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YOU ARE WHERE YOU EAT: DISCRIMINATION IN THE NATIONAL SCHOOL LUNCH PROGRAM

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ABSTRACT—The National School Lunch Program (NSLP) serves over thirty million children daily in over one hundred thousand schools across the United States. Though it is regulated at the federal level, state and local education agencies have a great deal of authority when it comes to actually implementing the NSLP. As a result, a number of schools nationwide have adopted practices that identify students who participate in the NSLP, which causes those students to experience stigmatization. This Note focuses on two of these practices: (1) the physical separation of paying and nonpaying students in the cafeteria, often resulting in de facto racial segregation, and (2) the practice of "shaming" students who are unable to pay for their meals. Given that minority students participate in the NSLP at a disproportionately high rate, this Note explores whether these state and local practices could potentially form the basis of an actionable claim of disparate impact under Title VI of the Civil Rights Act of 1964.

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INTRODUCTION

"The cafeteria was for the poor kids," one child observed, describing that "[k]ids who did not eat in the cafeteria were embarrassed to go into it during lunch for fear that others would think they were getting a free or discount[ed] lunch."[1] Another child observed that the "'ghetto' children[,] . . . mostly nonwhite students[,] . . . were the ones who ate the free lunches."[2] At other schools, the "white kids ate upstairs and Mexicans ate downstairs."[3] And in one elementary school, a school cafeteria cashier, uttering the phrase "[y]ou have no money," took a milk carton out of a four-year-old preschooler's hands and dumped her food in the trash.[4]

The National School Lunch Program (NSLP)[5] is the second largest food and nutrition assistance program in the United States, serving over thirty

[1] JANET POPPENDIECK, FREE FOR ALL: FIXING SCHOOL FOOD IN AMERICA 194–95 (Darra Goldstein ed., 2010) (examining current issues in the school-lunch context, including concerns about nutrition, competitive foods, commercialization, and the environment, and providing recommendations for change).

[2] *Id.* at 196.

[3] *Id.*

[4] Morgan Lee, *Schools Rethink Meal-Debt Policies that Humiliate Kids*, CHI. TRIB. (July 4, 2017, 10:41 PM), http://www.chicagotribune.com/news/nationworld/ct-schools-rethink-lunch-shaming-20170704-story.html [https://perma.cc/46XH-U8V5] (reporting on instances of lunch shaming across the country and discussing recent attempts by various states to pass anti-lunch shaming laws).

[5] The National School Lunch Program (NSLP) is a federally-assisted meal program that operates in public schools, nonprofit private schools, and residential childcare institutions. *See* U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., THE NATIONAL SCHOOL LUNCH PROGRAM (last updated Nov. 2017) https://fns-prod.azureedge.net/sites/default/files/cn/NSLPFactSheet.pdf [https://perma.cc/8S8N-KJTW] [hereinafter NSLP FACT SHEET]. For more information on the program, see *infra* Part I.

million children daily in over one hundred thousand schools.[6] For many students, the meals they receive through the NSLP and the National School Breakfast Program[7] provide more than half of their daily caloric intake.[8] This is especially the case for students from low-income and minority families, who make up a high percentage of NSLP participants.[9] And as the student experiences told in the beginning of this Note demonstrate, school cafeterias across the country are identifying and—intentionally or not—discriminating against students who receive free and reduced-price lunch meals.

This Note analyzes two practices that have evolved from the NSLP's implementation and their potentially disparate impact on students of color—the physical separation of paying and nonpaying students,[10] and the "lunch shaming"[11] of students with unpaid lunch debt.[12] Given the overrepresentation of minority students who participate in the NSLP, these

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[6] *The National School Lunch Program,* U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. (last updated Mar. 15, 2018) https://www.ers.usda.gov/topics/food-nutrition-assistance/child-nutrition-programs/national-school-lunch-program.aspx [https://perma.cc/Z6X9-CF4H] [hereinafter *National School Lunch Program*]. The NSLP is second in size only to the Supplemental Nutrition Assistance Program (SNAP), which provides food and nutrition assistance to millions of low-income individuals and families. *See Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (last updated Apr. 4, 2018), https://fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap [https://perma.cc/2EQV-8HHH].

[7] The School Breakfast Program (SBP) is a federally assisted meal program that operates in public schools, nonprofit private schools, and residential childcare institutions. U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., THE SCHOOL BREAKFAST PROGRAM (last updated Nov. 2017), https://fns-prod.azureedge.net/sites/default/files/sbp/SBPfactsheet.pdf [https://perma.cc/3547-X9PL]. The SBP operates in the same way as does the NSLP, serving federally subsidized breakfast meals to students and providing meals free or at reduced prices to eligible students. *Id.*

[8] *See* Melinda D. Anderson, *What Do Unpaid Lunch Tabs Mean for Schools?*, ATLANTIC (Feb. 9, 2016), https://www.theatlantic.com/education/archive/2016/02/unpaid-school-lunch-bills/460509 [https://perma.cc/P7TE-CJAE] (discussing the results of a 2015 online survey that found that 75% of teachers and 84% of principals report that their students come to school hungry, and 59% of educators report that "'a lot or most' of their students depend on school meals as a primary source of nutrition"); *see also* Lauren Tonti, *Food for Thought: Flexible Farm to School Procurement Policies Can Increase Access to Fresh, Healthy School Meals*, 27 HEALTH MATRIX 463, 464–65 (2017) ("In some low-income school districts, children may receive up to three meals per day, plus a snack, from school.").

[9] *See infra* notes 46–48 and accompanying text; *see also* Tonti, *supra* note 8, at 465 ("Free and reduced-price school-meal recipients are primarily black and Latino students from lower socioeconomic classes.").

[10] *See infra* Section III.A.

[11] "Lunch shaming" can encompass a wide range of disciplinary practices "intended to recoup costs, including: requiring chores as compensation for meals, stamping students' arms, publicly throwing away their food, and denying students the typical hot meal distributed to their peers." Alexandra Cox & Kristen Harper, *What School Lunch "Shaming" Says About Our Approach to Student Health*, CHILD TRENDS (June 23, 2017), https://www.childtrends.org/school-lunch-shaming-says-approach-student-health [https://perma.cc/YGA8-KVDV].

[12] *See infra* Section III.B.

two practices could potentially be shown to disproportionately harm students in protected classes, thus forming the basis for a disparate impact discrimination claim under Title VI of the Civil Rights Act of 1964.[13]

There has been little scholarly discussion surrounding these cafeteria practices. In her 2014 article, Professor Melissa Mortazavi addressed the issues caused by offering competitive foods[14] in school cafeterias, arguing that it exacerbates class stigma by identifying which students receive free or reduced-price meals and causing some students to refrain from participating in the NSLP at all.[15] However, this Note is the first to analyze lunch shaming practices from a legal perspective, as well as the first to suggest that certain cafeteria practices disproportionately affect students of color and thus could form the basis of a Title VI disparate impact claim.

While the issue of whether these practices constitute actionable discrimination on the basis of race, color, or national origin has not yet been approached from a legal perspective, scholars have spoken more broadly about the effectiveness of the Title VI disparate impact framework in schools. Paul Easton has discussed the application of the Title VI disparate impact framework to immigration laws in public schools and found that in the public-education context, "the effects-based inquiry permitted by a Title VI disparate impact claim avoids many of [the difficulties of a constitutional challenge], providing a clearer path to a successful challenge."[16] And Noah Lindell, in arguing for the use of Title VI to combat teacher inequality, stated that "precisely because it is legalistic, rather than prototypically policy-driven, Title VI is more insulated from the vicissitudes of politics than are

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[13] 42 U.S.C. § 2000d (2012).

[14] Competitive foods are à la carte food options sold to students during the school day that are not subsidized or reimbursed by the federal government through the NSLP. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-563, SCHOOL MEAL PROGRAMS: COMPETITIVE FOODS ARE WIDELY AVAILABLE AND GENERATE SUBSTANTIAL REVENUES FOR SCHOOLS 2 (2005), http://www.gao.gov/new.items/d05563.pdf [https://perma.cc/7NSD-4NKG]. Competitive foods can be sold through many means, including à la carte lines, vending machines, school stores, and snack bars. *Id.* Schools have significantly increased their offering of competitive foods due, in large part, to the substantial revenue they receive from competitive food sales. *Id.* at 4. Revenue generated from the sale of competitive foods is generally spent on food service operations and is sometimes used by school groups for student activities. *Id.*

[15] Melissa Mortazavi, *Consuming Identities: Law, School Lunches, and What It Means to Be American*, 24 CORNELL J.L. & PUB. POL'Y 1, 29–33 (2014) ("The structure of school meals supports existing class structures . . . by allowing competitive foods that highlight who is a free or subsidized meal participant. . . . Because there is a stigma attached to receiving a free lunch, children who are unable to buy competitive foods may abstain from eating rather than label themselves in front of their peers.").

[16] Paul Easton, Note, *School Attrition Through Enforcement: Title VI Disparate Impact and Verification of Student Immigration Status*, 54 B.C. L. REV. 313, 315 (2013).

these more modern policy initiatives."[17] This Note, however, provides a novel application of the Title VI disparate impact framework specifically to the context of school lunch and the NSLP.

In doing so, this Note proceeds in four parts. Part I provides background information about the National School Lunch Program and recent changes made to the program under the Healthy, Hunger-Free Kids Act of 2010.[18] Next, Part II discusses Title VI and the development of disparate impact claims in the educational context. Part III then analyzes two particular school practices that have evolved under the NSLP—the separation of paying and nonpaying students and the "shaming" of students with school lunch debt—and evaluates whether either practice could form an actionable disparate impact claim under Title VI. Lastly, Part IV offers various recommendations and solutions that would better protect students from disparate treatment in the school-lunch context.

I. THE NATIONAL SCHOOL LUNCH PROGRAM

The NSLP was established in 1946 as a part of the National School Lunch Act (NSLA).[19] Congress passed the NSLA "[t]o provide assistance to the States in the establishment, maintenance, operation, and expansion of school lunch programs."[20] The NSLP operates by providing federal funding to support the provision of free or reduced-cost meals to children and adolescents in schools.[21] In 2016, the NSLP operated in over 100,000 public and nonprofit private schools and residential child care institutions to provide lunches to 30.4 million children daily, with nearly three-quarters of school cafeteria lunches served free or at a reduced price.[22] The program costs $13.6 billion annually, including $12.2 billion in reimbursements and $1.4 billion in commodity costs.[23]

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[17] Noah B. Lindell, Note, *Old Dog, New Tricks: Title VI and Teacher Equity*, 35 YALE L. & POL'Y REV. 189, 232 (2016) ("Employing Title VI to combat teacher inequality can add another valuable string to the educational improvement bow . . . .").

[18] Pub. L. No. 111-296, 124 Stat. 3183.

[19] Pub. L. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. §§ 1751–1769j (2012)).

[20] 42 U.S.C. § 1751 (2012). The NSLA's Declaration of Policy stated:

> It is hereby declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.

Id.

[21] *See* NSLP FACT SHEET, *supra* note 5.

[22] *See National School Lunch Program*, *supra* note 6.

[23] *School Meal Trends & Stats*, SCH. NUTRITION ASS'N, https://schoolnutrition.org/AboutSchoolMeals/SchoolMealTrendsStats [https://perma.cc/GHD6-4L98]. Commodity costs include

The U.S. Department of Agriculture's (USDA) Food and Nutrition Service (FNS) is responsible for administering the program,[24] but state and local agencies retain a great deal of authority when it comes to actually implementing the NSLP. Much of the program is administered at the state level by state agencies through their agreements with local school food authorities.[25] While participation in the NSLP is voluntary, participating schools receive cash subsidies and commodities from the USDA for each reimbursable meal they serve, as long as they serve meals that meet federal requirements.[26] In addition to cash reimbursements, schools also receive USDA Foods,[27] and states can select which USDA Foods they want for their schools from a list of USDA-purchased foods.[28]

There are a variety of ways for children to qualify for free or reduced-price lunch through the NSLP. A child may be "categorically eligible" or can qualify based on family size and household income.[29] Children who participate in certain federal assistance programs or who have a qualifying status as a homeless, migrant, runaway, or foster child are categorically eligible for free meals through the NSLP.[30] Children are also determined eligible for free meals if their family income is at or below 130% of the federal poverty level, and are determined eligible for reduced-price meals if their family income is between 130% and 185% of the federal poverty

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the costs for agricultural products such as "corn, soybeans, wheat, cotton, grain sorghum, rice, peanuts, oats, barley, milk, hogs, and cow-calf." *Commodity Costs and Returns*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV. (last updated June 25, 2018), https://www.ers.usda.gov/data-products/commodity-costs-and-returns [https://perma.cc/9RFN-T6CW].

[24] *See* NSLP FACT SHEET, *supra* note 5.

[25] *Id.* For more information on individual state agencies and local school food authorities, see *School Meal Contacts*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (last updated Feb. 4, 2015), https://www.fns.usda.gov/school-meals/school-meals-contacts [https://perma.cc/Y9JT-VD8Q].

[26] NSLP FACT SHEET, *supra* note 5. In order to qualify for federal reimbursement under the NSLP, a school lunch must contain five basic components: meat or meat substitute, grain, fluid milk, fruit, and vegetables. Child Nutrition Programs, 7 C.F.R. § 210.10 (2013).

[27] NSLP FACT SHEET, *supra* note 5. Through the NSLP, schools are eligible to receive USDA-purchased food items, based on market availability. *See Food Distribution*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. (Feb. 22, 2018), https://www.fns.usda.gov/fdd/schoolscn-usda-foods-programs [https://perma.cc/9UUS-FXQY]. For the most updated list of the USDA Foods available for schools and institutions, see U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., USDA FOODS AVAILABLE LIST FOR SCHOOL YEAR 2019 FOR SCHOOLS AND INSTITUTIONS (Mar. 2018), https://fns-prod.azureedge.net/sites/default/files/fdd/schools-institutions-foods-available.pdf [https://perma.cc/Z4CD-8UE2].

[28] *See* NSLP FACT SHEET, *supra* note 5.

[29] *Id.*

[30] *Id.*

level.[31] Students who are ineligible for either free or reduced-price meals based on these income guidelines can still purchase NSLP meals at "full price," which means they are subsidized at a lower rate by the federal government.[32]

In 2010, Congress passed the Healthy, Hunger-Free Kids Act (HHFKA),[33] which reauthorized funding for five years for federal school meal and child nutrition programs, including the NSLP, and provided an additional $4.5 billion over ten years to fund these federal programs.[34] The overall goal of the HHFKA was to increase children's health and nutrition by improving food options in schools and educating children about food choices and healthy habits.[35] Specifically, the HHFKA amended the nutritional requirements for school meals by calling for a decrease of sodium and fat[36] and an increase in whole grains,[37] fruits and vegetables,[38] and low-fat milk products.[39] Schools that met these new nutritional standards could

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[31] *Id.* For a family unit of four in 2018, 130% of the federal poverty level would equal a family income of $32,630.00, and 185% of the federal poverty level would equal a family income of $46,435.00. *See* Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

[32] *See* COLLEEN KAVANAGH, A BETTER COURSE, FLUNKING LUNCH 16 (2010), https://abettercourseorg.files.wordpress.com/2015/12/flunking-lunch-2015-revision.pdf [https://perma.cc/2ZV8-X2T9].

[33] 42 U.S.C. § 1751 (2012). The HHFKA is still in effect today, though the House of Representatives has proposed legislation to "amend the . . . National School Lunch Act and the Child Nutrition Act of 1966 to eliminate certain Federal nutrition requirements, and for other purposes." H.R. 2382, 115th Cong. (1st Sess. 2017).

[34] *See Child Nutrition Reauthorization Healthy, Hunger-Free Kids Act of 2010*, LET'S MOVE!, https://obamawhitehouse.archives.gov/sites/default/files/Child_Nutrition_Fact_Sheet_12_10_10.pdf [https://perma.cc/2L3K-HSMQ].

[35] *Id.*

[36] 42 U.S.C. § 1758(a)(1)(B) ("The Secretary shall provide technical assistance and training . . . in the preparation of lower-fat versions of foods . . . to schools participating in the school lunch program to assist the schools in complying with the nutritional requirements . . . .").

[37] *Id.* § 1755a(a) ("The purpose of this section is to encourage greater awareness and interest in the number and variety of whole grain products available to schoolchildren, as recommended by the 2005 Dietary Guidelines for Americans.").

[38] *Id.* § 1769a(a) ("[T]he Secretary shall provide grants to States to carry out a program to make free fresh fruits and vegetables available in elementary schools . . . .").

[39] *Id.* § 1758(a)(2)(A)(i) ("Lunches served by schools participating in the school lunch program under this chapter . . . shall offer students a variety of fluid milk."); *see also* Betsy Klein, *Michelle Obama's Healthy School Lunch Program in Jeopardy?*, CNN (Mar. 15, 2017, 4:29 AM), http://www.cnn.com/2017/03/14/politics/michelle-obama-healthy-hunger-free-kids-act/index.html [https://perma.cc/N2Y6-33RB] (reporting on recent recommendations released by lobbying groups to scale back on the nutritional standards set by the HHFKA); Lindsey Turner et al., *Improvements and Disparities in Types of Foods and Milk Beverages Offered in Elementary School Lunches, 2006–2007 to 2013–2014*, 13 PREVENTING CHRONIC DISEASE 1, 2 (2016), https://www.cdc.gov/pcd/issues/2016/15_0395.htm [https://perma.cc/8DPT-AXRB] (discussing key changes to nutritional requirements, including requiring both daily fruits and vegetables, specifying the

receive an additional $0.06 per lunch in federal funding,[40] and schools that served 60% or more of their lunches free or at a reduced price could receive an additional $0.02 per lunch.[41] These amounts are in addition to the federal government reimbursement rate, which for the 2018–2019 school year was $3.31 for free meals, $2.91 for reduced-price meals, and $0.31 for full-price meals.[42]

The passage of the HHFKA presented a number of challenges for schools, especially when it came to meeting the updated nutritional standards. Local food authorities struggled to implement the new nutritional and meal requirements under the HHFKA, and some schools even lost federal reimbursement revenue due to students no longer purchasing the subsidized meals and either bringing their own lunches, not having lunch, or purchasing competitive foods instead.[43] Numerous reports also stated that schools and school districts were opting out of the NSLP due to low student participation, dissatisfaction with the program, and an inability to adhere to the new standards.[44] Overall, student participation in the NSLP declined from more than 31 million children participants in fiscal year 2012 to 30.4 million as of 2018.[45]

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types of vegetables offered, limiting milk to nonfat or low-fat, and mandating the offering of whole grains).

[40] *See* Klein, *supra* note 39.

[41] *School Meal Trends & Stats*, *supra* note 23.

[42] *Id.*

[43] *See* Alexandra Sifferlin, *Why Some Schools Are Saying 'No Thanks' to the School-Lunch Program*, TIME (Aug. 29, 2013), http://healthland.time.com/2013/08/29/why-some-schools-are-saying-no-thanks-to-the-school-lunch-program [https://perma.cc/P2Y7-NHWQ] (discussing how "smaller or nonprofit private schools that simply don't have enough kids who qualify for these lunches" are losing revenue due to "the often higher costs to feed them healthy meals that adhere to the new nutrition guidelines [that] are not covered by [the USDA's] reimbursement"); *see also* Mary Pickels, *Opting Out of School Lunch Program Appeals as a Palatable Option*, TRIBLIVE (Mar. 5, 2016, 11:00 PM), http://triblive.com/news/westmoreland/9953192-74/lunch-program-federal [https://perma.cc/84ZZ-73AL] (reporting on a school that lost approximately $20,000 per year during the five years since the enactment of the HHFKA and was considering opting out of the NSLP).

[44] *See, e.g.*, Christine Burroni, *"Freedom to Choose": Some Schools Drop Federal Lunch Program*, NBC BAY AREA (Sept. 18, 2014, 12:58 PM), https://www.nbcbayarea.com/news/local/Healthy-School-Lunches-Dropped-270675661.html [https://perma.cc/E2HT-3DZU]; Mary Clare Jalonick, *524 Schools Drop Out of the National School Lunch Program*, PBS NEWS HOUR (Sept. 30, 2013, 10:20 AM), https://www.pbs.org/newshour/nation/524-schools-drop-out-of-the-national-school-lunch-program-over-new-standards [https://perma.cc/MZJ7-HKNF]; *Some Schools Opt Out of Gov't-subsidized Lunch Program with Healthier Menu*, CBS News (Aug. 27, 2013, 3:26 PM), https://www.cbsnews.com/news/some-schools-opt-out-of-govt-subsidized-lunch-program-with-healthier-menu [https://perma.cc/YE8V-7C9P]; Sifferlin, *supra* note 43.

[45] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-104, SCHOOL LUNCH: IMPLEMENTING NUTRITION CHANGES WAS CHALLENGING AND CLARIFICATION OF OVERSIGHT REQUIREMENTS IS NEEDED 1, 16 (2014), https://www.gao.gov/assets/670/660427.pdf [https://perma.cc/7637-EV5V]; NSLP FACT SHEET, *supra* note 5.

Regarding NSLP demographic participation, the available data shows that there is generally an overrepresentation of minority students among NSLP participants. The following table lists data collected from two national surveys and compiled by the USDA—one studying NSLP participants in 2001 and another studying a three-year range from 1999–2002.[46]

TABLE 1: NSLP PARTICIPANT RACE/ETHNICITY

	2001 Panel of the Survey of Income and Program Participation (SIPP)		**1999–2002 National Health and Nutrition Examination Survey (NHANES)**	
	All students, ages 5–18	***All NSLP participants***	***All students, ages 5–18***	***All NSLP participants***
Non-Hispanic White	63.5%	55.2%	59.2%	55.3%
Non-Hispanic Black	15.2%	19.1%	15.1%	16.9%
Hispanic	15.9%	20.5%	19.3%	21.1%
Native American, Aleut, or Eskimo	1.6%	2.0%	N/A	N/A
Asian or Pacific Islander	3.8%	3.3%	N/A	N/A
Other Ethnicity	N/A	N/A	6.4%	6.7%

In both surveys, in comparison to the total population of students, Non-Hispanic White students appeared underrepresented as participants in the NSLP, while Non-Hispanic Black and Hispanic[47] students appeared overrepresented. The 2001 survey additionally shows that Native Americans were overrepresented as NSLP participants.

[46] *See* Constance Newman & Katherine Ralston, *Profiles of Participants in the National School Lunch Program*, U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV. 6–7 (Aug. 2006), http://files.eric.ed.gov/fulltext/ED502400.pdf [https://perma.cc/4N43-DR9T].

[47] Hispanic students are considered to be a protected class under Title VI. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 585–86 (1983) (validating a Title VI claim brought by Hispanic and black police officers); *see also* Easton, *supra* note 16, at 335 ("Individuals of Hispanic origin are a protected class under Title VI . . . .").

Another study, conducted by the National Center for Education Statistics, looked at the percentage of public school fourth graders eligible for free or reduced-price lunch in 2009.[48]

TABLE 2: ELIGIBILITY FOR FREE OR REDUCED-PRICE LUNCH

	Percentage of public school fourth graders eligible for free or reduced-price lunch (2009)
White	29%
Black	74%
Hispanic	77%
Asian/Pacific Islander	34%
American Indian/Alaska Native	68%

Here, the percentages of Black, Hispanic, and American Indian/Alaska Native fourth graders eligible for free and reduced-price meals appeared higher than the percentages of White and Asian/Pacific Islander fourth graders who were eligible.

Though the NSLA explicitly prohibits the overt identification and segregation of any student who participates in the program,[49] many schools across the country have established separate lines or service areas within their cafeterias for paying and nonpaying students. Furthermore, many cafeteria employees are instructed to mark or otherwise identify students who do not have enough money to pay for their meals, which often comes across as punishment or public shaming.[50] Due to the overrepresentation of minority students who participate in the NSLP, these practices could be shown to adversely affect students in protected classes by unlawfully creating barriers to—or even outright preventing—their full and meaningful participation in the NSLP. The rest of this Note discusses whether or not these barriers could serve as the basis for an actionable disparate impact claim under Title VI.

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[48] *Status and Trends in the Education of Racial and Ethnic Minorities*, NAT'L CTR. FOR EDU. STAT. (July 2010), https://nces.ed.gov/pubs2010/2010015/indicator2_7.asp [https://perma.cc/3LW7-2TAH].

[49] 42 U.S.C. § 1758(b)(10) (2012) (prohibiting the school from engaging in any "physical segregation of or other discrimination against any child eligible for a free lunch or a reduced price lunch," or "any overt identification of any child by special tokens or tickets, announced or published lists of names, or by other means" (footnote omitted)).

[50] *See infra* Section III.

II. TITLE VI AND EDUCATION

Title VI of the Civil Rights Act of 1964[51] prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.[52] Because public school districts receive federal financial assistance through the NSLP in the form of cash reimbursements, instances of discrimination against students on the basis of race, color, or national origin as a result of policies or practices related to the NSLP could be actionable claims of discrimination under Title VI. The first Section of this Part discusses the development of the Title VI disparate impact framework more broadly, and the second Section examines how the courts have treated the framework in the public-school context.

A. The Title VI Framework

The Supreme Court in *Brown v. Board of Education*[53] established equal opportunity in education as a fundamental guarantee for all students in the United States, regardless of race.[54] For a long time, however, this guarantee seemed hollow, as plaintiffs faced great difficulty in bringing successful claims of racial discrimination in the education context. Plaintiffs first attempted to bring these cases as equal protection claims under the Fourteenth Amendment, with some success.[55] After the Supreme Court's decision in *Washington v. Davis*,[56] however, it became nearly impossible to bring such cases as equal protection claims because plaintiffs were unable to show sufficient proof of discriminatory intent.[57] Plaintiffs thus began turning instead to Title VI of the Civil Rights Act of 1964 to litigate these cases,[58]

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[51] 42 U.S.C. § 2000d.

[52] *See id.* ("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.").

[53] 347 U.S. 483 (1954).

[54] *Id.* at 495.

[55] *See* Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1540–42 (1995) (seeking to "establish a federal baseline in this regard by identifying and exploring the most likely avenues of prospective litigation under Title VI of the Civil Rights Act of 1964").

[56] 426 U.S. 229, 242, 248 (1976) (holding that the Equal Protection Clause applied only to cases involving discriminatory intent and did not apply to racially neutral measures).

[57] *See* Biegel, *supra* note 55, at 1543. For the reasons explained above, this Note makes a statutory argument under Title VI, not a constitutional argument. Unlike the Constitution as interpreted in *Washington v. Davis*, Title VI only requires proof of disparate impact, with no separate discriminatory intent requirement. Therefore, as other scholars have also noted, Title VI is a better and more viable option than an equal protection claim. *See supra* note 16 and accompanying text.

[58] Biegel, *supra* note 55, at 1540. Congress originally enacted Title VI in large part to help enforce *Brown* in light of the South's failure to immediately and effectively desegregate public schools. *See* Easton, *supra* note 16, at 327.

and in 1974, the Supreme Court legitimized the disparate impact theory in the public-school context in *Lau v. Nichols*.[59]

Claims under Title VI can allege either disparate treatment[60] or disparate impact,[61] though there are important variations as to the proof required and who is able to bring each type of claim. Section 601 of Title VI prohibits discriminatory treatment: "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."[62] Parties who are able to put forward proof of discriminatory intent can bring Title VI disparate treatment claims directly under Section 601.[63] While Title VI itself does not contain a specific disparate impact provision, most federal departments and agencies have issued regulations pursuant to Title VI[64] that contain specific provisions prohibiting facially neutral policies or practices that disparately impact individuals on the basis of race, color, or national origin.[65] In the

[59] 414 U.S. 563, 563 (1974) (holding that "[t]he failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures" constituted a violation of Title VI). The Court in *Lau* was emphatic that "[d]iscrimination is barred which has that *effect* [of discriminating in the availability of academic facilities] even though no purposeful design is present." *Id.* at 568.

[60] Disparate treatment claims allege intentional discrimination, which is "generally analyzed in the same manner as an equal protection claim." Easton, *supra* note 16, at 328.

[61] Disparate impact claims involve a facially neutral policy or practice that can be shown to have a disproportionately adverse impact on a protected group. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Section VII: Proving Discrimination–Disparate Impact*, *in* TITLE VI LEGAL MANUAL 2 (2017) https://www.justice.gov/crt/case-document/file/934826/download [https://perma.cc/U9AY-LC5R] [hereinafter TITLE VI LEGAL MANUAL] ("As the Supreme Court has explained, even benignly-motivated policies that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas.").

[62] 42 U.S.C. § 2000d (2012). In contrast, the Equal Protection Clause applies only to state actors. *See* U.S. CONST. amend. XIV, § 1; The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[63] Easton, *supra* note 16, at 329–30 ("The Court has been clear, however, that parties who demonstrate the requisite intent necessary to make a Title VI disparate treatment claim have an implied private right of action under section 601—a benefit foreclosed under disparate impact theory." (footnote omitted)). See *infra* note 66 for discussion of why there is no longer a private cause of action for disparate impact claims under Title VI.

[64] Section 602 of Title VI gives federal departments and agencies the authority to issue regulations pursuant to Section 601. 42 U.S.C. § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of [Section 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . .").

[65] *See, e.g.*, 34 C.F.R. § 100.3(b)(2) (prohibiting "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin"). In Justice Thurgood

absence of proof of discriminatory intent, therefore, claims can still be brought under a disparate impact theory of discrimination pursuant to an agency's disparate impact regulations. Unlike claims of disparate treatment, disparate impact claims under Title VI must be brought by funding agencies pursuant to the relevant agency's implementing regulations on behalf of relevant plaintiffs, as there is no longer a private cause of action for Title VI disparate impact claims.[66]

In developing a framework for disparate impact cases under Title VI, courts analogized to the legislative history and disparate impact jurisprudence of Title VII[67] and ultimately adopted Title VII's three-part burden-shifting framework for use in Title VI disparate impact cases.[68] First, the investigating agency must establish that the adverse or harmful effect of the challenged policy or practice disproportionately affects members of a protected group identified by race, color, or national origin—otherwise known as the prima facie case.[69] To establish the prima facie case, the investigating agency must "(1) identify the specific policy or practice at

Marshall's dissent in *Guardians Association v. Civil Service Commission of New York City*, he stated that, pursuant to Section 602 of Title VI, "every Cabinet Department and about 40 federal agencies" had issued disparate impact regulations. 463 U.S. 582, 619 (1983) (Marshall, J., dissenting). "These agency regulations are generally still in force in nearly identical form, and have been upheld as a lawful implementation of Title VI's statutory language." Easton, *supra* note 16, at 328 n.101; *see also* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1261 n.244 (2004) (noting the identical form of many regulations).

[66] In *Alexander v. Sandoval*, the Court held that there is no private right of action to enforce Title VI disparate impact regulations. 532 U.S. 275, 293 (2001). This ruling, however, does not preclude funding agencies from challenging a funding recipient's action under a disparate impact theory. TITLE VI LEGAL MANUAL, *supra* note 61, at 5. Private individuals may also file administrative complaints under such a theory of liability. *Id.* at 2 n.1. Therefore, "agencies' Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism," and "[f]ederal funding agencies play a vital role in enforcing the prohibition on disparate impact discrimination through complaint investigations, compliance reviews, and guidance on how to comply with Title VI." *Id.* at 4–5.

[67] *See* Biegel, *supra* note 55, at 1545–46 ("Indeed, when Title VI and Title VII were enacted as part of the same historic act, legislators and jurists identified an inextricable link between the two provisions."); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 n.19 (1978) (Stevens, J., concurring in part and dissenting in part) ("Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a 'meeting of the minds' . . . .").

[68] *See* Ferguson v. City of Charleston, 186 F.3d 469, 480 (4th Cir. 1999) (listing cases that adopted the Title VII burden-shifting framework in Title VI disparate impact cases), *rev'd on other grounds*, 532 U.S. 67 (2001). While agency investigations "often follow a non-adversarial model in which the agency collects all relevant evidence then determines whether the evidence establishes discrimination," the three-part "court-developed burden shifting framework serves as a useful paradigm for organizing the evidence." TITLE VI LEGAL MANUAL, *supra* note 61, at 7.

[69] TITLE VI LEGAL MANUAL, *supra* note 61, at 6.

issue; (2) establish adversity/harm; (3) establish significant disparity; and (4) establish causation."[70]

In order to satisfy the first element of the prima facie case, the investigating agency must be able to point to a specific, "facially neutral"[71] policy or practice. Regarding the second element, proving that the plaintiffs suffered some type of adverse or harmful effect is a relatively low bar, and courts often do not treat this element separately from other elements within the prima facie case.[72] While disparate impact regulations issued by agencies do not explicitly define what constitutes the requisite adversity or harm, courts have found adverse effects when a facially neutral policy or practice has the following results for a protected class: fewer or inferior services or benefits received,[73] negative effects or hardships resulting from the unequal distribution of burdens,[74] and imminent or threatened harm.[75] Courts have also found adversity or harm where "recipient actions provide a mix of costs and benefits, or the alleged harm [is] difficult to quantify."[76]

To establish the third element of disparity, the investigating agency must show that "the challenged practice adversely affects a significantly higher proportion of protected class members than non-protected class members."[77] In order to do so, an investigating agency would typically compare "the proportion of persons in the protected class who are adversely affected by the challenged practice and the proportion of persons not in the

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[70] *Id.* at 9 (footnote omitted).

[71] A facially neutral policy or practice is one that does not appear on its face to be discriminatory, but is ultimately discriminatory in its application or effect. JAMES A. RAPP, 4 EDUCATION LAW § 10A.03[5][b] (Matthew Bender & Co., Inc., 2018).

[72] TITLE VI LEGAL MANUAL, *supra* note 61, at 12 ("Most cases applying the Title VI disparate impact standard do not explicitly address adversity as a separate element. Rather, courts frequently assume that the impacts alleged were sufficiently adverse, impliedly recognizing a wide range of harms, including physical, economic, social, cultural, and psychological.").

[73] *Id.* at 13; *see also infra* Section II.B.

[74] TITLE VI LEGAL MANUAL, *supra* note 61, at 14; *see, e.g.*, Coal. of Concerned Citizens Against I–670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (finding that the planned highway construction would negatively impact minorities residing in the area).

[75] TITLE VI LEGAL MANUAL, *supra* note 61, at 14; *see, e.g.*, NAACP v. Med. Ctr., Inc., 657 F.2d 1322, 1324, 1332 (3d Cir. 1981) (en banc) (examining whether the impact of a planned medical center relocation constituted a Title VI disparate impact claim).

[76] TITLE VI LEGAL MANUAL, *supra* note 61, at 14–15. An example of this is *Villanueva v. Carere*, in which the court found a lack of a harmful effect resulting from a school closure based on evidence that the new school had similar facilities, programming, and demographic makeup. 85 F.3d 481, 487 (10th Cir. 1996).

[77] TITLE VI LEGAL MANUAL, *supra* note 61, at 17. The DOJ's Title VI Legal Manual breaks this element into four steps for an investigating agency to follow: (1) identifying the protected class; (2) evaluating the availability and necessity of statistical evidence; (3) evaluating the population on which the adverse disparate impact must be shown; and (4) determining whether the disparity's size is sufficient to impose liability. *Id.*

protected class who are adversely affected."[78] Though not required to do so, courts often look to statistical evidence in order to establish disparity.[79] However, statistics are not always necessary when the disparate impact of a challenged policy or practice is obvious.[80] Moreover, courts have also found sufficient disparity by looking at the impact on certain individuals.[81] Even in cases involving small sample sizes of plaintiffs, courts have still found there to be disparate impact when "the disparate effect was obvious or predictable."[82] Thus, there is no bright-line rule for what constitutes sufficient disparity.[83]

In order to establish the final element of causation, courts look for a showing that the defendant actually caused the discriminatory effect. The investigating agency must therefore demonstrate that there is a causal link between the defendant's policy or practice and the alleged disparate impact.[84] As with the element of disparity, courts often look at statistical evidence for proof of causation.[85] Courts look specifically at whether any proffered

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[78] *Id.*

[79] *See* Thomas v. Wash. Cty. Sch. Bd., 915 F.2d 922, 926 (4th Cir. 1990) ("[A]lthough disparate impact cases usually focus on statistics, they are neither the exclusive nor a necessary means of proof." (citation omitted)).

[80] *See, e.g.*, Lau v. Nichols, 414 U.S. 563, 568 (1974) (finding national origin discrimination without relying on statistical evidence, because instruction solely takes place in English and therefore "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority"); Mitchell v. Bd. of Trs. of Pickens Cnty. Sch. Dist. A, 599 F.2d 582, 585–86 (4th Cir. 1979) (affirming district court's holding that "a policy that arguably would not renew the contract of any teacher who for any reason could not commit at contract renewal time to a full year's uninterrupted service, but that singled out pregnancy alone for compelled disclosure, would necessarily impact disproportionately upon women").

[81] *See, e.g.*, McCoy v. Canterbury, No. 3:10–0368, 2010 WL 5343298, at *5 (S.D. W. Va. Dec. 20, 2010) (finding that a "series of discrete episodes" of a challenged policy or practice can "raise a plausible inference that it has a discriminatory impact on minorities"), *aff'd*, 428 Fed. App'x 247 (4th Cir. 2011).

[82] *See* TITLE VI LEGAL MANUAL, *supra* note 61, at 24 ("[P]laintiffs have succeeded in establishing disparate impact, even with very small sample sizes, in cases where statistics were not necessary because the disparate effect was obvious or predictable.").

[83] Smith v. Xerox Corp., 196 F.3d 358, 366 (2d Cir. 1999) ("[T]he substantiality of a disparity is judged on a case-by-case basis."); Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526 (M.D. Ala. 1991) ("There is no rigid mathematical threshold that must be met to demonstrate a sufficiently adverse impact . . . .").

[84] *See* Flores v. Arizona, 48 F. Supp. 2d 937, 952 (D. Ariz. 1999) ("Plaintiff's duty to show that the practice has disproportionate effect requires plaintiff to demonstrate a causal link between the practice and the disparate impact identified.").

[85] *See* Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990) ("[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of [a particular group] because of their membership in a protected group." (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988))).

statistical disparities are significant enough that they "raise . . . an inference of causation."[86]

Once the agency establishes a prima facie case, the burden shifts to the funding recipient (in the education context, this would be a school or school district) to put forth a substantial legitimate justification for the policy or practice.[87] In doing so, the funding recipient must demonstrate that the disparate impact is necessary to achieve one or more goals of the program that it is implementing. In *Board of Education v. Harris*, the Supreme Court held that in the education context, defendants could advance an educational necessity defense, analogous to Title VII's "business necessity" justification, to rebut a prima facie case of disparate impact.[88] Defendants must justify that the impact is a result of an educationally necessary practice, which means that their challenged policy or practice is supported by a "substantial legitimate justification" and that it "bear[s] a manifest demonstrable relationship to classroom education."[89] While schools are able to make cost-based justifications for a facially neutral policy or practice under Title VI, those arguments often do not withstand scrutiny.[90]

If the defendant successfully shows that its policy or practice is educationally necessary, the practice can remain in place—even if it is found

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[86] *Id.*

[87] N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995).

[88] 444 U.S. 130, 151 (1979) ("That burden [of rebutting Title VI disparate impact] perhaps could be carried by proof of 'educational necessity,' analogous to the 'business necessity' justification applied under Title VII of the Civil Rights Act of 1964."); *see also* Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999) (collecting cases that adopt the Title VII burden shifting framework in Title VI disparate impact cases), *overruled on other grounds by* Alexander v. Sandoval, 532 U.S. 275 (2001). The concept of the educational necessity defense first appeared in a footnote in Justice Thurgood Marshall's dissent in *Guardians Ass'n v. Civil Service Commission of New York*. 463 U.S. 582, 623 n.15 (1983) (Marshall, J., dissenting) ("[A] prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity.").

[89] Ga. State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417–18 (11th Cir. 1985) (finding that the placement of black students in special education programs by achievement grouping did not constitute a violation under Title VI).

[90] *See, e.g.*, Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1312 (M.D. Ala. 1998) (finding defendant's cost argument unsupported by the evidence because translation services at issue could be obtained by alternative cost-effective means), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd sub nom.* Alexander v. Sandoval, 532 U.S. 275 (2001); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 741–42 (8th Cir. 2005); *see also* TITLE VI LEGAL MANUAL, *supra* note 61, at 34 ("It is important for investigating agencies to evaluate the veracity of any cost-based justifications the recipient puts forward. A monetary justification for a policy or practice (or lack thereof) will often fail because of a lack of evidence."); Department of Justice, Civil Rights Division, Complaint No. 171–54M–8, Letter to N.C. Courts from Assistant Attorney Gen. (Mar. 8, 2012), at 15–17 (rejecting the recipient's cost justification in part because despite having new funds, language access services in the courts were not increased; the expense of providing such services was a small portion of the recipient's operating budget; and the recipient "prevent[ed] courts from providing interpreters even when there would be no financial cost to do so").

to be discriminatory.[91] However, the burden then shifts back to the plaintiff, who can overcome educational necessity by demonstrating that there was an equally effective, less discriminatory alternative that the defendant overlooked, or alternatively, that the defendant's proffered justification is merely pretext for racial discrimination.[92]

B. Title VI in the School Context

This Section discusses how courts have treated the Title VI burden-shifting framework in the public-school context[93] by examining two seminal cases from the Eleventh and Ninth Circuits.[94] While these two cases considered a Title VI disparate impact claim in the education context, they did not specifically consider these claims with respect to the NSLP or food service in schools. This Note therefore presents a novel attempt to extend these decisions and apply their reasoning to the school-lunch context.

1. Elston v. Talladega County Board of Education

The Eleventh Circuit's decision in *Elston v. Talladega County Board of Education*[95] demonstrates how courts treat the educational necessity defense and causation element in practice, and also provides an example of the role of racial identifiability and stigmatization in the application of the Title VI disparate impact framework. In *Elston*, plaintiffs, represented by a group of black students and their parents, argued that a number of the local school board's decisions resulted in a disparate impact on black students. These decisions included the siting of a newly consolidated school in a white

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[91] *Sandoval*, 7 F. Supp. 2d at 1278.

[92] *Powell*, 189 F.3d at 394 (explaining that, in order to overcome an educational necessity, the plaintiff must show that "the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination").

[93] While this Section focuses primarily on Title VI claims in the public-school context, courts have left open the possibility that these types of claims could be brought against other types of schools, such as private schools. *See, e.g.*, Silva v. St. Anne Catholic Sch., 595 F. Supp. 2d 1171, 1181–82 (D. Kan. 2009) (assessing the scope of Title VI's applicability to a private Catholic school that received federal financial assistance through the NSLP and holding that "Title VI applie[d] to the entire school because of its receipt of federal funds through the NSLP").

[94] As a general note, the two cases discussed in this Section were decided prior to the Court's elimination of a private cause of action for Title VI disparate impact cases in *Sandoval*, so there could be a question as to whether these cases would still have been brought post-*Sandoval*. However, because funding agencies retain the ability to bring disparate impact claims under Title VI, these cases still provide a useful illustration of how the Title VI framework is applied in the education context. Furthermore, the Department of Justice's (DOJ) Title VI Legal Manual still includes these two cases in its explanation of the Title VI legal framework. *See* TITLE VI LEGAL MANUAL, *supra* note 61, at 6, 13, 21.

[95] 997 F.2d 1394 (11th Cir. 1993).

neighborhood,[96] the choice of new attendance zones,[97] the failure to stop white students from "zone-jumping,"[98] and the manner in which the school board reassigned students after the closing of an elementary school.[99] Ultimately, while the court found that these decisions resulted in an adverse disparate impact against black students, either plaintiffs failed to provide adequate proof of a causal link, or defendants put forth a sufficient educational necessity defense as an explanation for their policy.

First, the court stated that the placement of a new consolidated school in a predominantly white community rather than at the predominantly black Training School "might well constitute a disparate impact,"[100] citing the three discriminatory effects identified by plaintiffs.[101] The court concluded, however, that the school board's substantial legitimate justification for its decision was sufficient because it had "met the requirement of showing that the challenged siting decision was necessary to meeting [a broad educational goal]."[102] The school board's goal in building the new consolidated school

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[96] Plaintiffs argued that the placement of the new school disparately impacted black students in three primary ways: by "den[ying] blacks the benefit of having the new school in their community while granting that benefit to whites," by "stigmatiz[ing] black children by sending them a message that their community was not worthy of hosting a school that whites would attend," and by leaving the predominantly-black Training School at risk of closure due to low attendance and thus "impairing its ability to offer a full curriculum to its students." *Id.* at 1411–12. The Training School, a historically black school serving grades K–12, "continued to have a virtually all-black student population up to the time of trial." *Id.* at 1401.

[97] Plaintiffs argued that the school board's decision not to send the students from the former school zone to the Training School disparately impacted black students "both because it increased the racial identifiability of the Training School and because it left the school underutilized and likely to be closed." *Id.* at 1415. The district court had previously found that if the school board had sent these students to the Training School instead, it would have "add[ed] about 135 white students to the Training School which would significantly improve integration at the Training School." *Id.* at 1414 (internal quotation marks omitted).

[98] "Zone-jumping" refers to the practice of white students assigned to the Training School instead attending out-of-district schools. *Id.* at 1416. Plaintiffs argued that the board's failure to prevent this zone-jumping disparately impacted black students by increasing the racial identifiability of the Training School. *Id.* at 1419.

[99] Plaintiffs argued that the reassignment had a disparate impact on black students by "increas[ing] the concentration of blacks at the school, thereby furthering segregation and hindering the desegregation process." *Id.* at 1423. However, the court found this challenge to be moot, since, in the meantime, the school board had begun building a new school and thus "any black students who would have been affected by the overcrowding and concentration of black students . . . [we]re now attending the substantially more integrated" new school. *Id.* at 1424.

[100] *Id.* at 1412 ("[W]e assume *arguendo* that plaintiffs have demonstrated disparate impact.").

[101] *Id.*; *see supra* note 96 and accompanying text.

[102] *Elston*, 997 .F.2d at 1413. The court characterized the challenged decision as "an infrastructure planning decision" instead of "an educational policy decision," and thus determined that instead of having to meet a narrow educational necessity requirement, it was more reasonable to require that defendants show "that the challenged decision was necessary to meeting a goal that was legitimate, important, and integral to the defendant's institutional mission." *Id.* at 1412–13.

was "legitimate, important, and integral to the Board's educational mission," and the school's placement was necessary to achieve that goal, especially given the lack of adequate land for expansion at the alternate site.[103]

The Eleventh Circuit also noted that "an increase in the racial identifiability of the Training School would be enough to constitute a disparate impact under the Title VI regulations, regardless of whether overall racial balances have changed in . . . [the] school systems."[104] The court further stated that "the zone-jumping of white students has increased the racial identifiability of the Training School, thus zone-jumping may be said to have produced a disparate impact on black students."[105] Despite this, the court ruled that the plaintiffs' disparate impact claims as they pertained to the school board's choice of attendance zones and the zone-jumping of white students failed due to the lack of a causal link between the disparate impact and school board policy.[106] Because the zone-jumping and subsequent increase in racial identifiability "would have occurred no matter what the Board did," the court determined that the school board's zone-jumping policy "could not be said to have caused the identified disparate impact."[107]

2. Larry P. v. Riles

The Ninth Circuit's decision in *Larry P. v. Riles*[108] also provides a useful illustration of the Title VI framework and how courts treat the elements of adversity, disparity, and causation. In *Larry P.*, the Ninth Circuit affirmed the lower court's ruling that a school system's decision to use IQ tests to place students in E.M.R.[109] classes constituted actionable disparate impact under Title VI based on the discriminatory impact of the tests on black children.[110] In assessing plaintiff's prima facie case, the lower court held that the placement of students in the E.M.R. classes had a "definite adverse effect, in that E.M.R. classes are dead-end classes which de-emphasize academic skills and stigmatize children improperly placed in them."[111] After finding

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[103] *Id.* at 1413. Moreover, plaintiffs were not able to articulate a less discriminatory alternative to the school board's decision since the land at the alternative site was unavailable. *Id.*

[104] *Id.* at 1420.

[105] *Id.* (internal citation omitted).

[106] *Id.*

[107] *Id.* The court similarly affirmed the lower court's decision that the school board's decision regarding attendance zones did not have "any significant effect on the school's racial identifiability and level of utilization," since plaintiffs failed to prove that the white students who resided in the former school zone would have actually attended the Training School if assigned there, rather than attend private schools or other city schools. *Id.* at 1415–16.

[108] 793 F.2d 969 (9th Cir. 1984).

[109] E.M.R. is an acronym for "educable mentally retarded." *Id.* at 972.

[110] *See id.* at 982–83.

[111] *Id.* at 983.

that the lower court's holding was not clearly erroneous, the Ninth Circuit also found sufficient proof of disparity, stating that it was "undisputed that black children as a whole scored ten points lower than white children on the tests, and that the percentage of black children in E.M.R. classes was much higher than for whites."[112]

Regarding causation, the court determined that "these test scores were used to place black schoolchildren in E.M.R. classes and to remove them from the regular educational program."[113] The court disagreed with defendants that the disparate impact was caused by nondiscriminatory factors, vehemently rejecting defendants' argument that "the disproportionate number of black children in E.M.R. classes [was] based on a higher incidence of mental retardation in blacks than in whites that is due to poor nutrition and poor medical care brought on by the lower socioeconomic status of blacks."[114] The court therefore affirmed the lower court's ruling that "the overrepresentation of black children in E.M.R. classes cannot be explained away solely on the grounds of the generally lower socio-economic status of black children and their parents," but rather that it was clear that the IQ tests caused the disproportionate placement of black students in these classes.[115]

Overall, these two cases illustrate several important aspects of how courts treat the Title VI disparate impact framework that could be applicable in the school-lunch context. First, increased racial identifiability could potentially constitute evidence of disparate impact under Title VI.[116] Stigmatization felt by minority students, as seen in both *Elston* and *Larry P.*, could also constitute harm for purposes of Title VI disparate impact. And finally, the courts in both *Elston* and *Larry P.* found evidence of adversity because the school or school district denied some service or benefit to the plaintiffs or provided them with inferior or fewer services or benefits.[117] The next Part applies these lessons by analyzing the viability of the Title VI disparate impact framework in the school-lunch context.

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (internal quotation marks omitted).

[116] *See* Price v. Austin Indep. Sch. Dist., 729 F. Supp. 533, 550 (W.D. Tex. 1990) ("The increase in number of racially identifiable schools under the 1987 plan . . . amounts to evidence of disparate impact . . . ."), *aff'd*, 945 F.2d 1307 (5th Cir. 1991).

[117] *See* TITLE VI LEGAL MANUAL, *supra* note 61, at 13 ("Courts have frequently identified Title VI adversity/harm where recipients' policies or practices result in fewer services or benefits, or inferior service or benefits. In this type of case, the recipient denies the plaintiff something deemed desirable.").

III. APPLYING THE TITLE VI FRAMEWORK TO THE SCHOOL LUNCH PROGRAM

Schools and school districts tasked with implementing the NSLP have adopted practices that significantly affect the ability of certain protected classes of students to fully and meaningfully participate in the NSLP. This Part discusses two practices in particular—the separation of paying and nonpaying students and the "shaming" of students who are unable to pay—and applies Title VI's burden-shifting framework to analyze whether either of these practices could potentially form the basis of a Title VI disparate impact claim.[118]

A. Separating Students in School Cafeterias

Numerous schools across the country have facially neutral policies or practices in place that either directly separate paying and nonpaying students or indirectly allow for the identification of NSLP-participating students.[119] This Section discusses the policies and practices that could be challenged under Title VI, the strengths and weaknesses of a possible prima facie case, and the explanations that school districts could potentially put forward as educational necessity defenses.

1. Establishing the Prima Facie Case

In order to establish a prima facie case of disparate impact, the investigating agency[120] must first identify the specific facially neutral

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[118] In practice, these claims would most likely be brought through the administrative process rather than through the court system. Following the Court's decision in *Sandoval*, individuals must now file individual disparate impact claims under Title VI in an administrative complaint through the relevant agency rather than bringing these claims in court. *See supra* note 66. Agencies are then responsible for initiating investigations into the funding agency's potential violations of the disparate impact regulations. *See id.* Despite being brought as administrative actions, however, agencies often still utilize this three-part burden-shifting framework developed by the courts. *See* Easton, *supra* note 16, at 333 ("[T]he DOE and DOJ—and potentially a federal court exercising judicial review over final agency action—would conduct a three-step burden-shifting analysis to decide the merits of a disparate impact claim brought by members of a class protected by Title VI."). Some agency investigations "follow a non-adversarial model in which the agency collects all relevant evidence and then determines whether the evidence establishes discrimination"; however, the burden-shifting model is still relevant to those investigations as well. TITLE VI LEGAL MANUAL, *supra* note 61, at 7 ("In administrative investigations, this court-developed burden shifting framework serves as a useful paradigm for organizing the evidence."). Therefore, the application of the three-part burden-shifting framework still provides a useful and relevant model for analyzing the potential strengths and weaknesses of a disparate impact claim in this context.

[119] *See* Rajiv Bhatia et al., *Competitive Foods, Discrimination, and Participation in the National School Lunch Program*, 101 AM. J. PUB. HEALTH 1380, 1382 (2011) ("Limited evidence suggests that NSLP lunch environments may allow identification of low-income participants.").

[120] Due to a lack of precedent, it is unclear whether the investigating agency would be the USDA or the Department of Education (DOE). As the USDA is responsible for regulating the NSLP at the federal level, it would likely fall to the USDA to initiate an investigation and bring a case on behalf of plaintiffs;

practice at issue. Here, the facially neutral practice would be the separation of paying and nonpaying students, leading to the identification of students who participate in the NSLP. Some school cafeterias have two separate lines, one for government-subsidized food and one for competitive foods such as snacks and fast food,[121] thus directly segregating students who participate in the NSLP and those who do not participate. One national survey found that one-third of responding high schools separated the service of reimbursable meals and competitive foods in the cafeteria, and one in ten schools had "a clear and egregious overt identification problem" that often resulted in the segregation of students by color.[122] Some schools even set up these lines in two separate rooms, which provides for even easier identification of NSLP-participating students.[123]

Beyond these more overt practices, schools that offer competitive foods in the cafeteria also cause the indirect identification of NSLP-participating students, because the students who eat the NSLP-subsidized foods are therefore identifiable based on the food they eat (and the competitive foods they don't eat).[124] However, there could be some question as to whether it is actually an affirmative "practice" for schools to merely include competitive foods in addition to the NSLP offerings, especially if the schools provide both types of food in the same line. Therefore, this type of practice would likely be less susceptible to a Title VI challenge than would the physical separation of paying and nonpaying students.

After establishing a facially neutral policy or practice, the investigating agency must then show that adversity or harm results from that practice. The identification of children as NSLP participants through the practice of segregating paying and nonpaying students could adversely affect a

however, because both the USDA and the DOE have nearly identical disparate impact provisions, the Title VI disparate impact analysis would be the same regardless of which agency is ultimately responsible for the claim.

[121] Carol Pogash, *Free Lunch Isn't Cool, So Some Students Go Hungry*, N.Y. TIMES (Mar. 1, 2008), http://www.nytimes.com/2008/03/01/education/01lunch.html [https://perma.cc/RDA9-2FPZ]. For more information about the specific regulations regarding competitive food guidelines in each state, see *Competitive Foods Guidelines by State*, SCH. NUTRITION ASS'N (2013), https://schoolnutrition.org/uploadedFiles/Legislation_and_Policy/State_and_Local_Legislation_and_Regulations/4-Sept2013StateCompetitiveFoodPolicies.pdf [https://perma.cc/3V6W-73QM].

[122] *See* KAVANAGH, *supra* note 32, at 10, 27 ("In some schools this line consists of mainly low-income students and, depending on local demographics, sometimes mostly students of color.").

[123] *Id.* at 10.

[124] *See* Bhatia et al., *supra* note 119, at 1383 ("The very existence of à la carte foods not accessible to low-income qualified students within a public school lunch environment might be viewed as a discriminatory practice."). This is especially true in schools where "there are few nonsubsidized students participating in the NSLP meal program," as "participation itself may be an easily visible marker of income status." *Id.* at 1380.

particular class of children by causing them to experience stigmatization.[125] In and of itself, stigmatization is a form of discrimination, because the effects of stigmatization and the effects of discrimination based on one's identification with, or membership in, a particular group are the same: unequal treatment, increased barriers to participation in certain programs or activities, and decreased feeling of self-worth and self-esteem.[126]

In the education context, courts often find adverse or harmful effects when a facially neutral practice or policy results in fewer or inferior services or benefits being provided to students on the basis of race, color, or national origin.[127] Here, stigmatization could function in a variety of ways to prevent a student's full and meaningful participation in NSLP, including by preventing students from signing up for the program in the first place, deterring students from eating the subsidized meals, or ultimately shaming those students who do participate.[128] Often, the stigmatization that children who participate in the NSLP experience from cafeteria segregation or identification results in students' unwillingness or refusal to participate in the NSLP for fear of being identified as poor.[129] Because this stigmatization results in students receiving "fewer or inferior services or benefits" of the NSLP, it could thus possibly constitute sufficient harm to support a prima facie case of disparate impact under Title VI.

In addition to the effects of stigmatization, the inability of students to fully and meaningfully participate in the NSLP could also have adverse physical or academic effects on the students. A strong link exists between food insecurity and a child's academic performance and development.[130]

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[125] *Id.*

[126] *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 817 (2004) ("[V]irtually all social scientists accept the broad definition of stigma . . . namely that 'stigmatized persons possess an attribute that is deeply discrediting and that they are viewed as less than fully human because of it.'"); *see also Stigma and Discrimination*, CANADIAN MENTAL HEALTH ASS'N, https://ontario.cmha.ca/documents/stigma-and-discrimination [https://perma.cc/N82C-AEXL] ("Stigma is the negative stereotype and discrimination is the behaviour that results from this negative stereotype."); Bhatia et al., *supra* note 119, at 1384 ("Stigma is considered a harmful, health-adverse outcome . . . .").

[127] *See* TITLE VI LEGAL MANUAL, *supra* note 61, at 13 (discussing how cases in which funding recipients deny plaintiff services or benefits "often arise in the education context").

[128] *See* POPPENDIECK, *supra* note 1, at 192 ("[S]tigma can frustrate the intent of the [NSLP] in two opposite but complementary ways—by deterring children from eating or by inflicting shame on those who do so.").

[129] *See* Pogash, *supra* note 121 (discussing students' reports that "[l]unchtime 'is the best time to impress your peers'" and that "[b]eing seen with a subsidized meal . . . 'lowers your status'").

[130] *See, e.g.*, K. Heather Devine, *Vermont Food Access and the "Right to Food": Using the Human Right to Food to Address Hunger in Vermont*, 41 VT. L. REV. 177, 197–98 (2016) ("Hunger and dietary quality strongly correlate with academic performance, which can obstruct a student's ability to provide for herself when she becomes an adult."); *The Role of Sound Nutrition and Physical Activity in Academic*

While research on this topic is limited, a 2008 study of approximately 5000 fifth-grade-student surveys from 2003 found that, independent of socioeconomic status, the one-third of students with the highest quality diets were 41% more likely to pass a literacy test than the one-third of students who had the lowest quality diets.[131] Hunger and food insecurity are also associated with poor performance on academic achievement tests, lower retention of information during the school year, and an increase in anxiety and depression among students.[132]

Regarding the element of disparity, it could prove difficult for an investigating agency to determine exactly how many students are being separated into paying and nonpaying lines or rooms, and even more difficult to determine the demographics of these students. However, as discussed earlier in this Note, the data that is available reveals that there is an overrepresentation of minority students who participate in the NSLP.[133] This overrepresentation could be used to demonstrate disparity for purposes of establishing a disparate impact claim under Title VI.[134]

Courts have also inferred discriminatory impact on minorities from merely a "series of discrete episodes."[135] The results of national surveys like Professor Janet Poppendieck's,[136] or Colleen Kavanagh's report detailing

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Achievement, ACTION FOR HEALTHY KIDS 1 (2004), http://www.wholebodyfitness.ca/wp-content/uploads/2012/10/The-Role-of-Sound-Nutrition-and-Physical-Activity-in-Academic-Achievement.pdf [https://perma.cc/2333-HSGJ] (discussing effects of poor nutrition on a student's academic achievement in the following ways: scoring lower on vocabulary tests, reading comprehension, arithmetic, and general knowledge; increasing the likelihood of repeating a grade due to low academic achievement; and compromising cognitive development and school performance).

[131] Michelle D. Florence et al., *Diet Quality and Academic Performance*, 78 J. SCH. HEALTH 209, 212 (2008).

[132] *See* Pub. Interest Gov't Relations Office, *What Are the Psychological Effects of Hunger on Children?*, AM. PSYCHOL. ASS'N, https://www.apa.org/advocacy/socioeconomic-status/hunger.pdf [https://perma.cc/Y2BZ-KSUZ] (discussing how hunger can have numerous negative outcomes for kids, including effects on brain development, anxiety, depression, and poor physical health conditions); *see also* Susan Scutti, *How Does Nutrition Affect Children's School Performance?*, CNN (Mar. 21, 2017, 9:03 AM), http://www.cnn.com/2017/03/21/health/school-nutrition-program-benefits/index.html [https://perma.cc/7TZB-3NCC] ("There is pretty solid evidence that children who are hungry are not able to focus, so they have a low attention span, behavioral issues, [and] discipline issues in the school." (internal quotation marks omitted)).

[133] *See supra* notes 46–48 and accompanying text; *see also* Newman & Ralston, *supra* note 46, at 5–7 (reporting estimates of NSLP-participant characteristics based on the results of two national surveys: the 2001 Panel of the Survey of Income and Program Participation (SIPP) and the 1999–2002 National Health and Nutrition Examination Survey (NHANES)); Tonti, *supra* note 8, at 465 ("Free and reduced-price school-meal recipients are primarily black and Latino students from lower socioeconomic classes.").

[134] *See supra* notes 108–112 (discussing the court's use of overrepresentation of minorities in a special E.M.R. class as proof of disparity for purposes of a prima facie case).

[135] *See supra* note 81 and accompanying text.

[136] *See infra* notes 146–147 and accompanying text.

instances of segregated lunch lines in different schools,[137] could serve as a series of discrete episodes in order to "raise a plausible inference that [the practice] had a discriminatory impact" on minority students participating in the NSLP.[138] The investigating agency could also make the argument that, even though the statistical disparity might be small, the most recent data is nearly ten years old and the data that is available shows an increase in the overrepresentation of minorities in the NSLP. Therefore, if further research were to be conducted on the demographics of NSLP participants, it might show that this overrepresentation has continued to increase to a more statistically significant point over the past ten years.[139]

Finally, the investigating agency must be able to show that the school's practice of separating paying and nonpaying students actually caused the racial segregation in school cafeterias. The available data demonstrating an overrepresentation of minority students in the NSLP,[140] coupled with evidence of cafeteria segregation by race, could potentially support the causal link between the school's facially neutral practice and the resulting disparate impact. While there is currently a lack of statistical evidence demonstrating such racial segregation, there is ample anecdotal evidence. For instance, in researching the effect of à la carte sales on stigmatization, Professor Poppendieck revealed numerous instances of cafeteria segregation through her national survey of students, including students reporting that

- "There was the cafeteria line, mostly filled with Hispanic kids with lunch tickets. Then there was the food area adjacent and that sold cookies, bagels, sodas, [and] brand name . . . expensive items;" [141]
- "The top floor has the 'café,' which does not take student vouchers . . . . The bottom cafeteria serves hot lunch and accepts school lunch vouchers . . . [and] was composed of predominantly African American and Latin American students. Consequently, the upstairs eating area was predominantly white;" [142]
- "The cafeteria was for the poor kids. The food there was gross. Kids who did not eat in the cafeteria were embarrassed to go into it during lunch for fear that others would think they were getting free or discount lunch;" [143]

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[137] KAVANAGH, *supra* note 32, at 10.

[138] *See supra* note 81 and accompanying text.

[139] See *infra* Part IV for discussion of the need for more thorough data collection regarding the characteristics of NSLP participants.

[140] *See supra* notes 46–48 and accompanying text.

[141] POPPENDIECK, *supra* note 1, at 194–97.

[142] *Id.*

[143] *Id.*

- "Those who were provided with lunch . . . were the only ones who actually ate the school food . . . . There was also a separate door for them to go to, to receive their lunch, and they had to eat in the cafeteria because the school dishes and trays were not allowed outside;" [144]
- "It was located in the suburbs but not far from downtown Richmond from whence came the 'ghetto' children, . . . mostly nonwhite students. These kids were the ones who ate the free lunches;"[145] and
- "My school was very segregated in that white kids ate upstairs and Mexicans ate downstairs [where the free and reduced-price lunch was served]."[146]

As Professor Poppendieck concludes, "[b]ecause race and class are so closely linked in many schools, a separation between paying customers on an a la carte line and students receiving free and reduced price meals in another quickly translates into racial separation."[147]

In addition, evidence of a causal link might be found by demonstrating that children do in fact experience stigmatization as a result of a school's identification of them as NSLP participants, either through the practice of physically separating paying and nonpaying students or the presence of competitive foods resulting in the indirect identification of students. In a 2007 national survey, students reported being able to tell what type of meal that students received in a variety of different ways that included the amount charged or form of payment, cashier behavior, food items included, and the existence of separate serving lines in the cafeteria.[148] Data from this survey also showed that 68% of surveyed students "thought that lunch prices varied according to the individual," while 24% of students "could tell—or at least thought they could tell—which students received lunches free or at a reduced price."[149]

There could be a question as to whether mere awareness of student participation in the NSLP sufficiently constitutes stigmatization. Numerous studies have looked at the effect that competitive foods have on NSLP participation. One study in particular observed "demonstrated gains in NSLP

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[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 196.

[148] Anne Gordon et al., *School Nutrition Dietary Assessment Study-III: Vol. II: Student Participation and Dietary Intakes*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV. 46 (Nov. 2007), https://fns-prod.azureedge.net/sites/default/files/SNDAIII-Vol2.pdf [https://perma.cc/ZAT8-6ULX]. There were several ways that students reported being able to tell who received meal benefits that related to how the school was implementing the NSLP: the specific dollar amount charged (32%), form of payment (21%), cashier behavior (9%), separate serving line (5%), meal price status on the register (3%), and portion size or inclusion of specific food items (9%). *Id.*

[149] *Id.*

participation after removal of separate competitive à la carte lunch meal offerings," as well as "the need for greater attention to the potential discriminatory effects of competitive foods and to the issue of stigma by school nutrition program administrators, researchers, regulators, and policymakers."[150] Another report found that in two separate studies, the elimination of competitive foods in school cafeterias was successful in increasing both NSLP participation and overall revenue.[151] Overall, these studies indicate that the presence of competitive foods in school cafeterias "may be lowering qualified student participation either directly or via identification of subsidized low-income students or stigmatization of the NSLP."[152] The findings from these studies could support the causal link between the practice of offering competitive foods and subsequent decreased participation in the NSLP. Furthermore, as noted in the previous Part's discussion of *Elston* and *Larry P.*, courts have specifically found stigmatization to constitute evidence of adversity or harm for purposes of disparate impact under Title VI.[153]

2. Educational Necessity and Less Discriminatory Alternatives

If the investigating agency were able to successfully establish a prima facie case of adverse disparate impact, the burden would shift to the school or school district to demonstrate that the challenged policy or practice is supported by a "substantial legitimate justification" and that it "bear[s] a manifest demonstrable relationship to classroom education."[154] The policy or practice must be necessary to achieve an important educational goal and must actually relate to the stated educational goal.[155] In the school-cafeteria context, schools may face significant challenges arguing that a policy or practice bears a "manifest demonstrable relationship to classroom education," because most of the implementation takes place in school

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[150] Bhatia et al., *supra* note 119, at 1380.

[151] *See* KAVANAGH, *supra* note 32, at 55–57. In one of the studies, the number of NSLP meals served doubled from the 2005–2006 school year to the 2007–2008 school year, and in another one of the studies, the number of NSLP meals served tripled from the 2005–2006 school year to the 2006–2007 school year, after the elimination of competitive foods from the cafeteria. *Id.*

[152] Bhatia et al., *supra* note 119, at 1380.

[153] *See supra* Section II.B.

[154] Ga. State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417–18 (11th Cir. 1985).

[155] *See* Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1412–13 (11th Cir. 1993); *see also* Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL'Y 327, 345 (2005) ("School officials will probably argue that zero tolerance policies are necessary to create and maintain a safe learning environment and that any disparities that appear are due to a higher level of severity of initial or repeat offen[ses] by students of color. . . . Studies have shown, however, that zero tolerance policies may be ineffective at curbing violence and ensuring safety. Therefore, an argument might be made that, while the school may have a legitimate goal, a zero tolerance policy has a tenuous relationship to that objective.").

cafeterias rather than in the classroom itself. In this particular context, though, a policy or practice may be justified as long as it bore a "demonstrable relationship" to the stated objective of the program itself, not to a specific educational goal.[156]

Here, a school could respond to the agency's prima facie claim with the justification that segregating paying and nonpaying students by meal type is necessary to fulfill the educational goals of the NSLP. One of the key goals of the NSLP and the HHFKA is to educate students about nutrition and teach them the components of a healthy, balanced meal.[157] Because competitive foods do not have to adhere to the same nutritional standards as reimbursable meals under the NSLP, a significant percentage of competitive foods in schools are much less healthy than the subsidized meals served through the NSLP.[158] The separation of subsidized and nonsubsidized meals in school cafeterias might help to ensure that students are not confused about which foods comprise a nutritionally balanced meal, thus fulfilling the program's goal of educating students about nutrition.

There are, however, potentially less discriminatory alternatives available to schools that the agency could put forward in response. For example, schools could implement electronic point-of-sale payment systems[159] instead of using traditional cash registers or separate lines/service areas. Such systems have numerous less discriminatory benefits, including speeding up lines in school cafeterias, making online accounts available for students, allowing parents to check balances and deposit money into their children's account online, and decreasing confusion regarding which foods in the cafeteria line are subsidized.[160] Schools could also eliminate the

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[156] *See* TITLE VI LEGAL MANUAL, *supra* note 61, at 33.

[157] *See* Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088, 4101 (Jan. 26, 2012) ("One of the goals of the School Meal Programs is to help children easily recognize the key food groups that contribute to a balanced meal, including fruits and vegetables."). As articulated by the USDA, the goal of these regulations, as promulgated by the Food and Nutrition Service, is to "provide children access to food, a healthful diet, and nutrition education in a manner that promotes American agriculture and inspires public confidence." *Id.* at 4108.

[158] *See* Nicole Larson & Mary Story, *Are 'Competitive Foods' Sold at School Making Our Children Fat?*, 29 HEALTH AFF. 430, 430 (2010), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2009.0716 [https://perma.cc/B4X2-3MTE].

[159] Electronic point-of-sale (POS) payment systems allow students to pay for or receive their meals using either a swipe card or a personal identification number. *See* KAVANAGH, *supra* note 32, at 11. Because most full-priced students use cash to pay for their meals, POS systems would eliminate the need for cash payments and decrease the potential identification of students receiving reduced-price or free meals, because a "differentiated payment system makes it obvious to students who of their peers are in the lowest income tier in the school." *Id.*

[160] *See K-12 Software Solutions*, FOOD SERV. SOLUTIONS (2017), http://www.foodserve.com/k12-software-solutions.html [https://perma.cc/UPE7-XBLF]; *see also* Bhatia et al., *supra* note 119, at 1382 (discussing a pilot intervention study conducted in San Francisco schools in which researchers found that

presence of competitive foods altogether, a choice made by some school districts in response to state-level policies regarding competitive foods.[161] Indeed, schools that opt to do this may not lose the forecasted revenues from providing competitive foods; there is evidence that shows competitive food sales actually result in a decrease in overall federal reimbursement revenue for schools.[162]

B. The Practice of "Lunch Shaming"

In addition to the policy of separating paying and nonpaying students, a number of schools across the country also engage in "lunch shaming" practices, which involve the use of embarrassing or humiliating tactics that identify children with low or insufficient lunch balances in an attempt to encourage payment of their debt. Lunch shaming practices have increased in recent years due in large part to the significant amount of unpaid debt that schools have accumulated—at the end of the 2015–2016 school year, for instance, a School Nutrition Association survey found over three-quarters of reporting school districts in the country had unpaid student debt, with a median lunch debt of a few thousand dollars and some debts as high as $4.7 million.[163] Because school districts are unable to offset the loss of unpaid lunch debt with federal dollars, they must instead use other forms of revenue or seek other forms of reimbursement.[164] This led many school cafeterias to engage in lunch shaming practices in order to recoup this debt.

This Section discusses these lunch shaming practices and analyzes whether or not they could potentially form the basis for an actionable claim of disparate impact under Title VI. In doing so, this Section concludes that while a disparate impact claim may be possible due to the resulting harm suffered by the students, the agency would likely struggle to establish the requisite disparity, and that further investigation into these practices—including more thorough data collection—is greatly needed.

1. Establishing the Prima Facie Case

School officials in nearly half of all U.S. school districts currently have the ability to discipline students if their parents have not paid their school

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the implementation of a point of service system as well as the elimination of competitive à la carte offerings "may have contributed to participation gains through a reduction in stigma").

[161] *See generally Competitive Foods Guidelines by State*, *supra* note 121.

[162] *See* Cora Peterson, *Competitive Foods Sales Are Associated with a Negative Effect on School Finances*, 111 J. AM. DIETETIC ASSOC. 851, 851 (2011).

[163] Bettina Elias Siegel, *New Mexico Outlaws School 'Lunch Shaming*,*'* N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/well/family/new-mexico-outlaws-school-lunch-shaming.html [https://perma.cc/VC7V-6838].

[164] *See id.*

lunch bill.[165] While the goal of these practices is to identify students with low or insufficient meal balances in order to obtain payment from their families, in many schools this takes the form of lunch shaming practices that embarrass or humiliate students in front of their peers. Some schools force students to wear stickers when their balances are low or stamp their hands or arms in order to identify them.[166] Other schools require children to complete chores such as mopping the cafeteria floors or cleaning the tables, and some even take away students' food and throw it away in front of them if they cannot pay.[167] Because these practices have the effect of physically identifying students whose balances are low or depleted altogether, the resulting stigmatization is identical to the harm experienced by students who are separated into different lines or rooms within school cafeterias.[168]

The investigating agency may struggle to demonstrate sufficient disparity to support a prima facie case, because the data is unclear and somewhat conflicting regarding who is actually experiencing lunch shaming. Some reports state that lunch shaming practices primarily affect children whose families make just enough to disqualify them from NSLP eligibility,[169] while other data shows that over the same period there has been an increase of students within the paid or reduced-price category of NSLP who lack the funds to pay for school meals,[170] suggesting that some NSLP participants are also experiencing lunch shaming.

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[165] *See* Tom Udall, *It's Time to Outlaw Lunch Shaming*, CNN (Aug. 23, 2017, 8:13 AM), http://www.cnn.com/2017/08/23/opinions/lunch-shaming-opinion-udall/index.html [https://perma.cc/PME2-W73Z] (reporting the ability of school officials in the United States to punish students if their parents have not paid their school lunch bill).

[166] *See, e.g.*, Ivana Hrynkiw, *'I Need Lunch Money,' Alabama School Stamps on Child's Arm*, AL.COM (June 13, 2016), https://www.al.com/news/birmingham/index.ssf/2016/06/gardendale_elementary_student.html [https://perma.cc/7HFM-SK8F] (reporting on an elementary school cafeteria in Alabama that stamped a third grader's arm with "I Need Lunch Money").

[167] *See, e.g.*, Lisa Schencker, *Lunches Seized from Kids in Debt at Salt Lake City Elementary*, SALT LAKE TRIB. (Jan. 30, 2014, 10:19 AM), http://archive.sltrib.com/story.php?ref=/sltrib/mobile3/57468293-219/lunches-olsen-students-district.html.csp [https://perma.cc/4NLR-VN7T] (describing an incident in which "[u]p to 40 kids at Uintah Elementary in Salt Lake City picked up their lunches . . . , then watched as the meals were taken and thrown away because of outstanding balances on their accounts"); Siegel, *supra* note 163 (reporting children were "forced to clean cafeteria tables in front of their peers to pay the debt").

[168] *See supra* Section III.A.1.

[169] *See* Lee, *supra* note 4 ("Free and reduced-price meals funded by the Agriculture Department's National School Lunch Program shield the nation's poorest children from so-called lunch shaming. . . . It's households with slightly higher incomes that are more likely to struggle, experts on poverty and nutrition say.").

[170] *See* Lauren Camera, *Battling School Lunch Shaming and End-of-Year Debts*, U.S. NEWS & WORLD REP. (July 11, 2017), https://www.usnews.com/news/education-news/articles/2017-07-11/battling-school-lunch-shaming-and-end-of-year-debts [https://perma.cc/E93H-ZFJ2] ("[Thirty-eight]

Though more recent data on demographic participation in the NSLP is unavailable, the following table lists the breakdown of NSLP meal type within each demographic group.[171]

TABLE 3: NSLP MEAL TYPE BY PARTICIPANT RACE/ETHNICITY

	2001 Panel of the Survey of Income and Program Participation (SIPP)			**1999–2002 National Health and Nutrition Examination Survey (NHANES)**		
	Paid	***Reduced-Price***	***Free***	***Paid***	***Reduced-Price***	***Free***
Non-Hispanic White	64.6%	9.9%	25.5%	68.1%	7.0%	24.9%
Non-Hispanic Black	21.3%	13.0%	65.8%	19.8%	10.7%	69.6%
Hispanic	15.2%	8.1%	76.6%	23.1%	12.8%	64.2%
Native American, Aleut, or Eskimo	15.4%	6.3%	78.3%	N/A	N/A	N/A
Asian or Pacific Islander	48.2%	9.2%	42.6%	N/A	N/A	N/A
Other Ethnicity	N/A	N/A	N/A	42.2%	10.2%	47.6%

While minority students are overrepresented as participants in the NSLP overall,[172] students are more evenly represented when demographic data is broken down by the distribution of NSLP lunch payments. Because it is unclear which category of NSLP participants is most affected by lunch shaming practices, and because students who may not even be eligible for the NSLP may also be affected, it would be difficult for the investigating agency to demonstrate the element of disparity for purposes of a prima facie case under Title VI. Collection of more thorough and current data would

percent of districts report that the number of students within the paid or reduced-price category who do not have funds to pay for breakfast or lunch increased over the same school year period.").

[171] Newman & Ralston, *supra* note 46, at 10–11.

[172] See *supra* notes 46–48 for statistical evidence regarding the overrepresentation of minority students in the NSLP.

clarify the situation and the merits of a discrimination claim and could be the focus of further research.

2. Educational Necessity and Less Discriminatory Alternatives

A school could put forth a number of seemingly legitimate reasons for using stamps, stickers, or other markers in order to identify students with either low school meal balances or unpaid lunch debt. One possible reason is that physical markers have proven to be effective in reducing student lunch debt,[173] and because the NSLP cannot function without funding, the collection of these unpaid debts is necessary to fulfill the goals of the NSLP. This increased school lunch debt also potentially has the unfortunate consequence of further increasing the presence of competitive foods in schools, which, as discussed in the previous Section, could even further exacerbate the identification and thus the stigmatization of students participating in the NSLP.[174]

Despite these reasons, however, the resulting stigmatization of students should counter any possible benefit gained from the discriminatory practice. Moreover, there are a number of less discriminatory alternatives available to schools that the agency could put forth that would accomplish the same goal of reducing lunch debt without subjecting students to public shame or stigmatization. For instance, schools could take proactive measures to collect unpaid school lunch debt that does not involve the identification of students, such as sending bills or reminder mail to families (either by email, postal mail, or both) when their student's account goes into the red.

Ultimately, while these schools may very well not intend to isolate or "identify" NSLP-participating students, it is the effects of these practices that matter more than the school's intent in a disparate impact claim, and the reality of these practices is that they result in identification and segregation of NSLP students. Therefore, while agencies may face some difficulties, a Title VI claim could potentially be brought to stop such harmful practices.

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[173] *See, e.g.*, Ann Schimke, *When Denver Stopped Lunch-Shaming, Debt from Unpaid Meals Skyrocketed*, DENVER POST (June 25, 2018, 1:57 PM), https://www.denverpost.com/2018/06/25/denver-schools-unpaid-lunch-debt [https://perma.cc/JQS4-5Z5H] (reporting on school meal debt in Denver public schools after administrators made efforts to reduce lunch shaming practices). Last year, Denver public schools guaranteed full meals to students regardless of their ability to pay; as a result, unpaid lunch debt increased from $13,000 to $356,000, which amounts to approximately 900 unpaid lunches every school day. *Id.*

[174] *See id.* ("The school lunch debt is one reason Denver district officials quietly introduced snacks such as Doritos and Rice Krispies Treats in elementary school cafeteria lines late this past winter. The new additions, seen as unhealthy by some parents, helped generate around $41,000 in new revenue for the nutrition services department.").

IV. RECOMMENDATIONS

Several steps can be taken at the federal, state, and local levels to better protect students who participate in the NSLP from adverse disparate impact. Additionally, further research, including the facilitation of more thorough and up-to-date data collection, would help provide agencies, schools, and other stakeholders with the information necessary to take proactive measures to better understand the scope of what is occurring in school cafeterias. This Part proceeds by providing recommendations and suggestions in the following three areas: (1) steps that agencies can take at the federal level; (2) recommendations for schools, school districts, and administrators at the state and local level; and (3) overall recommendations for further areas of research, study, and data collection that would help improve the effective and nondiscriminatory administration of the NSLP.

A. Changes at the Federal Level

Following the Supreme Court's ruling in *Sandoval*, individuals no longer have a private cause of action to enforce Title VI disparate impact regulations.[175] However, the Department of Justice Civil Rights Division's 2001 memorandum following *Sandoval*—directed to all "Heads of Departments and Agencies, General Counsels, and Civil Rights Directors"—confirmed the role of federal agencies in enforcing disparate impact regulations.[176] The memorandum clarified that "although *Sandoval* foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained their authority and responsibility to enforce them."[177] Therefore, agencies now play an even more critical role in prohibiting discrimination at the hands of their funding recipients, which include schools, school districts, and local food authorities responsible for administering the NSLP at the local level.[178] Agencies should make sure their complaint processes are made available to students and parents, and take

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[175] *See supra* note 66 and accompanying text.

[176] *See* TITLE VI LEGAL MANUAL, *supra* note 61 at 5 ("The agencies' Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism."); *see also* Memorandum from the Assistant Attorney General to the Heads of Departments and Agencies, General Counsels, and Civil Rights Directors (Oct. 26, 2001) https://www.justice.gov/crt/federal-coordination-and-compliance-section-201 [https://perma.cc/EW2C-4879] [hereinafter DOJ Memo] (explaining that *Sandoval* did not address the validity of Title VI disparate impact regulations and thus did not impliedly strike down those regulations).

[177] TITLE VI LEGAL MANUAL, *supra* note 61, at 5 (citing DOJ Memo, *supra* note 176).

[178] *See id.* at 4 ("Federal funding agencies play a vital role in enforcing the prohibition on disparate impact discrimination through complaint investigations, compliance reviews, and guidance on how to comply with Title VI.").

proactive measures to initiate and investigate possible instances of discrimination taking place in school cafeterias.

The National School Lunch Act explicitly prohibits the overt identification and segregation of any student that participates in the program.[179] Despite the existence this broad, unambiguous prohibition, the USDA is not ensuring its adequate enforcement.[180] The USDA should use its authority to issue regulations prohibiting the practice of having separate lines or service areas for à la carte food items in order to prevent the overt identification and stigmatization of NSLP participants. Furthermore, the USDA also has authority to issue regulations regarding competitive foods sold in participating schools and institutions.[181] The passage of the HHFKA gave the USDA newfound authority to set nutritional standards for competitive foods sold in schools during the school day, including food sold in school stores, vending machines, and à la carte lunch lines.[182] While the USDA cannot remove competitive foods from schools entirely, it could potentially use its authority, pursuant to the HHFKA, to strengthen its regulatory oversight over how and where competitive foods are sold within schools.

Finally, the USDA should conduct a more thorough and robust Civil Rights Impact Analysis (CRIA) of the NSLP.[183] The USDA must conduct a CRIA each time a new rule is promulgated in order to identify and address any civil rights impacts that their proposed rulemaking may have on either their workforce or program participants on the basis of their membership in a protected class.[184] After the passage of the HHFKA, for instance, the Food

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[179] *See* 42 U.S.C. § 1758(b)(10) (2012) (prohibiting schools from any "physical segregation of or other discrimination against any child eligible for a free lunch or a reduced price lunch" and "any overt identification of any child by special tokens or tickets, announced or published lists of names, or by other means").

[180] *See* KAVANAGH, *supra* note 32, at 29 (referring to a public interest law firm's characterization of the USDA's enforcement as "very narrow").

[181] 42 U.S.C. § 1779(a) ("The Secretary shall prescribe such regulations as the Secretary may deem necessary, . . . including regulations relating to the service of food in participating schools and service institutions in competition with the programs authorized under [the HHFKA and 42 U.S.C. § 1751].").

[182] *Id.* § 1758(e) ("A school or school food authority . . . may not contract with a food service company to provide a la carte food service unless the company agrees to offer free, reduced price, and full-price reimbursable meals to all eligible children.").

[183] *See* U.S. DEP'T OF AGRIC., OFFICE OF CIVIL RIGHTS, DR 4300-003, CIVIL RIGHTS IMPACT ANALYSIS (2003). https://www.ocio.usda.gov/sites/default/files/docs/2012/DR4300-004%5B1%5D.htm [https://perma.cc/6JEQ-GC5T] (establishing the Civil Rights Impact Analysis policy).

[184] U.S. DEP'T OF AGRIC., OFFICE OF CIVIL RIGHTS, DR 4300-003, CIVIL RIGHTS IMPACT ANALYSIS II (2016), https://www.ocio.usda.gov/document/departmental-regulation-4300-004 [https://perma.cc/8586-XNXE]. Specifically, a CRIA must look at the impact on the following classes: "race, color, national origin, age, disability, and where applicable, sex, gender identity (includes gender

and Nutrition Service (FNS) conducted a CRIA in 2011 to review the proposed nutritional standards under the Act and "to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability."[185] The FNS determined that the proposed rule was "not expected to affect the participation of protected individuals in the NSLP and SBP," nor was it "expected to limit program access or otherwise adversely impact the protected classes."[186] However, the CRIA did not analyze the potential discriminatory impact of the practices discussed in this Note. Therefore, a more detailed and exhaustive CRIA would hopefully illuminate these challenges and prompt the USDA to take action to remedy the problem.

B. Changes at the State and Local Levels

One of the most critical changes that can be made at the state and local levels is the enactment of anti-lunch shaming legislation. On April 7, 2017, New Mexico became the first state in the country to enact legislation prohibiting lunch shaming practices in their schools by passing the Hunger-Free Students' Bill of Rights Act.[187] State Senator Michael Padilla introduced the bill, motivated by experiencing lunch shaming tactics himself as a child.[188] As of the 2017–2018 school year, school districts participating in the NSLP are required to put into place policies and procedures that address the issue of unpaid school meal debt.[189] In response, some states are considering anti-lunch shaming bills similar to the one passed in New

expression), marital status, familial status, parental status, religion, sexual orientation, genetics, political beliefs, or receipt of income from any public assistance program." *Id.* at 4–5.

[185] Nutrition Standards in the National School Lunch and School Breakfast Programs, 76 Fed. Reg. 2494, 2509 (Jan. 13, 2011).

[186] *Id.*

[187] N.M. STAT. ANN. § 22-13C (West 2017). The Act accomplishes four main goals: (1) requires school districts to extend credit and allow children to charge meals even if their family needs additional time to pay; (2) prohibits districts from employing humiliating or embarrassing tactics to collect student debts, such as denying them meals; (3) requires districts to ensure that they are enrolling as many free and reduced-price eligible students as possible, rather than allowing these students to keep accumulating lunch debt; and (4) allows districts to collect unpaid debt from parents directly using a wide variety of tools. *See* Jennifer Ramo, *NM Bans 'Lunch Shaming' with Hunger-Free Students' Bill of Rights*, ALBUQUERQUE J. (Oct. 7, 2017, 12:02 AM), https://www.abqjournal.com/1074686/nm-bans-lunch-shaming-with-hungerfree-students-bill-of-rights-ex-state-is-the-first-in-the-country-of-legislate-against-the-damaging-practice.html [https://perma.cc/5T9A-ZYH9].

[188] *See* Siegel, *supra* note 163. As a child, State Senator Padilla had to do things "like mop the floor in the cafeteria," and he stated that "[i]t was really noticeable that [he] was one of the poor kids in the school." *Id.*

[189] *See The End of School Lunch Shaming?*, FOOD RESEARCH & ACTION CTR., http://www.frac.org/blog/end-school-lunch-shaming [https://perma.cc/5A4Y-KRD7].

Mexico.[190] State and local governments should use this opportunity to pass anti-lunch shaming bills to reduce the stigma and embarrassment that students experience as a result of these practices.

School districts can also make numerous changes to the way that they administer the NSLP within their own cafeterias to reduce the potential discriminatory impact. First and foremost, schools should eliminate the use of separate rooms and lines that segregate paying and nonpaying students. Additionally, schools should be thoughtful about the type of payment system that they implement in their cafeterias; for instance, some schools have payment systems that allow for both point-of-sale electronic payments as well as payments in cash. In these types of differentiated payment systems, paying students are the ones most often paying in cash,[191] while students eligible for free meals pay electronically, thus increasing the identification of students participating in the NSLP.[192] Therefore, schools implementing these types of electronic payment systems should ensure that all students are required to use prepaid accounts for meals and should consider disallowing cash payments entirely.

C. Areas of Further Research

One of the biggest challenges in the area of school lunches is the overwhelming lack of available data regarding student participation in NSLP. There has been no national collection of NSLP-participant demographic information since 2006, when the USDA conducted two national surveys and subsequently published a comprehensive report.[193] Much of this data is kept at the local or state level, but even that data is often not broken down by demographic—instead, schools merely report the percentages of students eligible for free and reduced-price meals during that fiscal year.[194] Exacerbating this scarcity of data is the fact that many schools self-report their data, and as a result data collection is not comprehensive.[195]

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[190] *See, e.g.*, H.B. 2159, 85th Leg. Sess. (Tex. 2017) (Texas bill); Child Hunger Prevention and Fair Treatment Act of 2017, S.B. 250, 2017 Leg. (Cal. 2017) (California bill).

[191] According to Kavanagh's study, 92% of schools with a POS system "allowed or required students not eligible for free meals to pay in cash in the cafeteria." KAVANAGH, *supra* note 32, at 28.

[192] One high school parent reported not being able to send a check into school with her daughter to prepay for lunches, stating that it "would be so humiliating to her because she says 'When you do that they are going to think I'm poor . . . I need to have money in my hand; I need to pay.'" *Id.* at 11.

[193] *See supra* Section III.A.2; *see also* Newman & Ralston, *supra* note 46, at 5–7.

[194] *See, e.g.*, *Free and Reduced-Price Meal Eligibility Data*, ILL. STATE BD. OF EDUC., https://www.isbe.net/Pages/Seamless-Summer-Option-Meal-Eligibility.aspx [https://perma.cc/6QGW-2K9F] (providing links to spreadsheets listing free and reduced-price eligibility data collected from schools in Illinois for each fiscal year).

[195] *Id.* ("This report contains self-reported data from sponsors in the National School Lunch Program; therefore, not every school in Illinois is listed in the following reports.").

Therefore, facilitating the collection of thorough and up-to-date data regarding the characteristics and demographics of NSLP participants is of the utmost importance.

Further research could also be conducted in the field in order to determine what is actually occurring within schools and whether there is any evidence of discriminatory intent involved in separating nonpaying and paying students, or in the instances of lunch shaming that occur. Evidence of discriminatory intent would suggest an argument could be made that there is evidence of the disparate treatment of minority students in some schools, especially in the context of school lunch shaming.[196] Because private causes of action are still available under Section 601 of Title VI following *Sandoval*, individual plaintiffs could then potentially bring Title VI claims of disparate treatment themselves instead of relying on the agency to investigate and bring disparate impact claims on their behalf.

Finally, there should be further, potentially interdisciplinary, research conducted regarding the frequency of these practices in schools and their effect on children. While the issue has not been approached from a legal perspective, social science researchers have examined the issue of cafeteria segregation and the identification of NSLP participants through the presence of competitive foods. Increased social science research in the school-lunch context could help fill in these gaps and supplement existing research in order to increase the focus on potential disparities occurring in schools and related legal causes of action. For example, further research into the effects of stigma on children and the prevalence and effects of lunch shaming and cafeteria segregation could help provide crucial information needed to bring a successful claim under Title VI. While there have been several helpful studies in these areas, some responses from those in the school food service indicate that the results of these surveys are currently either being discounted or have not yet been ingrained into the public consciousness.[197] More research in this area might also help supplement the problematic lack of data at the local level regarding who exactly is participating in the NSLP.

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[196] *See* POPPENDIECK, *supra* note 1, at 194–96. Disparate treatment claims can be raised along with a claim for disparate impact in the educational context. *See* Accountability Project of the Children's Rights Litigation Committee, *Disparate Impact Under Title VI and the School-to-Prison Pipeline*, ABA SECTION OF LITIG. 1, 4, 6, 27 (2015), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/disparate-impact-memo-2015.authcheckdam.pdf [https://perma.cc/VNQ5-AVK4] ("If an attorney has any examples of similarly situated students treated differently, these examples should be included in the [disparate impact] complaint because OCR investigations can and will look at evidence of discrimination of both different treatment and disparate impact, and both issues may be present.").

[197] *See, e.g.*, POPPENDIECK, *supra* note 1, at 190 ("School food service directors seem to agree that stigma is not a problem in elementary schools—at least not in the lower grades.").

CONCLUSION

Overall, regardless of intent, school cafeterias across the country are consistently identifying, segregating, and ultimately stigmatizing students who participate in the NSLP. This Note attempts to characterize this treatment as potential discrimination in the form of disparate impact and provide these students with a viable form of relief by articulating a possible disparate impact claim under Title VI. While this Note is the first to analyze these issues from a legal perspective, it should not be the end of the discussion, as there is ample room for further research into the legal implications of these cafeteria practices and their effects on students. These discriminatory practices, and these children, must not continue to go unnoticed.