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Montana's Rural Version of the School-to-Prison Pipeline School Discipline and Tragedy on American Indian Reservations

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ARTICLES

MONTANA'S RURAL VERSION OF THE SCHOOL-TO-PRISON PIPELINE: SCHOOL DISCIPLINE AND TRAGEDY ON AMERICAN INDIAN RESERVATIONS

Melina Angelos Healey*

TABLE OF CONTENTS

INTRODUCTION ..... 17 R
I. FOUNDATIONS OF THE PIPELINE ..... 18 R
A. *The Nationwide School-to-Prison Pipeline* ..... 18 R
B. *Tribes and Reservations Examined in this Article* ..... 21 R
II. BACKGROUND AND APPROACH ..... 23 R
A. *The Legacy of American Indian Boarding Schools and Educational Segregation* ..... 23 R
III. THE DATA: THE PRESENCE OF PIPELINE INDICATORS IN MONTANA ..... 25 R
A. *The Harmful Effects of Geographic Economic Segregation and School Accountability Programs for Students at Reservation Schools* ..... 25 R
B. *Academic Achievement by Race* ..... 28 R
1. *Montana's Racially Imbalanced Academic Achievement Levels* ..... 28 R
2. *Wolf Point's Racially Imbalanced Academic Achievement Levels* ..... 28 R
C. *Racially Disproportionate School Discipline* ..... 30 R

* Judicial Clerk to the Honorable John T. Nixon, U.S. District Court for the Middle District of Tennessee. Thanks to the ACLU of Montana and Professors Joy Radice and Randy Hertz for inspiration, guidance, and support. Many thanks to the patience, advice and efforts of Paul Leisher and the University of Montana Law Review Board. And as always, the ultimate gratitude belongs to Claudia Angelos.

1. *Statewide Discipline* ..... 30 R
2. *Discipline in Wolf Point* ..... 31 R
D. *School Disciplinary Procedures* ..... 33 R
1. *Minimum Disciplinary Procedural Due Process Required by the State* ..... 33 R
2. *Disciplinary Procedures Particular to Wolf Point* .. 34 R
E. *Minimum Procedures Required for the Discipline of Students with Disabilities* ..... 35 R
1. *Actual Wolf Point Disciplinary Practices Involving Students with Disabilities* ..... 36 R
F. *Dropping Out: Youth at Risk Behaviors Statewide and on Fort Peck* ..... 37 R
IV. Suicide and School Failure on the Reservation ..... 38 R
A. *The Fort Peck Reservation Suicide Crisis* ..... 38 R
B. *Narratives from Fort Peck: On School Sports, Discipline, and Suicide on the Reservation* ..... 40 R
V. Disproportionate American Indian Contact with the Juvenile Justice System ..... 46 R
A. *Statewide Racial Disproportionality in Juvenile Justice* . 47 R
B. *Disproportionate Contact of Hill County American Indians with the Juvenile Justice System* ..... 48 R
C. *American Indian Youth Involvement in Tribal and Federal Courts* ..... 49 R
VI. Recommendations For Change ..... 49 R
A. *Support and Strengthen the Steps Already Taken by Montana's Office of Public Instruction* ..... 50 R
B. *Restore Recently Reduced Federal Funding* ..... 52 R
C. *Train Teachers and Administrators on Best Practices for School Discipline* ..... 53 R
D. *Increase Mental Health and Mentoring Services for Reservation Schools* ..... 55 R
E. *Develop and Recruit American Indians as School Officials, Educators, and Administrators* ..... 56 R
F. *Incorporate Tribal Culture and Language Curriculum into Reservation Schools' Instruction* ..... 56 R
VII. Proposed Litigation Strategies ..... 57 R
A. *Use Montana's Dignity Clause to Demand Remediation of Inconsistent Provision of Health and Human Services* ..... 58 R
B. *Legal Challenge Based on Fiscal Inequity as a Violation of Montana Students' Constitutional Right to a "Quality" Education* ..... 59 R
C. *"Different Treatment" Discrimination Claim* ..... 61 R
D. *"Racially Hostile Educational Environment" Claim* .... 63 R
E. *Procedural Due Process Challenge* ..... 63 R
F. *Substantive Due Process Challenge* ..... 64 R

G. *Equal Protection Voting Rights Challenge to Disproportionate White Voting Power on the Wolf Point Reservation School Board* ..... 65 R
CONCLUSION ..... 66 R

INTRODUCTION

American Indian[1] 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. While these are typical of the school-to-prison phenomenon as it also appears in poor minority communities across the country, the rates and the disproportion for American Indians in Montana are particularly acute.[2] Even more disturbing, many American Indian students in Montana are also the victims of another heartbreaking trend related to the school-to-prison pipeline—alarming levels of adolescent suicides and self-harm. The tragic situation of these children on remote reservations in the Northeast corner of Montana has received far too little attention.

This article presents relevant regional data, heretofore largely unexamined, and provides some personal narratives that demonstrate the shocking educational inequities American Indian children suffer in Montana. It also makes recommendations for addressing the problem. Part I lays out the theory of the school-to-prison pipeline and introduces the tribes of the Fort Peck and Rocky Boy's reservations. Part II provides some background and history on American Indian public education. Part III presents data which demonstrate the existence of the school-to-prison pipeline for American Indians in Montana, including characteristic features of the pipeline such as school funding inequalities, racial imbalances in academic achievement among public school students, and racially disproportional school discipline. Part IV describes the youth suicide crisis on the Fort Peck Reservation and its relationship to school practices. Part V examines the dispropor-

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. Off. of Pub. Instr., *Glossary: 2011-2012 Discipline Data Collection*, 5, http://opi.mt.gov/pdf/SchoolDiscipline/13SD_Glossary.pdf (last visited Apr. 27, 2013). The Board of Crime Control does not define the racial categories used in their 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 youth. Mont. Off. of Pub. Instr., Mont. Pub. *School Enrollment Data*, 4 (*available at* http://www.opi.Mont.gov/pdf/Measurement/EnrollBook2011.pdf).

tionate involvement of American Indian youth with the State's juvenile justice system. Part VI provides recommendations for how to alleviate the school-to-prison pipeline problem through changes in policy or practice. Part VII proposes legal challenges to combat the pipeline and posits that the limited number of legal avenues available for reversing the pipeline is illustrative of a more general nationwide dilemma in education law for which lawyers and advocates will need to develop innovative strategies.[3]

I. 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, which effectively relocate the most at-risk schoolchildren out of classrooms and into the juvenile justice system.[4] It 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. Fiscal inequality in school funding has resulted in inadequate resources for our nation's most needy school districts: those that serve children who are disproportionately low-income, of color, English language learners, with disabilities, and homeless.[6] These districts are characterized by overcrowding,

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 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. American Civil Liberties Union, *Locating the School-to-Prison Pipeline* (accessed Oct. 2, 2013) (available at http://www.aclu.org/images/asset_upload_file966_35553.pdf).

5. Catherine Kim et al., *The School-To-Prison Pipeline: Structuring Legal Reform* 4 (New York U. Press 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").

understaffing, inferior facilities and resources, and inadequate counseling and mental health services.[7] Unsurprisingly, these issues lead to disengagement and dropout and increase the likelihood that the young people served in these districts will end up as criminal defendants.[8] And ironically, schools facing testing-based accountability to the local and federal government for funding have incentives to expel or "push out" low-performing students or encourage them to abandon school in order to boost the schools' reported test scores.[9]

The unequal treatment of low-income students of color is exacerbated by high disparities in the rate and severity of school disciplinary practices along racial lines.[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, often the children who most need instructional time and guidance 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 available disciplinary alternatives, has aggravated the situation.[12] This exclusion can be devastating; when children are excluded from their regular classrooms for even a few days, their education is negatively affected.[13] The longer the time the child spends away from school, the more severe the educational impact.[14]

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7. *See* Kim, *supra* n. 5, at 4.

8. *Id.* at 1 (noting deficiencies in school resources "increase students' disengagement and the likelihood of their dropping out and later becoming involved with the courts").

9. *Id.* at 1, 26, 30–31 (noting push-out also occurs when schools wish to discharge chronically truant and older or under-credited students).

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

11. *Id.* at 3.

12. *See Id.* at 78–80.

13. Kim, *supra* n. 5, at 78 ("[E]xclusion 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 School Failure: Alternative Education for Children and Youth 3, 155 (Spring 2009) ("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 Edu. & Urban Soc'y 359, 359–367 (analyzing a study that found "suspended students had substantially lower pre-suspension achievement than did students in the comparison group, gained considerably less academically throughout 3 years with suspensions, and had

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] In general, school-based arrests by police officers who work as school safety personnel have increased considerably, including an escalation of arrests for minor school infractions such as graffiti and schoolyard fights.[16] Unfortunately, once children become involved with the court system and are placed in detention, it becomes difficult to re-enter the regular school system.[17] Mainstream schools will often deny admission to students with arrest, juvenile delinquency, or criminal records.[18] "Alternative" schools 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 and is created by many varied causes, and is not generally attributed to the covert workings of nefarious and racist individuals.[22] For this reason, the best

high drop-out rates" and "the more days that students spent in suspension, the less students gained in reading").

15. *See* Kim, *supra* n. 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 interviewed for this article, 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. *See* Kim, *supra* n. 5, at 3.

18. Jessica Feierman, 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 re-entering from the juvenile justice system because of perceived safety risks and academic concerns, and administrative barriers routinely place additional hurdles to enrollment).

19. Kim, *supra* n. 5, at 3; *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. & Policy 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 (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* n. 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 it is the product of widespread intentional discrimination by nefarious and racist individuals working in the educational or juvenile justice

way to 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 tendency to assume that racial discrimination results from invidious individual motives and instead to recognize that institutional racism has many origins, not all of which are intentional.[25] In examining the problem as a confluence of these varied contributing factors, and exploring the potential legal avenues advocates might use to address it, 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 dire. Too many of them receive substandard education without instruction on their unique cultural heritage, get pushed out of school, and end up involved in the juvenile (and ultimately criminal) court systems.

B. Tribes and Reservations Examined in this Article

This investigation examines statewide patterns, but it focuses on the young people of two of Montana's American Indian reservations that have particularly acute problems, and are representative of the larger epidemic: Fort Peck, and, to a lesser extent, Rocky Boy's. The Fort Peck Reservation is a community that faces a confluence of classic school-to-prison pipeline factors affecting American Indian children there, including disproportionately low academic achievement, high-risk behaviors, and subjection school discipline. The Fort Peck Reservation also recently experienced an alarming, and related, pattern of early adolescent suicides. Rocky Boy's Reservation was identified for study because of the 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 tribes have traditionally relied on agriculture, tribal leases,

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systems. Thus, scholars have suggested approaching the issue through the lens of Critical Race Theory. *Infra* n. 23.

23. Chauncee D. Smith, for example, employs this method in *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 Fordham Urb. L.J. 1009, 1023 (2009).

24. *Id.* at 1026.

25. *E.g. id.* at 1023.

26. *Id.* at 1024–1025.

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 five school districts: Wolf Point, Poplar, Brockton, Frazer, and Frontier.[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 70% 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. Montanatribes.org, *Fort Peck Reservation Assiniboine and Sioux Tribes* 43 (available at http://www.montanatribes.org/links_&_resources/tribes/Fort_Peck.pdf).

28. *Id.* at 41.

29. Louis Montclair, *2010–2011 School Year; Head of State Education to be at Three Schools Next Week*, Fort Peck Journal (Fort Peck, Montana) (June 9, 2011).

30. Associated Press, *Senate Hearing in Poplar Examines Indian Suicides*, Fox News (Aug. 9, 2011) (available at http://www.foxnews.com/us/2011/08/09/senate-hearing-in-mont-examines-indian-suicides/).

31. Mont. Off. of Pub. Instr., *Mont. Indians: Their History and Location*, 56 (Apr. 2009) (available at http://www.opi.mt.gov/pdf/indianed/resources/MTIndiansHistoryLocation.pdf).

32. *Id.*

33. *Id.*

34. *Id.* at 59.

35. *Id.* at 58.

36. *Id.*

37. Mont. Indian Education Association, *Third Annual Urban Indian Education Report* (2009) (available at http://www.mtiea.org/3rd_annual_urban_indian_education_report_2009.pdf).

38. Mont. Indian Education Association, *Report to Membership 2009–2010*, 3 (2010) (available at http://www.mtiea.org/downloads/report_to_membership_10.pdf).

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

40. *Id.* at § 20–7–102.

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 finally implement the State's long dormant Indian Education for All constitutional provision, which is intended to foster and preserve tribal cultural heritage in public education, and to bring more fiscal equality to school funding. The Office of Public Instruction has taken steps to address school inadequacies in Indian Country. Nonetheless, as documented below, the conditions in many schools with large American Indian populations remain dismal. These schools are plagued by staff shortages, poor resources and facilities, a lack of American Indians on staff, lack of training on how to work with American Indian populations, and little curricular attention to the Montana tribes' cultural heritage.

II. 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, and a brief recounting of this history helps inform the current situation. The first American Indian school was founded in 1879, and by 1909 the federal government had created nearly 200 boarding schools and 307 day schools and forced over 100,000 American Indian students to attend these institutions, often removing them from their homes for several years.[41] These schools had a mission of assimilating tribal youth to "American" culture and lifestyle.[42] The American Indian students were not permitted to speak their native language or interact with their tribal families.[43] These assimilationist schools persisted for decades, exorcising ancient traditions from students in what amounted to a cultural genocide.[44] Sexual and physical abuse and starvation were endemic.[45] In 1972, the Montana Legislature attempted to counteract the lingering stigma and effects of these

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

42. Richard Pratt, who founded the first Indian boarding school, described his mission as "Kill the Indian in order to save the Man." Smith, *supra* n. 41, at 90. Stephen Pevar, *The Rights of Indians and Tribes; The Authoritative ACLU Guide to Indian and Tribal Rights* (3d. ed., Oxford U. Press 2004).

43. Smith, *supra* n. 41, at 91 (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").

44. *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.).

45. *Id.* at 91.

schools by amending its constitution to include the "Indian Education for All" provision. The provision acknowledged that "[t]he state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity."[46] Unfortunately, this provision was entirely ignored and unfunded for many years and, as explained in Part IV below, is now suffering from annually decreasing funding.

Patty McGeshick, the director of the Fort Peck reservation Family Violence Resource Center, went to school in the Wolf Point District, located on the reservation. McGeshick attended when classrooms were racially segregated. She recalls, "I would go into a classroom and there were white children on one side, Indian kids on the other side." She adds that there was no communication between the school and the American Indian community it served. She says, "So we 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."[47] Instead, she believes, schools need to reach out and, as institutions, build back trust from the tribes and American Indian parents. McGeshick says, "Education systems have to understand how to deal with Native people, a culture that has been stripped away."[48]

The sad history of public education for American Indians has led to mistrust and skepticism of the system by tribal communities. The legacy of regarding tribal culture and traditions as inferior and unworthy of instructional time may also negatively impact how American Indian students are viewed by teachers and other pupils, and how the American Indian students respond 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.[49] 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.[50]

Of course, when academic achievement, skills, and cognition are measured through racially biased assessments that favor white, Anglo cultural

46. Mont. Const. art. X, § 1.

47. Interview with Patty McGeshick, Director of the Fort Peck Reservation Family Violence Resource Center, Wolf Point, MT (Aug. 3, 2011).

48. *Id.*

49. Smith, *supra* n. 23, at 1035.

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

backgrounds,[51] the extent to which stereotype threat has a role in depressing the scores of students of color is difficult to determine.[52]

The internalization of stereotype and bias is apparent in American Indian populations, which suffer, as described below, from poor academic achievement in Montana. Some theorize that stereotypes are also contributing to the tragic suicide crisis described in detail in Part IV. Raymond White Tail Feather, a Baptist minister and former tribal chairman, argues that the suicide crisis on Fort Peck is linked to the federal government's systematic dismantling of tribal culture, saying, "[T]he way of life, the federal government attempted to destroy this. When you do that to a people, what comes about is hopelessness."[53]

III. The Data: The Presence of Pipeline Indicators in Montana

The data gathered for this article demonstrates that American Indian schoolchildren in Montana, and in particular on the Fort Peck reservation, are victims of each of the school-to-prison pipeline indicators, including academic 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 too frequently leads to self-harm, absence from school instruction, and involvement in the juvenile and criminal justice systems. The data below—from stateside sources as well as from the Wolf Point School District on Fort Peck, is collected, analyzed, and presented for the first time in this article. It provides shocking evidence of the calamity faced by American Indian children in Montana.

A. The Harmful Effects of Geographic Economic Segregation and School Accountability Programs for 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.[54] On a macro level, the racial segregation of neighborhoods and communities contributes to the pipeline because students of color in racially isolated areas too often end up attending schools with minimal resources

51. This is known as "selection system bias." *Id.*

52. *Id.* at 1035.

53. Matt Volz, *Suicide Crisis Among Indian Children, Young Adults Baffles Communities*, Missoulian (Mar. 21, 2011).

54. Smith, *supra* n. 23, at 1027 ("fragmented inequities" together "have a drastically unequal cumulative impact on students of color").

and high suspension and incarceration rates.[55] This sort of racial and economic segregation is evident on the reservations and in other concentrated communities of American Indians in Montana.[56] Local poverty dramatically affects the funding available for health and human services and education for young people who live in these communities.[57]

New nationwide emphasis on testing-based school accountability can exacerbate racially disparate funding levels. Public schools on reservations are accountable for meeting testing standards under the federal No Child Left Behind (NCLB) legislation. As its mission, the NCLB Act seeks to meet "the education 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."[58] Perversely, this demographic has been left even *further* behind as a result of the testing regime. Students belonging to the groups mentioned already typically attend schools in low-income areas where resources are scarce. By making funding for these schools contingent upon testing results, the NCLB Act facilitates fiscal inequality.[59] Indeed, the U.S. Civil Rights Commission reported in 2004 that NCLB had, in fact, exacerbated the achievement gap between white and minority students and made no attempt to level resource disparities among rich and poor schools. The report noted that the high stakes of exams, and obsessive curricular focus on testing were overwhelming teachers' ability to develop students' logical reasoning and critical thinking skills.[60]

55. *Id.* at 1027.

56. Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 Mont. L. Rev. 1, 30 (2010) (the "greatest spatial concentrations of poverty in Montana are on reservations or otherwise within counties that have significant American Indian populations").

57. *Id.*

58. K. Tsianinan Lomawaima & Teresa L. McCarty, *To Remain an Indian*, 154–155 (Teacher's College Press 2006).

59. *Id.* at 155; *see also* Mary Eunice Romero Little & Teresa L. McCarty, Ariz. State Univ. Educ. Policy Studies Laboratory, *Language Planning Challenges and Prospects in Native American Communities and Schools*, 30–31 (Feb. 2006) (available at http://epsl.asu.edu/epru/documents/EPSL-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.").

60. Lomawaima & McCarty, *supra* n. 58, at 156 ("[T]he 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.'").

This narrower, test-focused curriculum also 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 curricula.[61] 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 concern their own history, language, and culture.[62] This is a tragic development because heritage languages are vitally important for intra-tribal relationships and maintaining pride in one's unique cultural identity.[63] In addition, 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.[64]

61. Little & McCarty, *supra* n. 59, at 30 ("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.").

62. Lomawaima & McCarty, *supra* n. 58, at 156 ("There is widespread concern that NCLB compromises tribal sovereignty and Indigenous community choice, negatively impacts culturally based instruction, leads to hyper-attention to standardized tests at the expense of pedagogically sound instruction, and is inadequately funded to enable tribes to meet its mandates."). *See also* Little & McCarty, *supra* n. 59, 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.").

63. Little & McCarty, *supra* n. 59, 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.").

64. Little & McCarty, *supra* n. 59, at ii–5, 25 ("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

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 as compared 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. According to state exams, 72% of American Indian students were below proficiency levels in math for their grade, whereas 29% of white students were below grade level.[65] Even worse, in reading, American Indian students were more than three times as likely to be below proficiency: 37% of American Indian students were below proficiency, compared to 13% of white students.[66] In science, 73% of American Indian students were below proficiency levels, while 39% of white students were below proficiency.[67] These numbers indicate a troubling pattern of underperformance on state exams by American Indian students compared to their white peers.

2. Wolf Point's Racially Imbalanced Academic Achievement Levels

Data from the Wolf Point School District exemplify the disturbingly wide academic achievement disparities between Montana's white and American Indian children. In 2009–2010, Wolf Point High School was 68% American Indian and 30% white.[68] During that year, 70% of American In-

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* Little & McCarty, *supra* n. 59, at 22–23 (for statistics from studies indicating increased academic performance resulting from heritage language instruction). The elimination of heritage language instruction has troubling roots in the colonial education system of assimilationist boarding schools created by the U.S. government in the 19th 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 deficiencies, I could tell kids today that if you don't know your language, you will feel [lost].' "). The boarding school system is discussed in further depth *infra* in Part IIA.

65. Mont. Off. of Pub. Instruction, *MontCAS (CRT) Proficiency Comparisons by Subgroup*, http://gems.opi.mt.gov/StudentAchievement/Pages/CRTProficiencyComparisons.aspx (accessed Aug. 23, 2013) (select: School Year "2009–2010"; State/District/School: "State"; Content Area: "Reading").

66. *Id.* (select: School Year "2009–2010"; State/District/School "State"; Content Area "Mathematics").

67. *Id.* (select: School Year "2009–2010"; State/District/School "State"; Content Area "Science").

68. Mont. Off. of Pub. Instr., *ACLU Data Request: Enrollment for Select Schools 2011, 2010, and 2009* (on file with Author). Wolf Point High School had 253 total students, 171 of whom were American Indian and 76 were white.

dian students were below proficiency in math, while only 40% of white students were below proficiency.[69] Strikingly, 44% of American Indian students were below proficiency in reading, with 40% evaluated as "novice," the lowest reading level. Not a single white student at Wolf Point was below proficiency in that subject.[70] Science was the only area where white and American Indian students achieved relatively comparable levels, with 74% of American Indian students and 60% of white students below proficiency.[71]

In that same year, Wolf Point Middle School was plagued by similar statistical patterns. Out of a total school population of 132 in the school, 79% of the students were American Indian, and 20% were white.[72] Sixty-five percent of American Indian students were below proficiency in math, and 30% of white students were below proficiency, making the American Indian students more than twice as likely to be below proficiency.[73] Forty percent of American Indian students were below proficiency in reading, while 17% of white students were below proficiency.[74] Finally, 69% of American Indian students were below proficiency in science, while just 36% of white students were below level.[75] 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. These students 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. But the patterns of varying performances based on race are stark and troubling nevertheless.

69. Mont. Off. of Pub. Instruction, *supra* n. 65 (select: School Year "2009–2010"; State/District/School "Wolf Point High School"; Content Area "Mathematics").

70. *Id.* (select: School Year "2009–2010"; State/District/School "Wolf Point High School"; Content Area "Reading").

71. *Id.* (select: School Year "2009–2010"; State/District/School "Wolf Point High School"; Content Area "Science").

72. Mont. Off. of Pub. Instr., *supra* n. 68 (Wolf Point Middle School had 117 total students, of whom 92 were American Indian and 23 were white).

73. Mont. Off. of Pub. Instruction, *supra* n. 65 (select: School Year "2009–2010"; State/District/School "Wolf Point 7–8"; Content Area "Math").

74. *Id.* (select: School Year "2009–2010"; State/District/School "Wolf Point 7–8"; Content Area "Reading").

75. *Id.* (select: School Year "2009–2010"; State/District/School "Wolf Point 7–8"; Content Area "Science").

C. Racially Disproportionate School Discipline

1. Statewide Discipline

Statewide, school-based discipline of American Indian students is deeply disproportionate along racial lines. For American Indian children with disabilities, the situation is acute. During the 2008–2009 school year, American Indian students with disabilities were expelled at nearly ten times the rate of their white peers with disabilities.[76] 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.[77] The following school year, 2009–2010, American Indian students with disabilities were six times as likely to be expelled as white students with disabilities.[78] The American Indian students with disabilities were also more than twice as likely to receive in- and out-of-school suspensions.[79]

During the 2008–2009 school year, 11% of all public school students in Montana, both general and special education, were American Indian, and 84% were white.[80] During that period, American Indian students were al-

76. *Compare* Mont. Off. of Pub. Instr., ED *Facts* Reporting System, *'09 Childcount Data*, *with Special Education Discipline Data Request* (on file with Author). In 2008–2009, 17 American Indian students with disabilities were expelled out of a 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%).

77. *Id.* Out of a total population of 2,672 American Indian students with disabilities, 823 received out-of-school suspensions (30.80%). Out of a total population of 14,075 white students with disabilities, 1,854 received out-of-school suspensions (13.17%). Out of a total population of 2,672 American Indian students with disabilities, 1,194 received in-school suspensions (44.68%). Out of a total population of 14,075 white students with disabilities 2,302 received in-school suspensions (16.35%).

78. *Compare Special Education Discipline Data Request*, *supra* n. 76, at Tab 7, *with ACLU Data Request: 2010 Count* (on file with Author) (providing total number of students with disabilities by race/ethnicity). Out of total enrollment of 2,607 American Indian students with disabilities, 16 were expelled (0.61%). Out of a total population of 13,705 white students with disabilities, 14 were expelled (0.10%).

79. *Compare Special Education Discipline Data Request*, *supra* n. 76, at Tab 7, *with ACLU Data Request: 2010 Count, supra* n. 78. Out of a total population of 2,607 American Indian students with disabilities, 742 received out-of-school suspensions (28.46%). Out of a total population of 13,705 white students with disabilities, 1,721 received out-of-school suspensions (12.56%). Out of a total population of 2,607 American Indian students with disabilities, 847 received in-school suspensions (32.49%). Out of a total population of 13,705 white students with disabilities, 1,993 received in-school suspensions (14.54%). The author notes that total suspensions of students with disabilities went down between the 2008–2009 school year and 2009–2010 school year for both racial categories. Although racial disparities in treatment remain, this is to be commended.

80. Mont. Office of Pub. Instruction, *Mont. Pub. School Enrollment Data, Fall 2008–2009*, 4 (2009) (available at http://www.opi.mt.gov/pdf/Measurement/EnrollBook2009.pdf) (There were 16,198 American Indian students out of a total population of 141,899 in the Mont. Pub. Schools as well as state-funded Pine Hills, Riverside, and Mont. School for the Deaf and Blind. There were 118,812 white students in that population.).

most five times as likely to be expelled from school.[81] They were also four times as likely to be suspended.[82]

The 2009–2010 school year had similar statewide patterns. Among all students in both general and special education statewide that year, 12% of elementary and high school students were American Indian,[83] but the group disproportionately represented 39% of all students who were expelled that school year.[84] In other words, they were four times as likely as white students to face expulsion.[85] American Indians also represented 43% of students who served out-of-school suspensions and were four times as likely to receive out-of-school suspensions as white students.[86]

2. *Discipline in Wolf Point*

In 2008–2009, the Wolf Point School District was 82% American Indian and 16% white.[87] All 13 students expelled that year were American Indian.[88] American Indian students were one-and-a-half times as likely to incur out-of-school suspensions.[89] In 2009–2010, the Wolf Point School District was 81% American Indian.[90] The District expelled 12 students, of whom 11 were American Indian, and they were twice as likely as white

81. *Compare* Mont. Off. of Pub. Instr., *supra* n. 76, *with* Mont. Office of Pub. Instruction, *supra* n. 80, at 4. 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).

82. *Compare* Mont. Off. of Pub. Instr., *supra* n. 76, *with* Mont. Office of Pub. Instruction, *supra* n. 80, at 4. Of the total American Indian student population, 3,569 were suspended (22.03%). Of the total white student population, 6,634 were suspended (5.58%).

83. Mont. Off. of Pub. Instr., *Mont. Pub. School Enrollment Data, Fall 2009–2010*, 4, (Oct. 5, 2009) (available at http://www.opi.mt.gov/pdf/Measurement/EnrollBook2010.pdf.). There were 16,724 American Indian students out of a total student population of 141,807 in the Mont. Pub. Schools as well as state-funded Pine Hills, Riverside, and Mont. School for the Deaf and Blind.

84. *Compare* Mont. Off. of Pub. Instr., *supra* n. 76, *with* Mont. Off. of Pub. Instr., *supra* n. 83, at 4. Of a total 123 students who were expelled, 48 were American Indian (39%).

85. *Compare* Mont. Off. of Pub. Instr., *supra* n. 76, *with* Mont. Off. of Pub. Instr., *supra* n. 83. Out of total American Indian student population of 16,724, 48 were expelled (0.29%). Out of a total white student population of 117,784 students, 83 were expelled (0.07%).

86. *Compare* Mont. Off. of Pub. Instr., *supra* n. 76, *with* Mont. Off. of Pub. Instr., *supra* n. 83. Out of total American Indian population of 16,724, 3,681 American Indian students received out-of-school suspensions (22.01%). Out of a total white population of 117,784 students, 6,373 received out-of-school suspensions (5.41%).

87. Mont. Off. of Pub. Instr., *ACLU Data Request: Enrollment for Select Schools 2011, 2010, and 2009* (on file with Author). The Wolf Point School District had 650 American Indian students out of a total student population of 793. The remaining students were white.

88. Mont. Off. of Pub. Instr., *ACLU Discipline Data Request* (on file with Author).

89. *Compare id. with* Mont. Off. of Pub. Instr., *supra* n. 87. Out of a total of 650 American Indian students in the district, 82 were given out-of-school suspensions (12.62%). Out of a total of 130 white students, 11 were given out-of-school suspensions (8.46%).

90. Mont. Off. of Pub. Instr., *supra* n. 87. During this year, the school district had 694 American Indian students out of a total student population of 859.

students to be expelled.[91] Of 99 students who received out-of-school suspensions, 89 were American Indian.[92] American Indian students were more likely to receive out-of-school suspension than white students, and nearly half of the total students who received out-of-school suspensions were American Indian students with disabilities.[93] There were 63 students with disabilities total who served in-school suspensions that year, of whom 60 were American Indian.[94]

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.[95] The racially inconsistent treatment evident for all levels of discipline in Wolf Point is very 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 the American Indian students in Wolf Point undoubtedly suffer from higher rates of poverty as compared to the white students, 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."[96] 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 many problems for children, who fall behind their peers in school, and their parents, who struggle to find alternative child care arrangements.

91. *Compare* Mont. Off. of Pub. Instr., *supra* n. 88, *with* Mont. Off. of Pub. Instr., *supra* n. 87. Out of a total American Indian population of 694, 11 were expelled in the Wolf Point District (1.59%) versus 1 white student out of a total white population of 148 (0.07%).

92. *Compare* Mont. Off. of Pub. Instr., *supra* n. 87, *with* Mont. Off. of Pub. Instr., *supra* n. 87.

93. *Compare* Mont. Off. of Pub. Instr., *surpa* n. 88, *with* Mont. Off. of Pub. Instr., *supra* n. 87. Out of a total enrollment of 694 American Indian students in the Wolf Point District, 89 received out-of-school suspensions (12.82%). Out of a total enrollment of 148 white students in the Wolf Point District, 10 received out-of-school suspensions (8.11%). Out of a total of 99 district-wide, 43 American Indian students with disabilities received out-of-school suspensions.

94. Mont. Off. of Pub. Instr., *supra* n. 88.

95. *Id.* Between the 2008–2009 and 2009–2010 school years, there were 24 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.

96. 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* 179 (William Ayers, Rick Ayers, & Bernadette Dohrn eds., New Press 2001).

D. School Disciplinary Procedures

1. Minimum Disciplinary Procedural Due Process Required by the State

Nearly 40 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 10 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."[97]

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."[98]

States may add due process requirements to the *Goss* requirements. Montana is one of the few states that have not done so; there are no additional minimum guaranteed procedural protections for students subject to suspensions for fewer than ten days.[99] 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 any specific requirements for the procedure.[100] For even more serious punishment, Montana still provides no procedural protection. Indeed, while only the school board of trustees may expel a student, which in Montana includes any suspension without services beyond 20 school days, there are no procedural requirements for this action.[101] 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.[102] As a gesture towards due process, Montana does mandate that schools "maintain a record of any disciplinary action that is educationally related [including suspensions], with explanation, taken against the student."[103] There is no uniform provision of alternative

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

98. *Id.* at 584.

99. 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, 353 (2009).

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

101. Mont. Code Ann. § 20–5–202(1). School administrators may impose an additional 10-day suspensions beyond this initial expulsions provided the student is given an "informal hearing with the school administrator prior to the additional suspension." No educational services need be provided during the student's absence.

102. *Id.* at §§ 20–4–302(5); 20–4–402 to 20–4–403.

103. Admin. R. Mont. 10.55.910 (2007); Zirkel & Covelle, *supra* n. 99, at 353.

schools or instruction to students serving suspensions or expulsions in Montana.

2. *Disciplinary Procedures Particular to Wolf Point*

Personal accounts from the Wolf Point School District illustrate the ways in which lack of both stated and enforced procedural protection can affect children caught up in the school disciplinary system. The Wolf Point School District Policies provide that "a building administrator" may order a suspension of up to ten school days for any student and may additionally impose up to ten more days of suspension if an "informal hearing" is given to the student.[104] The Policies also require that "a building administrator will report *any* suspension *immediately* to a student's parent or legal guardian."[105]

Unfortunately, many American Indian Wolf Point parents report that even these minimal procedural policies are not followed. Angie K.'s son T.K. attended school in the Wolf Point School District and graduated in 2010. On each of the five occasions that T.K. was suspended from Wolf Point High School, he would be sent off school premises alone. The school never contacted her to retrieve him or to alert her as to the reason for the suspension. A call or letter would arrive hours or often days later, stating that T.K. had been suspended and sent away from school alone and specifying a date when T.K. could return to school. Early in 2011, Angie had to temporarily live hours away in Billings in order to care for her dying mother, and informed the school that T.K. was staying with his uncle until she could return. During this period, school administrators met with T.K. without a parent or guardian present, and informed him he was 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 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 education there.[106]

Bernadette J., another Wolf Point parent, reports a similar experience with suspensions at Wolf Point High School. On several occasions, school

104. Wolf Point High School, *Wolf Point Sch. District Policies*, Section 3 ("Students") § 3300.
105. *Id.*
106. Interview with Angie K., Parent of Student, Wolf Point, Mont. (Aug. 3, 2011) (notes on file with Author).

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 later date.[107]

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."[108] 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.[109]

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

Federal law mandates additional procedural protections to special education students when schools seek suspensions. Under 20 U.S.C. § 1401, "children with disabilities" includes children with one or more of several categories of physical, emotional, and cognitive disabilities who are in need of special education and related services.[110] State public schools must provide an "individualized education plan" (IEP) and special procedural protections to students with these classified disabilities.[111] 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 suspen-

107. Interview with Bernadette J., Parent of Student, Wolf Point, Mont. (Aug. 3, 2011) (notes on file with Author).

108. Interview with Patty McGeshick.

109. *Id.*

110. 20 U.S.C. § 1401(3) (2006).

111. *Id.* at §§ 1414–1415.

sion period, but ideally immediately, the school must conduct a "manifestation determination" in which:

> 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.[112]

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.[113] 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.[114] Parents must be notified about the school's decision to seek a disciplinary change in placement,[115] and must be given opportunity to take part in the manifestation determination and appeal any decisions with which they do not agree.[116]

Montana does not mandate that school districts provide alternative schools 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.[117]

1. Actual Wolf Point Disciplinary Practices Involving Students with Disabilities

Accounts from students and families of Fort Peck illustrate the particularly difficult situation facing Montana's American Indian students with disabilities. In accordance with federal law, the Wolf Point School District Policies provide for a manifestation determination review meeting for stu-

112. *Id.* at § 1415; 34 C.F.R. § 300.530 (2012).
113. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530.
114. 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530.
115. 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530. 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 C.F.R. § 300.536.
116. 34 C.F.R. § 300.530(h), 300.532.
117. Email from Tim Harris, Dir., Special Educ. Div., Mont. Off. of Pub. Instr. (July 11, 2011, 10:28 RMT) (on file with Author).

dents with disabilities who face suspensions of more than ten school days.[118] Schools are required to provide notice of the procedural protections due to students with disabilities once annually, and whenever the school seeks to suspend or expel students for more than ten days.[119] But parents of Wolf Point High School students with disabilities report that they are not informed of their student's entitlement to a manifestation determination or the ability to challenge the decision by the school that the behavior was not a manifestation of the student's disability.

Bernadette J. reports that, although her daughter, J.J., has an IEP from Wolf Point High School, she was never informed that the classification affords procedural protections for J.J. 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.[120] Bernadette's husband, Richard J., also notes that J.J. was 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 J.J. had 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. J.J. had an IEP and was classified with ADHD. Nevertheless, the school provided no manifestation determination review, and there was no discussion of the relationship of her disability to her involvement in the incident, despite the fact that ADHD is well known to cause or contribute to a host of negative behaviors in school. Wolf Point High School decided to suspend J.J. for a full year.[121]

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

For American Indian children in Montana, the correlation between risky adolescent behavior and failure in school is clear. Only 2.9% of Montana's white students in grades 7–12 drop out of school, but American Indian students have a dropout rate of 8.8%.[122] It is therefore unsurprising that American Indian students on reservations exhibit more of the risky behaviors that contribute to dropout, suspensions, and arrests than white students. Nearly three times as many American Indian students on reservations had sexual intercourse for the first time before age 13 compared to the state-

118. Wolf Point High School, *supra* n. 104, at § 3300P, 2.

119. 34 CFR § 300.530(h).

120. Interview with Bernadette J.

121. Interview with Richard J., Parent of Student, Wolf Point, Mont. (August 3, 2011) (notes on file with Author).

122. Mont. Off. of Pub. Instruction, *Mont. Statewide Dropout and Graduate Report: 2008–2009 School Year*, 6 (May 2010) (available at http://opi.mt.gov/pdf/Measurement/DropoutReportFY08_09.pdf).

wide average.[123] Twice as many American Indian students in grades 7–12 on reservations smoke cigarettes daily as the statewide average.[124] 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, 12% of high school girls were pregnant, and more than one-fifth of fifth-graders drank alcohol weekly. There is also a 40% dropout rate.[125] These statistics demonstrate a clear need for heightened guidance intervention measures and mental health services in schools on reservations.

IV. 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 exists of links between this suicide epidemic and 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,[126] which was enacted 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 all contribute to the increased risk of self-harm on the reservation. The high suicide rate can be characterized as yet another tragic symptom of the school-to-prison pipeline.

Sadly, statewide, 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 30 years.[127] Forty-five percent of Montana counties are at or above the 80th percentile for suicide rates compared to the national rate.[128] This unfortunate distinction is exacerbated in Montana's American Indian communities.

123. Mont. Off. of Pub. Instruction, *2009 Mont. Youth Risk Behavior Survey Results, Comparative Report*, 9 (2009) (available at http://opi.mt.gov/pdf/YRBS/09/Reports/09ComparativeReport.pdf).

124. *Id.* at 5.

125. Volz, *supra* n. 53.

126. Mont. Code Ann. § 20–1–501.

127. Mont. Dept. of Pub. Health and Human Servs., *Mont. Strategic Suicide Prevention Plan*, 7–8, http://prevention.mt.gov/suicideprevention/StateSuicidePlan.pdf (accessed Sept. 3, 2013).

128. *Id.* at 12.

As of February 2011, 6.5% of all high school students in Montana reported attempting suicide one or more times in the past year.[129] American Indian high school students on reservations attempted suicide at a much higher rate of 11%.[130] Separate statistics for rates of suicide among white children are unavailable, but they are likely 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 there felt "so sad or hopeless almost every day for more than two weeks" that they "stopped doing some usual activities," and 21.5% actually made a plan for how they would kill themselves.[131]

Five out of only 153 students at Poplar Middle School committed suicide in the 2009–2010 school year. Twenty more attempted suicide. By March 2011, two more Fort Peck children had committed suicide.[132] In response, the United States Public Health Service (PHS) deployed emergency teams for 90 days in 2010 to Fort Peck to provide counseling and mental health services, supplementing the "overworked counselors and strained resources of the reservation." They also produced a report with recommendations for alleviating the crisis.[133]

The Public Health Service report cited several community-based factors that contributed to the suicide crisis, including broken homes, violent crime, and poverty. While undoubtedly these factors contributed to the high suicide rate, many parents were frustrated that the report simply outlined "problems at the reservation that most everybody already knew" without providing assistance in fixing them in the long term.[134] While there were no suicides during the 90 day period of the federal response team's presence on the reservation, since the team left in October 2010, at least four more youth on the reservation have committed suicide.[135] One was an eight-year-old child.[136]

129. Mont. Off. of Pub. Instr., *2011 Youth Risk Behavior Survey: High School Results*, 9 (2011) (available at http://www.opi.mt.gov/pdf/YRBS/11/Reports/11YRBS_HSResults.pdf).

130. *Id.* at 63.

131. Mont. Off. of Pub. Instr., *2011 Roosevelt County Youth Risk Behavior Survey Middle School Student Frequency Distributions* (on file with Author).

132. Volz, *supra* n. 53.

133. Matt Volz, The Buffalo Post, *Tragic suicide sprees baffle Fort Peck community* (Mar. 21, 2011) (available at http://www.buffalopost.net/?p=14178).

134. *Id.*

135. *Id.*; *see also* Cindy Uken, *Montana Tribes Seek Solutions to Reducing Suicides*, Missoulian (Apr. 7, 2013) (available at http://missoulian.com/news/local/montana-tribes-seek-solutions-to-reducing-suicides/article).

136. Uken, *supra* n. 135.

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. Instead, in December, the tribal court created a new criminal charge that allows prosecutors to detain persons threatening suicide.[137] The new charge, "aggravated disorderly conduct," enables local prosecutors to lock up children at high risk of self-harm.[138] Barry Bighorn, the Fort Peck Juvenile Court Judge, estimates that the charge had been brought against 20–30 juveniles within months of its implementation.[139] Judge Bighorn is dismayed by the use of the charge because he does not believe that the courts should be involved in situations where the provision of mental health to children is the primary concern, and 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.[140] Surely this discourages children in crisis from reaching out for help in those moments.

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."[141] This raises serious concerns that children who are in crisis will not reach out for help for fear they will be locked up like criminals for their ideations. Indeed, Fort Peck Family Court Judge Roxanne Gourneau worries that this punitive approach "takes away a child's voice to ask for help."[142]

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 calamity. 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

137. CCOJ Title VII § 445 (2010).

138. *Id.*

139. Interview with Barry Bighorn, Juvenile Court Justice of Fort Peck Tribal Court, Poplar, Mont. (Aug. 3, 2011) (notes on file with Author).

140. *Id.*

141. Volz, *supra* n. 133.

142. Interview with Roxanne Gourneau, Family Court Justice of Fort Peck Tribal Court, Wolf Point, Mont. (Aug, 4, 2011) (notes on file with Author).

discipline practices.[143] 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.

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 17, 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 60 days. No counseling was offered and the decision was final.[144] The school imposed a zero tolerance punishment even though official school policies allow for discretion for tobacco offenses to simply refer students for counseling as a disciplinary response.[145] Judge Gourneau says the school sent Dalton home alone in tears without even contacting a guardian.[146]

By all accounts Dalton was a beloved member of the community, popular among all students, and always ready to help a friend or elder. Family and friends say he was a very happy young man. Dalton was also a gifted wrestler in a community where sports are vitally important, and students care deeply about their athletic competitions. Dalton had qualified for the state championship competition, and was looking forward to it eagerly. His suspension from activities meant that he would miss the competition. 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.[147]

Dalton's mother blames the School District and the State for his death. 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 equipped to deal with children in crisis. Instead of rushing to discipline a youth who is part of a population that experiences 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 kindness" would have made a difference in her son's fate.

143. Volz, *supra* n. 133.

144. Interview with Roxanne Gourneau.

145. Use or possession of tobacco is a "level three" offense, to which a response can be counselor referral, or a suspension for as little as one day. Wolf Point High School, *Wolf Point High School Handbook 2009-2010*, 18 (on file with Author).

146. Interview with Roxanne Gourneau.

147. Associated Press, *Mom files lawsuit in Indian child suicide outbreak*, Billings Gazette (June 1, 2011).

Nobody gave Dalton the chance to explain what happened in the hallway. He was simply told that the decision was binding and there was no ability to appeal.[148]

While Wolf Point high school policies require contacting a parent when children are disciplined for anything above a "level one" offense, the school never contacted Judge Gourneau in any way to let her know that Dalton was found with tobacco, a "level three" offense.[149] 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 experienced great tragedy over the prior year. Judge Gourneau has filed suit to address her son's death; she hopes that her lawsuit will 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.[150] 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.[151]

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 14, and loved it. She was looking forward to an away game that her parents would be able to attend. One evening the week before the game, however, 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 humiliating experience her daughter had the evening before, and not informed by the school of the failing grade, Angie agreed. B.K. proceeded to take a bottle of ibuprofen and attempted to hang herself. When this attempt failed, B.K.

148. Interview with Roxanne Gourneau.

149. *Id.*

150. In February of 2013, Roosevelt County District Judge David Cybulski dismissed Judge Gourneau's lawsuit against the school district and state and school district superintendent Henry Hamill. Cindy Uken, *Mother: 'I heard him cry like I've never heard him cry'*, Billings Gazette (Mar. 31, 2013). The Montana Supreme Court subsequently denied Gourneau's appeal, ruling that the school could not have foreseen the risk of suicide when disciplining Dalton.

151. Interview with Roxanne Gourneau.

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.[152]

Sharon H. also reported serious communication problems with Wolf Point High School. Sharon's granddaughter, for whom she is a legal guardian, is a student at Wolf Point. Sharon's granddaughter was frequently being bullied 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. The phone system at the school seemed to lead to nowhere; Sharon says she "punched every number" on the phone system. 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.[153]

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.[154] Sharon H.'s granddaughter's coach also told her granddaughter that she wasn't good enough to play basketball, and

152. Interview with Angie K.

153. Interview with Sharon H., Grandparent of Student, Wolf Point, Mont. (Aug. 3, 2011).

154. Interview with Bernadette J., Parent of Student, Wolf Point, Mont. (Aug. 3, 2011) (notes on file with Author).

should just find something else.[155] 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 opportunities to engage in behavior that may be harmful to themselves or others."[156] 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.[157]

Outsiders often wonder why high school sports, particularly basketball, are so important to Wolf Point residents. Angie K. says these people must wonder "why would a child kill themselves over sports?" Angie believes that for her daughter, sports were her whole life.[158] 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 Alexie[159] story, former high school basketball heroes remain the reservation's heroes for life.[160] The poverty on the reservation forecloses many options for extracurricular activities and other opportunities to excel, so school sports can dominate young people's 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, Fort Peck Tribal Council member Tom Christian notes that the Poplar School District puts locks on the school playground for the entire summer. While the District may be worried about liability, he feels that this action symbolically displays the public school system's lack of sensitivity to the community's needs. Poplar is an entirely American Indian school, and most of the children in the area live below the poverty line and have few opportunities for recreation of any kind in the summer.[161] 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 when adminis-

155. Interview with Sharon H.

156. Pedro A. Noguera, *Finding Safety Where We Least Expect It,* in *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* 213 (William Ayers, Rick Ayers, Bernadette Dohrn eds., New Press 2001).

157. Interview with Bernadette J.

158. Interview with Angie K.

159. 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 (accessed Sep. 24, 2013). Alexie's novels portray American Indian reservation life and the central importance of high school sports in such communities.

160. Interview with James Melbourne, Fort Peck Tribal Health Dir., Poplar, Mont. (Aug. 3, 2011) (notes on file with Author).

161. Interview with Tom Christian, Fort Peck Tribal Council Member, Poplar, Mont. (Aug. 4, 2011) (notes on file with Author).

trators refused to work with her to address the dangerously high levels of obesity and diabetes among the American Indian students. She tried unsuccessfully to alter the school's menu to be more diabetic friendly because many of the students eat all of their meals at school. Angela also expressed her dismay that administrators returned to "business as usual" after student suicides instead of addressing the continuing crisis and trauma.[162]

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 declined.[163] Identifying abuse is crucially important on the reservation because victims of abuse are at far greater risk of suicide.[164]

McGeshick, like Sharon H., is also frustrated by seemingly trivial but consequential problems like the school's phone system. When she calls the school, she is rarely able to reach a human being—which is especially problematic because 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."[165] Even prominent and successful tribal members report discrimination by the Wolf Point School District. 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.[166]

162. Interview with Angela Urbanic, former Wolf Point High School Nurse, Wolf Point, Mont. (Aug. 4, 2011) (notes on file with Author).

163. Interview with Patty McGeshick.

164. *See* Deborah Fry, Amalee McCoy & Diane Swales, *The Consequences of Maltreatment on Children's Lives*, 13 Trauma, Violence, & 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."). *See also,* The Coalition to End Violence, *Children and Domestic Violence*, http://www.thecoalition.org/Children%20and%20Domestic%20Violence.htm (accessed Oct. 22, 2011); *Get Educated: Abuse in America*, The Hotline (Oct. 22, 2011, 1:00 PM) (available at http://www.thehotline.org/get-educated/abuse-in-america).

165. Interview with Patty McGeshick.

166. Interview with Richard K. Jackson, Chief Justice, Fort Peck Tribal Court, Wolf Point, Mont. (Aug. 4, 2011) (notes on file with Author).

The School District's decision to switch to a four-day school week in 2011[167] is also of concern to the tribal community. This seems an odd decision 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 and tribal member Ed Bauer believes that "it's a way to save money; it's not about the kids."[168] Suspending children from school, and decreasing the length of the school week, is problematic for a population at risk of suicide. It is well known that suicide is a phenomenon "tied to individualism, social isolation, [and] alienation,"[169] all of which are more likely when rural students don't have school as a daily gathering place.

V. Disproportionate American Indian Contact with the Juvenile Justice System

Suspending children from school for even a few days "disrupts their education and often escalates poor behavior by removing them from a structured environment and giving them increased time and opportunity to get into trouble."[170] A study published in the *Journal of School Psychology* demonstrated that suspended students are 26% more likely to be involved with the legal system.[171] Schools contribute to racial disproportionality 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 "delinquent" behaviors.[172] Additionally, by having police officers facilitate school discipline—either by calling officers in the event of an incident or having police officers on site—schools move students directly into the juvenile justice system rather than allowing them an opportunity to correct their behavior before creating a court record. 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.

167. Associated Press, *Wolf Point Schools adopt four-day school week*, Missoulian, (Apr. 13, 2011) (This was largely a cost saving measure.).

168. Interview with Ed Bauer, Wolf Point, Mont. (Aug. 3, 2011) (notes on file with Author).

169. Noguera, *supra* n. 156, at 207.

170. Johanna Miller et.al., New York Civil Liberties Union, *Education Interrupted: The Growing Use of Suspensions in New York City's Public Schools*, 7, (Jan. 2012) (available at http://www.nyclu.org/files/publications/Suspension_Report_FINAL_noSpreads.pdf).

171. *Id.*

172. Kim, *supra* n. 5, at 78.

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.[173] 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 for both populations.[174] White juvenile arrestees were far more likely than American Indian juvenile arrestees to have their cases diverted from court and into alternative out-of-court programs; American Indians' cases were diverted to these 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 the possibility of detention.[175]

In 2009, petitions were filed against American Indian juvenile arrestees at a relative rate of 1.69 compared to petitions filed against white arrestees.[176] Perhaps most shockingly, American Indian juveniles adjudicated delinquent were placed in secure detention at twice the rate of white juveniles found to be delinquent.[177] American Indian cases were transferred to adult criminal court at a relative rate of 2.58 compared to white juvenile cases.[178]

In 2010, the juvenile justice system's racial disparities improved. This is likely due in part to the attention of the Montana Board of Crime Control's Disproportionate Minority Contact (DMC) Committee to the problem,

173. Mont. Board of Crime Control, *Montana 2009 RRI Data* (on file with Author). Of 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 9,926 American Indian/Alaska Native children in that age range, 897 were arrested, or 9.04% of the population of American Indians.

174. 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.

175. Mont. Board of Crime Control, *supra* n. 173. 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 14.87% of white arrestees' cases involved secure detention.

176. *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.

177. *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.

178. *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.

and their efforts to reduce the racial disproportionality at all levels of the juvenile justice system, which included collecting comprehensive data on and analysis of minority interactions with the State's juvenile justice system, as well as making recommendations to local law enforcement and court systems.[179] Nevertheless, the problem remains pronounced. American Indian juveniles were arrested at a relative rate of 1.51 as compared to the number of white juveniles.[180] American Indians' cases were diverted at a relative rate of 0.89 for every white juvenile diversion.[181] Petitions were filed against American Indian juvenile arrestees at a relative rate of 1.26 compared to petitions filed against white arrestees.[182] And while American Indian juveniles adjudicated delinquent were still placed in secure detention at 1.86 the rate of white juveniles found to be delinquent,[183] the rate of juvenile American Indian Cases transferred to adult criminal court improved tremendously to 1.05 as compared to white juvenile cases.[184]

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 in the juvenile justice system. The County had an American Indian youth relative rate of arrest of 2.39 as compared to white youth.[185] American Indian youth in the County were 30% less likely to have their case diverted from the justice system than white youth in 2009.[186] Petitions were filed against American Indian youth in Hill County at a relative rate of 2.69 compared to white youth.[187] And of juveniles adjudicated delinquent,

179. *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).

180. Mont. Board of Crime Control, *2010 RRI for Juveniles* (on file with Author). Of 98,899 white children in the at-risk age population (10–17 years of age), 6,467 were arrested, or 6.54% 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.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Mont. Board of Crime Control, *DMC/JDAI Site Reports*, http://mbcc.mt.gov/JuvenileJustice/DMC/DMC_JDAIReports.asp (click on "Hill County" in the section labeled "for each DMC site within the state") (last visited November 7, 2011).

186. *Id.*

187. *Id.*

American Indians were 2.44 times as likely to be placed in secure detention.[188]

C. *American Indian Youth Involvement in Tribal and Federal Courts*

The statistics provided above for the State and for Hill County cover only state prosecutions and do not account for arrests of American Indian youth (1) on reservations by the tribal police and adjudications in tribal courts or (2) arrested by federal authorities or charged or sentenced in federal court. Adding in the figures for these arrests would make the disparities noted above even more pronounced. In 2008, 21 American Indian youths under the age of 21 were arrested by federal authorities in Montana.[189] During that period, Montana had the highest percentage in the nation of federal arrests of American Indian youths.[190] Eighteen of 24 criminal cases filed against youth under age 21 in Montana's federal district court that year were filed against American Indians.[191] Additionally, 19 of 21 youths in Montana committed to federal custody were American Indian.[192] The data for arrests, adjudications, and sentencing in tribal courts statewide were not available, but the *Fort Peck Journal* reported that in 2010 the Fort Peck Tribal Court considered 997 juvenile delinquency charges.[193]

VI. Recommendations For Change

This section of the article proposes a series of changes to federal, state, and local policies and practices. The first recommendation is for the federal and the State governments, and the Office of Public Instruction (OPI) to direct additional resources towards promising programs that have already been implemented in Montana's Indian Country. It then proposes that the State provide teachers with required intensive training on culturally sensitive classroom management and discipline. Next, it lays out some programs and strategies that have been successful in other states and that Montana could use as a model. It further proposes increases in the resources and attention devoted to mental health and mentoring services on reservation

188. *Id.*

189. William Adams et. al, U.S. Department of Justice, *Tribal Youth in the Federal Justice System, Final Report (Revised) Doc # 234549*, Appendix A: Arrest and Booking Stage, Table AA.13a (July 2011) (available at https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf).

190. *Id.* Federal authorities in Montana arrested a total percentage of 24.14% of all federal arrests of American Indians under age 21. 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%.

191. *Id.* at Appendix D, Table D9, Table D4.

192. *Id.* at Appendix G, Table G15, Table G5.

193. Louis Montclair, *More DC Committed in 2010 than other crimes*, Fort Peck Journal (June 9, 2011).

schools. Finally, it recommends that the State take concerted steps to increase the representation of American Indians among school faculty and personnel.

A. *Support and Strengthen the Steps Already Taken by Montana's Office of Public Instruction*

While the suicide crisis in Fort Peck and the racially disproportionate school discipline practices and academic achievement in Wolf Point and statewide are certainly deeply troubling, it is also important to note that local, state, and federal efforts have been directed toward alleviating the problem. These efforts should be supported and expanded.

The Fort Peck Tribal Health Department, in partnership with the University of Montana's National Native Children's Trauma Center, was awarded a $1.4 million grant by the U.S. Center for Mental Health Services to "promote activities that emphasize youth resilience and leadership on Fort Peck."[194] The Fort Peck Tribal Health Department has also issued a new response protocol for suicide attempts.[195] It remains to be seen whether these new initiatives will make a difference. Schools must participate in the effort. Director Gary James Melbourne reports that the Department has hosted a suicide prevention meeting every Tuesday evening for months.[196] He has reached out on several occasions to the on-reservation school superintendents and principals. While some schools have expressed interest in collaborating on the issue, Wolf Point school officials have not yet attended a single meeting.[197] Melbourne also reports that the District refused to allow a suicide prevention coordinator to run trainings and workshops for the children.[198]

Denise Juneau, Montana's State Superintendent of Public Instruction, has instituted an important and encouraging program through a Title I School Improvement Grant received by the Office of Public Instruction from the U.S. Department of Education. The "Schools of Promise Program" received $11.5 million to resuscitate three failing on-reservation public high

194. U.S. Sen. Max Baucus, *Baucus, Tester Announce New Suicide Prevention Project for Fort Peck: Fort Peck Tribes and University of Mont. Partner to Promote Youth Resiliency* (July 28, 2011) (available at http://baucus.senate.gov/?p=press_release&id=605).

195. Fort Peck Tribal Health Department Suicide Prevention Program, *Incident Command Protocol* (June 2011) (on file with Author).

196. Interview with Gary James Melbourne, Director, Fort Peck Tribal Health Department, Poplar, Mont. (Aug. 3, 2011) (notes on file with Author).

197. *Id.*

198. *Id.*

schools, Pryor, Lame Deer, and Frazer (on the Fort Peck Reservation).[199] In order to receive funding from the program, these schools had to relinquish some of their autonomy and partner with OPI.[200] This involved bringing advisors into the schools to train and coach teachers, rearrange employees, and implement new parent and student programs.[201] So far, Schools of Promise has been successful in boosting academic achievement.[202] It has also focused on cultural awareness training, engagement with local American Indian communities, and individual counseling and advising for students.[203]

The Schools of Promise Program acknowledges that the historic trauma suffered by American Indians can influence their attitude towards state schools, noting that "Native adults who as children were forced to go to boarding schools can be left with a negative view of schools."[204] Frazer High School is doing simple things to counteract this problem, such as having teachers set up meetings with parents at the parents' convenience, and visiting them at home to make communication easier for families. The program is focusing on mental health as a crucial aspect of education. Juneau says, "We're trying to get a support system for each child in those schools so they'll be able to move into the classroom ready to learn."[205]

Unfortunately, the Schools of Promise Program has to date only reached a few select schools statewide. While these schools may provide good models for other schools, each school board has broad discretion as to how they want their schools run and they may choose not to implement the models. However, because OPI controls funding and accreditation procedures, it can and should create incentives for better disciplinary models. Racially balanced and humane disciplinary policies can be made an aspect of accreditation requirements. OPI can also assist school boards in developing better, more racially neutral practices, by providing trainings and guidelines on disciplinary practices. Schools across the country have learned how to deal with discipline in a culturally sensitive way;[206] Montana can do so as well. Additionally, some school districts in Montana provide alternative

199. Sarah Yager, *Making New Promises in Indian Country*, The Atlantic (Mar. 23, 2012) (available at http://www.theatlantic.com/national/archive/2012/03/making-new-promises-in-indian-country/254969/).

200. Susan Olp, *State's Lowest Performing Schools Finally Get Some Good News*, Billings Gazette (Aug. 7, 2011).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Susan Sandler, *Turning to Each Other, Not on Each Other,* in *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* 225 (William Ayers, Rick Ayers, Bernadette Dohrn eds., New Press 2001).

educational facilities for suspended or expelled students, but this is very inconsistent across the State. OPI should strive to ensure wider access and improvement to education for these students.

B. Restore Recently Reduced Federal Funding

Reservations like Fort Peck have been particularly vulnerable to the spending cuts associated with the recent federal sequester.[207] 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.[208] The effects of sequestration on education are severe nationwide,[209] but reservation schools, which cannot rely on state taxation of local individuals and property, and are heavily dependent on federal funding, have been particularly impacted.[210] While federal funds make up about only about 10% of the budget for a typical U.S. public school district, on reservation lands federal funding contributes as much as 60% of school budgets.[211]

Because of the sequester, the Poplar School District on Fort Peck is now struggling to deal with $1.2 million in cuts. As a result, the District will be unable to hire a reading teacher or guidance counselor for a school where 50% of the students cannot read and five students committed suicide in a single school year.[212] They will also be 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.[213]

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.

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207. Lindsey Layton, *In Montana, an Indian reservation's children feel the impact of sequester's cuts*, The Wash. Post (March 21, 2013) (available at http://articles.washingtonpost.com/2013-03-21/local/37904086_1_sequester-tribal-leaders-million-in-additional-cuts).

208. *See* Budget Control Act of 2011, Pub. L. 112–25 (Aug. 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 (Jan. 2, 2013).

209. National Education Association, *Impact of Sequestration on Federal Education Programs - State-by-State*, http://www.nea.org/home/52610.htm.

210. Layton, *supra* n. 207.

211. *Id.*

212. *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."

213. *Id.*

C. Train Teachers and Administrators on Best Practices for School Discipline

Suspension removes 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."[214] 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.[215] It is important that the State provide training to school staff on the most current, effective, and humane disciplinary policies, some of which are discussed below, and that there be ongoing accountability of individual school districts to avoid imposing excessive suspensions and expulsions at racially disproportional rates.

It is vitally important that schools be safe places where students can learn undisrupted by other students with behavioral problems. However, there are alternatives to zero tolerance exclusions from school that are more effective and "avoid the collateral consequences of excessive suspensions, expulsions, and arrests."[216] The American Psychological Association (APA) advocates a discipline approach that is primarily preventive, addressing behavioral issues in students before they start to cause problems. The APA emphasizes the importance of conflict resolution programs, screening for students who are at risk of violence, and providing mental health and mentoring services. The APA also recommends multi-systemic therapy (MST) or restorative justice programs when these preventive measures have failed and students get in trouble.[217] Some of these approaches and programs are described below.

The Resolving Conflict Creatively Program (RCCP) has proven to be highly successful in maintaining safe learning environments and dealing with "problem" students without adopting zero tolerance policies.[218] 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."[219] Lessons are run "workshop" style, where the teachers pre-

214. Miller, *supra*, n. 170, at 7.

215. Judith A. Browne, *The ABCs of School Discipline: Lessons from Miami-Dade County*, in *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* 189–190 (William Ayers, Rick Ayers, Bernadette Dohrn eds., New Press 2001).

216. Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies As Violating State Constitution Education Clauses*, 35 N.Y.U. Rev. L. & Soc. Change 303, 314 (2011).

217. *Id.* at 315.

218. *Id.*

219. *Id.*

sent scenarios involving topics like resolving conflicts, fostering cooperation, and countering bias that the students then work to resolve together.[220] RCCP has been proven highly effective in studies of both urban and rural schools in many states at improving the behavior of students, reducing emotional and physical aggression, and fostering a friendly social environment.[221]

Mentoring also appears to have a significant impact on at-risk students' behavior and has the added benefit of improving academics, attendance, and rule compliance.[222] Anger management programs that employ cognitive behavioral techniques, encouraging students to analyze situations from an outside perspective, and providing students with strategies to manage anger have also been found highly effective.[223]

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 "offender" must fulfill. Restorative justice programs are "significantly more effective at preventing recidivism than non-restorative programs."[224]

Positive Behavior Supports (PBS) are another method some schools employ. PBS is not a static approach to disciplinary and behavioral issues, but rather targets each individual student in a highly specialized way.[225] 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."[226]

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220. *Id.* at 316.

221. *Id.*

222. Bloomenthal, *supra* n. 216, at 317 ("a meta-analysis looking at fifty-five youth mentoring programs similarly found mentoring to have a positive effect on problem or high-risk behavior").

223. *Id.* at 318.

224. *Id.* at 319.

225. George Sugai, et al., *Applying Positive Behavior Support and Functional Behavioral Assessments in Schools* (Working Paper Cal. Polytechnic St. U. 1999) (available at http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1031&context=gse_fac&seiredir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fq%3DPositive%2BBehavior%2BIntervention%26ie%3Dutf8%8%26aq%3Dt%26rls%3Dorg.mozilla%3Aen-US%3Aofficial%26client%3Dfirefox-a#search=%22Positive%20Behavior%20Intervention%22); *see also* Bloomenthal, *supra n.* 216 (PBS programs "consider the unique and individualized learning histories (social, community, historical, familial, racial, gender, etc.) of all individuals . . . . Such plans must be based on information about the nature of the problem behavior and the environmental context in which the problem behavior is observed.").

226. Skiba, *supra* n. 96, at 183.

Exclusion is not a productive disciplinary response, as removal from school "can have a profound impact on minority students, may do irreversible damage to self-esteem, and cause negative attitudes about school."[227] For minor behavioral infractions, psychologists recommend methods that maintain engagement in the school environment, including community service, mandatory tutoring, additional work assignments, and public apologies.[228]

D. Increase Mental Health and Mentoring Services for Reservation Schools

Marilyn Bruguier Zimmerman, director of the National Native Children's Trauma Center, says that the IHS report on the suicide cluster was very useful to the Center. The report detailed students' suggestions for how to assist with the crisis. These students asked for "more meaningful adult contact, one-on-one relationships we might call mentoring."[229] The Trauma Center then identified students at Poplar Schools who were deemed to have been engaged in a pattern of violence and matched them with persons on school staff whom they trusted. The staff checked in with these students three times during the school year, after which there were measurable decreases in assault rates. Zimmerman notes that the same population targeted by the Trauma Center program was also likely at risk of suicide, and recommends implementing similar cost-efficient, "simple" programs in other schools.[230]

Zimmerman recognizes that school is the cornerstone of children's lives, the place where they spend most of their waking hours. On reservations like Fort Peck, where poverty levels are extreme, schools can provide structure, safety, and nourishment. However, students cannot learn unless their mental health needs are accommodated. Zimmerman also believes that "whether we feel it's necessary or we like it, schools have become the *de facto* mental health centers of our country."[231] If mental health services were provided on a universal basis, children could presumably focus on their education rather than personal trauma in their lives.

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227. Daniel J. Losen & Christopher Edley, Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline is a Civil Rights Issue*, in *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* 231 (William Ayers, et al., eds., New Press 2001).

228. Noguera, *supra* n. 156, at 212.

229. Marilyn Bruguier Zimmerman, Testimony, (Washington, D.C. Aug. 9, 2011) (available at http://indian.senate.gov/hearings/upload/testimony.pdf)

230. Telephone Interview with Marilyn Bruguier Zimmerman, Dir. of Natl. Native Children's Trauma Ctr. of the U. of Mont., Missoula, Mont. (July 29, 2011) (notes on file with Author).

231. *Id.*

It is vital that schools communicate with parents and community organizations; "given that a growing number of students arrive at school in need of emotional and psychological support, it is also important for schools to develop partnerships with health and social services agencies that can provide direct assistance to students."[232]

E. Develop and Recruit American Indians as School Officials, Educators, and Administrators

Montana's public schools should increase recruiting efforts and placement of American Indian teachers in 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 19 American Indian teachers on all of the Fort Peck reservation schools while there were 185 non-American Indian teachers.[233] The Office of Public Instruction does not track the races of school staff. However, Tribal Education Director Dale Four Bear reports that across the board, administrators in all of the on-reservation public schools are overwhelmingly white.[234] This is particularly true for Wolf Point; Four Bear could not identify a single American Indian school administrator in the Wolf Point School District.[235] Chris Windchief alleges that this is not for lack of qualified local tribal members who are certified teachers.[236] It is important for young American Indian students to work with teachers and administrators who come from their community and can relate to their tribal upbringing and learning styles. Otherwise, there is a danger that students will become disengaged from school, or will fail to recognize the possibility that they might also have a career in education or academics.

F. Incorporate Tribal Culture and Language Curriculum into Reservation Schools' Instruction

As noted by both Professor Maylinn Smith of the University of Montana School of Law, a former tribal judge and an Indian law specialist, and Dale Four Bear, Tribal Education Director for Fort Peck, cultural awareness

232. Noguera, *supra*, n. 156, at 210.

233. U.S. Commission on Civil Rights, *Equal Educational Opportunity for American Indian Students in Montana Public Schools*, Chapter 4, Tribal Leadership and Tribal Education Perspectives, http://www.usccr.gov/pubs/sac/mt0701/ch4.htm (accessed Sept. 4, 2013).

234. Interview with Dale Four Bear, Director, Fort Peck Tribal Education Department, Poplar, Mont. (Aug. 3, 2011) (notes on file with Author).

235. *Id.*

236. Interview with Chris Windchief, Teacher, Wolf Point, Mont. (Aug. 4, 2011) (notes on file with Author).

instruction is vitally important for all teachers who work with American Indian populations.[237] John Morales, former Tribal Chairman of the Fort Peck Assiniboine and Sioux Tribes, agrees and believes that legislation must be crafted

> to address the overwhelming need for educating the educators of our children in a manner designed to raise their level of understanding . . . regarding the historic significance of Indian people to this state and this nation . . . educational institutions [must] rise to meet the academic and social requirements of their constituents, which include both Indian and non-Indian people . . . . It is essential that Indian people have the opportunity for education and training in the environment that is conducive to their specific learning requirements and with an eye toward utilizing their knowledge as a means of achieving true self-sufficiency and self-determination.[238]

VII. Proposed Litigation Strategies

In addition to seeking the above policy changes, 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 that can 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 "dignity," 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 school disciplinary hearings, can also provide relief for Montana's American Indian children.[239] These rights and remedies are relevant for American Indian students beyond the scope of tribal sovereignty and jurisdiction because they are independently granted by the State and federal governments to all state public school students. Each of these is described briefly below. Although some of these claims have yet to be tried in the State, innovative approaches are necessary considering the dire state of affairs for American Indian children.

237. Telephone Interview with Maylinn Smith, Assoc. Prof. of Law, U. of Mont. Law Sch., Missoula, Mont. (June 15, 2011) (notes on file with Author); Interview with Dale Four Bear.

238. U.S. Commission on Civil Rights, *Equal Educational Opportunity for Native American Students in Montana Public Schools*, *Tribal Leadership and Tribal Education Perspectives*, http://www.usccr.gov/pubs/sac/mt0701/ch4.htm (quoting from John Morales, *Statement before the Mont. Advisory Committee to the U.S. commission on Civil Rights*, 18 (Billings, MT Fact Finding Meeting Dec. 10, 1996)).

239. *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).

A. *Use Montana's Dignity Clause to Demand Remediation of Inconsistent Provision of Health and Human Services*

Professor Lisa Pruitt of the UC Davis School of Law proposes legal challenges to state funding inequalities of human services through the use of the Montana Constitution. Pruitt identifies a process of "devolution," whereby the State government delegates responsibilities to municipal and county governments to provide for their citizens, as problematic for poor, rural areas because the

> fiscal capacity of a local government to generate tax revenue is indicated by the per capita income of residents, and residents of remote rural places tend to have lower incomes, higher unemployment rates, and a greater reliance on income transfers.[240]

She argues that while a right to public benefits is not recognized under the U.S. Constitution, and funding disparities have rarely been effectively challenged under the federal Equal Protection Clause, Montana's Constitution may provide "a basis for redressing the serious spatial inequalities evident across the State's counties for ensuring that the essential needs of all children are met."[241]

Pruitt points to three unusual provisions of the Montana Constitution which might provide sources of relief: its unique Equal Protection Clause and its Dignity Clause, coupled with the enumerated right to pursue "life's basic necessities."[242] Regarding the former, Pruitt argues that "[t]he principal purpose of Montana's Equal Protection Clause is to avoid subjecting persons to arbitrary and discriminatory governmental action. Yet the county funding scheme does precisely that . . . . This disparate impact on the basis of geography or place arguably falls within one of the Constitution's explicitly forbidden bases for discrimination: 'social origin or condition.'"[243] Pruitt brings in the Dignity Clause and right to pursue basic necessities[244] by pointing to children's vulnerability.

> [B]ecause children are necessarily dependent, dignity and/or inalienable rights to pursue necessities and to seek safety and health are meaningless if their parents cannot—or simply do not—provide them food, clothing, and shelter.

240. Pruitt, *supra* n. 56, at 12–14.

241. *Id.* at 7.

242. The Montana Constitution reads, in relevant part, "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const. art. II, § 4. Mont. Const. art. II, § 3 enumerates the following inalienable rights: "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways."

243. Pruitt, *supra* n. 56, at 84.

244. Mont. Const. art. II, § 3.

> For those children, no prospect exists for the exercise of these supposedly inalienable rights, just as they enjoy no meaningful prospect of living with dignity . . . . Further, if children are not provided the most basic necessities, they cannot develop into fully functioning adults with the capabilities to pursue these inalienable rights.[245]

Adopting this interpretation of the Constitution's Dignity Clause would require the State to provide equitable funding of services to children in all counties, ensuring that those basic needs are met even in poor counties with low local revenues. Additionally, the right to pursue basic necessities provision was interpreted as including the right to pursue employment in *Wadsworth v. State*,[246] and such reasoning could be extended to cover the right of children to a fundamental education in order to ensure that all citizens are actually able to pursue basic necessities. However, schools alone should not be entirely responsible for the mental and physical health of their students. Local governments need adequate resources to provide health and human services to young people throughout the State, especially when those children are faced with suicide crises.

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

The Montana State Constitution contains another special clause. This one guarantees each citizen the right to a "quality education."[247] This provision, rare in state constitutions, 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."[248] In *Columbia Falls Elementary School District No. 6 v. State*,[249] 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."[250] 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 edu-

245. Pruitt, *supra* n. 56, at 88.

246. 911 P.2d 1165, 1172 (Mont. 1996).

247. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005) (citing Mont. Const. art. X, §1).

248. Mont. Const. art. X, §1, cl. 3.

249. *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 257.

250. *Id.* at 261.

cation" and highlights the unique strength of Montana's constitutional guarantee to a free and equal education for all its students.[251]

Furthermore, the Court in *Columbia Falls* found that Montana's education finance system was in violation of Article X, Section 1, Clause 3 and the principles of the Indian Education for All provision.[252] 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.[253] 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."[254] 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 competition for general fund dollars between special and general education.[255]

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."[256]

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.[257] This decision built on the Court's earlier decision in *Helena School District v. State*, which held the State's education finance system, in neglecting to adequately fund schools with American Indian populations, violated Article X, Section 1, Clause 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."[258]

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 "de-

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

252. *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 259.

253. *Id.* at 261; *see* Brooker, *supra* n. 251.

254. *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 262.

255. *Id.* at 263.

256. *Id.* at 262.

257. *Id.* at 263.

258. *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 693 (Mont. 1989).

velop curriculum, provide training, and distribute grants."[259] This funding has taken a dramatic dive since 2005, however, and the amount appropriated has decreased to $20.40 per student as of 2009.[260] Also, $10 million, which was in the State budget in 2009 for at-risk students, was reduced to just one dollar, and many of the students who previously benefited were American Indians.[261] Notably, the Indian Education for All funds were put into school districts' general funds, not into a special separate fund.[262]

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 Montana Constitution. Parents of children in underperforming and under-resourced reservation public schools have the option of bringing a claim based on failure to adequately fund those schools and provide minimum quality education. It is also important that the legislature recognize the importance of funding Indian Education for All and providing sufficient resources to all schools. Studies show that students who see school as having little relevance to their lives engage in much greater oppositional behaviors in school, and "ensuring that curricula are engaging and relevant to students, and addressing factors like neglected school facilities, may be important steps in improving problematic behavior."[263] Thus, taking steps to challenge resource inequities, in addition to pushing for more tribal oriented curricula, can have the effect of re-engaging students and preventing the need for disciplinary exclusion.

C. "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.[264] Title VI of the Civil Rights Act of 1964 also forbids racially discriminatory

259. Carol Juneau & Denise Juneau, *Indian Education for All: Mont.'s Constitution at Work in Our Schools*, 72 Mont. L. Rev. 111, 119 (2011).

260. Montana Indian Education Association, Board of Directors, *Report to Membership 2009–2010*, 3 (available at http://www.mtiea.org/downloads/report_to_membership_10.pdf).

261. *Id.* at 4.

262. Linda McCulloch, *K–12 Public Education,* Montana Indian Education Association Summit on Indian Education Policy and Budget Issues, September 17–19, 2006, Helena Mont., 9 (available at http://www.mtiea.org/downloads/finalreportsummitonindianeducationpolicy.pdf).

263. Bloomenthal, *supra* n. 216, at 322.

264. *See* U.S. Const. amend. XIV, § 1.

practices in public schools.[265] 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.[266] These are known as "different treatment" discrimination claims, and are distinguished from "disparate impact" claims, which involve allegations of discrimination without proof of a discriminatory animus.[267] While disparate treatment claims do not require "smoking gun" evidence of discrimination, and allow for the consideration of circumstantial evidence,[268] plaintiffs must show that minority students are punished differently than "similarly situated" white students and that this difference is intentional.[269] In some courts, the evidence that students are "similarly situated" must meet a very high threshold.[270] Accordingly, it is typically very difficult for individual parents to demonstrate sufficient proof of different treatment. This is why it is good for communities to join forces and establish "patterns" of different treatment and file joint lawsuits.[271]

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 envi-

265. 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.").

266. 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) ("disproportionate 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"). The Court later clarified that "intent" requires a showing the discriminatory action was taken "because of," and not merely "in spite of," the plaintiff's membership in a particular group. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), the 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 such suits allege discriminatory intent ("[W]e have . . . 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.") (internal citations omitted).

267. For a detailed discussion of the treatment of disparate impact claims originating in public schools and brought under Title VI, *see e.g.* 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, 258–266 (2004).

268. Kim, *supra* n. 5, at 36.

269. *Dartmouth Rev. v. Dartmouth College*, 889 F. 2d 13, 19 (1st Cir. 1989).

270. Kim, *supra* n. 5, at 36.

271. Losen, *supra* n. 227, at 235.

ronment for the American Indian population.[272] 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. 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.[273] 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.[274] Similar lawsuits could be brought in Montana to challenge racially discriminatory discipline practices and harassment.

D. "Racially Hostile Educational Environment" Claim

Litigants can also challenge discriminatory school practices if the practices create a "racially hostile education environment." Plaintiffs in these cases must establish the following five elements: (1) that the defendant had actual knowledge of the harassment; (2) the harassment was "severe, pervasive, and objectively offensive"; (3) the harassment "deprived the victims of access to the educational benefits or opportunities provided by the school"; (4) the school was "deliberately indifferent"; and (5) the district had "substantial control over both the harasser and the context in which the known harassment occurs."[275] Such a claim is difficult, but in a particularly discriminatory school environment it might be successful.

E. Procedural Due Process Challenge

As discussed above, there are minimal procedural due process requirements for suspensions under ten days.[276] However, challenged litigation in-

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

273. *Id.*

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

275. Kim, *supra* n. 5, at 39; *Davis v. Monroe Co. Bd. of Edu*, 526 U.S. 629, 650 (1999).

276. *See* discussion *supra,* Part III.D.1.

volving deprivation of educational rights is analyzed under the balancing test established by the court in *Mathews v. Eldridge*.[277] 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; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[278]

Catherine Kim points out that, given the interests weighed, the *Matthews* test affords little protection to children given ten minute time-outs, but "advocates have enjoyed some success in systemic challenges to the failure to provide for adequate protections to challenge long-term suspensions and expulsions."[279]

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.[280] Although Montana is under the jurisdiction of the Ninth Circuit, no Montana court has ever cited the case as relevant precedent. Still, it remains available to litigators, even though Montana courts have not yet ruled on the State's constitutional due process requirements for schools 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.

F. Substantive Due Process Challenge

Cases challenging school discipline on the ground that it has deprived students of a fundamental right secured them under the "liberty" provision of the due process clause have had limited success.[281] The U.S. Constitution does not provide an explicit right to an education, and the Supreme Court

277. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

278. *Id.*

279. Kim, *supra* n. 5, at 81.

280. Kim, *supra* n. 5, at 183; *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F. 2d 1040, 1045 (9th Cir. 1973).

281. *See e.g. C.B. ex rel Breeding v. Driscoll*, 82 F.3d 383 (11th Cir. 1996) (finding no violation of 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); *see also Dunn v. Fairfield Cnty. 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

has held that education is not a "fundamental right."[282] The U.S. Supreme Court is notably unwilling to overturn the disciplinary decisions of school administrators, even if the decision is "lacking a basis in wisdom or compassion."[283] To be unconstitutional, school discipline must transgress the "'outer limit' of legitimate governmental action," and be "arbitrary, conscience-shocking, or oppressive," not merely "incorrect or ill-advised."[284] However, some courts have found unreasonably harsh suspensions fail to meet the rational basis standard.[285] These challenges usually prevail when there is no evidence of knowledge or intent on the part of the disciplined student.[286] Litigation including a substantive due process claim can be considered in particularly egregious cases.

G. Equal Protection Voting Rights Challenge to Disproportionate White Voting Power on the Wolf Point Reservation School Board

In response to some of the issues brought to light by research for this article, the ACLU of Montana filed suit against the Wolf Point School District Board of Trustees based on violations of American Indian Plaintiffs' right to participate in school board elections.[287] The suit alleges that the apportionment of voting power among subdivisions in the District infringes on the one-person, one-vote guarantees of the Fourteenth Amendment Equal Protection Clause and Section Two of the Voting Rights Act, 42 U.S.C. § 1973. Specifically, the ACLU states that a predominantly white subdivision in the District has voting power in School Board elections that is grossly disproportionate to its population, with one board member for every 143 residents.[288] A neighboring American Indian-dominant subdivision has correspondingly diluted voting power, with one board member for

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").

282. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973).

283. *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 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.").

284. *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp. 2d 421, 434 (N.D.N.Y. 2005); *see also Bell v. Ohio St. U.*, 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.").

285. Kim, *supra* n. 5, at 85.

286. *Id.*

287. For a copy of the complaint, see http://www.aclumontana.org/images/stories/documents/litigation /wolfpoint08072013.pdf.

288. *Id.* at 4 (The complaint states that the voting power of this subdivision, 3, deviates from the ideal power based on population by -75.24%.).

every 841 residents.[289] The ACLU has called upon the federal district court to order redistricting in compliance with federal law.[290] If successful, this suit could have a significant impact on the ability of the reservation's tribal community on to have a voice in school governance and possibly enact some of the school-based changes recommended by this article.

Conclusion

The statistical evidence and tragic stories recounted in this article demonstrate beyond doubt that American Indian children on 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—whether through deliberate actions or through inattention—in those deaths is cause for serious self-reflection and remediation. This article was 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.

289. *Id.* (The complaint states that the voting power of this subdivision, 45A, deviates from the ideal power based on population by +45.25%.).

290. *Id.* at 6–7.