarantees . . . freedom from government actions that ‘shock the conscience,’ . . . and certain interests that the Supreme Court has found . . . to be fundamental.”).

311. *KIM*, *supra* note 5, at 85.

312. *Id.*