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### Recommended Citation

Ashlee Germany, *"Cause I Ain't Got No Pencil": A Call for Chicago Public School Funding Litigation Reform*, 68 DePaul L. Rev. (2019)

Available at: <https://via.library.depaul.edu/law-review/vol68/iss3/8>

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# “CAUSE I AIN’T GOT NO PENCIL”: A CALL FOR CHICAGO PUBLIC SCHOOL FUNDING LITIGATION REFORM

*I woke myself up  
Because we ain’t got an alarm clock  
Dug in the dirty clothes basket,  
Cause ain’t nobody washed my uniform  
Brushed my hair and teeth in the dark,  
Cause the lights ain’t on  
Even got my baby sister ready,  
Cause my mama wasn’t home.  
Got us both to school on time,  
To eat us a good breakfast.  
Then when I got to class the teacher fussed  
Cause I ain’t got no pencil.<sup>1</sup>*

## I. INTRODUCTION

Malcolm X once described poverty and poor education as a vicious cycle.<sup>2</sup> Poverty is ubiquitous as it is both the result and the cause of an inferior education. In the United States, we tend to deify freedom, even though the country was built on slavery. That same irony persists because minority children are left with an *adequate* education instead of an *equal* education, and they are ultimately forced into this vicious cycle of poverty. The quality of education a person receives directly affects her economic status.<sup>3</sup> When students experience the visceral stress of poverty, to the extent of not even owning a pencil to do their

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1. Talia Richman, *Viral Poem, ‘Cause I Ain’t Got a Pencil,’ Was Not Written by a Baltimore Student*, BALTIMORE SUN (Feb. 13, 2018, 10:55 AM), <https://www.baltimoresun.com/features/baltimore-insider-blog/bs-md-ci-cause-i-aint-got-a-pencil-20180213-story.html> (describing the origins of the poem).

2. Isaac Legend, *Malcolm X on the Very Vicious Cycle of Poverty*, YOUTUBE (Aug. 21, 2014), <https://www.youtube.com/watch?v=E8YGITrPMuc> (quoting Malcolm X: “When you live in a poor neighborhood, you are living in an area where you have to have poor schools. When you have poor schools, you have poor teachers. When you have poor teachers, you get a poor education. When you get a poor education, you can only work in a poor-paying job. And that poor-paying job enables you to live again in a poor neighborhood. So it’s a very vicious cycle”).

3. John F. Watson, *The Cause, Effect and Constitutional Consequence of Unequal Funding: Public Education in Illinois*, 26 J. MARSHALL L. REV. 399, 402 (1993).

work, it becomes essential for public school funding to be specifically altered to meet those dire needs.<sup>4</sup>

Recently, in *Board of Education v. Rauner*, the plaintiff filed claims of discrimination against the government regarding the allocation of funds to public schools throughout the State of Illinois.<sup>5</sup> Chicago Public Schools (CPS) is the only school district in Illinois required to pay teachers' pensions instead of the State, and in turn, it is the only district in Illinois that has a student population comprised of over 90% minority students.<sup>6</sup> The extra burden of paying teacher pensions in CPS has aggravated its debt accumulation.<sup>7</sup> As a result, CPS has been forced to redirect its funds even further away from students.<sup>8</sup> This discrepancy in funding has caused school closures, and for the schools that remain open it has resulted in a second-class education for the Black and Hispanic students in CPS.<sup>9</sup> However, public school funding litigation has been struck down relentlessly regardless of the analysis brought forth.

It is time for the judiciary to retire the archaic ideology of an adequate education and place more weight on the stark impact of discrimination on minority children in its analysis. This Note makes two assertions: (1) The Circuit Court of Cook County misapplied the disparate impact analysis in *Board of Education v. Rauner* in general; and (2) the analysis for public school funding litigation should be altered to heavily scrutinize the starkness of the impact created because of the vulnerable class of plaintiffs affected and to balance the starkness against the defendants' proffered explanation for their discriminatory policy.

This Note will examine the insufficient application of the analysis in public school funding litigation in CPS by analyzing the *Rauner* case. Ineffective public school funding litigation precipitates the risk of pov-

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4. *Effects of Poverty, Hunger and Homelessness on Children and Youth*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/families/poverty.aspx> (select the "Poverty" drop-down menu) (last visited Dec. 5, 2017).

5. *Bd. of Educ. v. Rauner*, No. 2017 CH 2157, 2017 WL 2407356, at \*1–4 (Ill. Cir. Ct. 2017).

6. *Id.* at \*2–3; Matt Masterson, *Teachers' Pension Fund Not Expecting Full CPS Payment by Friday Deadline*, WTTW NEWS (June 27, 2017, 5:09 PM), <https://news.wttw.com/2017/06/27/teachers-pension-fund-not-expecting-full-cps-payment-friday-deadline>.

7. *Rauner*, 2017 WL 2407356, at \*3–4; Verified Amended Complaint for Declaratory Judgment, Permanent Injunction, and Other Relief at ¶¶ 6–16, *Rauner*, 2017 WL 2407356 (No. 2017 CH 02157), <https://www.courthousenews.com/wp-content/uploads/2017/02/CPS-Funding.pdf>.

8. *Rauner*, 2017 WL 2407356, at \*3–4 (indicating CPS's need to cut school programs in order to make its required payments to the pension fund).

9. *Id.* at \*2; Juan Perez Jr. & Jennifer Smith Richards, *More Than a Dozen Chicago High Schools Struggle to Survive as Enrollment Plummets, Performance Falters*, CHI. TRIB. (Nov. 30, 2017, 7:22 AM), <https://www.chicagotribune.com/news/ct-met-chicago-schools-enrollment-decline-20171129-story.html>.

erty for minority students because of the acceptance of the ideology of an “adequate” education and the refusal of the judiciary to remedy this error. Funding for all schools must, regardless of race, have an infrastructure founded on equity. The vehicle to ensure equal funding is the judicial system. The judiciary can no longer sit by and allow this systemic discrimination to prodigiously handicap students of color. The application of disparate impact scrutiny in public school funding litigation is essential to ending this vicious cycle of poverty and low-quality education. Therefore, it is essential that courts emphasize the starkness of the disparate impact created by the discriminatory policy, in its determination of liability.

Part II of this Note provides a background on the three major issues of public school funding reform, including: (1) the theory that an adequate education is equivalent to an equal education, (2) the lack of judicial activism in education litigation, and (3) the perpetual understating of the discriminatory impact in the application of public school funding litigation. Part III of this Note will continue by analyzing the *Board of Education v. Rauner* opinion and how the disparate impact theory of liability was applied sparingly. Part IV of this Note will analyze how the judiciary must (1) reject an *adequate* education, (2) recognize the importance of judicial activism in this scope, and (3) accentuate the starkness of a discriminatory impact in the analysis of public school funding litigation by replacing the burden-shifting test with a balancing test. This Part also reapplies *Swan*’s disparate impact analysis to the *Rauner* case. Part V of this Note will conclude by discussing the impact of public school funding litigation reform and its deep-rooted connection to poverty.

## II. BACKGROUND

This Part will discuss the origins of an *adequate* education in comparison to an equal education in the scope of public school funding litigation. Next, this Part will explain the history of judicial activism in education litigation in *Committee for Educational Rights v. Edgar*.<sup>10</sup> Finally, this Part will describe the necessity for the courts to emphasize the large discriminatory discrepancy in public school funding litigation. The litigation that evaluates the distribution of funding in public education throughout Illinois remains problematic because of these ancient doctrines.

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10. 672 N.E.2d 1178 (Ill. 1996).

A. San Antonio Independent School District v. Rodriguez:  
*The Importance of an Adequate Education*

*San Antonio Independent School District v. Rodriguez* is the seminal case of public school funding litigation.<sup>11</sup> In *Rodriguez*, the amount of money per pupil in Texas school districts was primarily funded by the property taxes in that specific district.<sup>12</sup> This method resulted in vast disparities in funding between affluent districts and poor districts.<sup>13</sup> The State spent \$594 per pupil in the wealthier districts, which consisted of 20% minority students.<sup>14</sup> The State spent an estimated \$356 per pupil in the less affluent districts, which consisted of over 96% minority students.<sup>15</sup> The plaintiffs argued that public school funding that resulted in inter-district spending disparities violated the Fourteenth Amendment because it provided the students who lived in certain neighborhoods with a lower quality of education.<sup>16</sup>

The Supreme Court of the United States stated that “education is perhaps the most important function of state and local governments.”<sup>17</sup> Education is important to a democratic society because “[i]t is required in the performance of our most basic public responsibilities[, and] . . . [i]t is the very foundation of good citizenship.”<sup>18</sup> The Court emphasized that any child who is expected to succeed in life must have an *adequate* opportunity to an education.<sup>19</sup> Even though the Court recognized the importance of education, it held that the judiciary is not a legislative body. Therefore, the Court cannot pick human activities and label them as fundamental rights in order to afford them additional protection.<sup>20</sup> The Court proclaimed its duty was only to recognize already established constitutional rights.<sup>21</sup> The plaintiffs argued that education is connected to other constitutional rights, such as the right to free speech and the right to vote, and in turn, that it should fall under the penumbra of constitutional protection.<sup>22</sup> Despite this argument, the Court held that there was no explicit or implicit protection for education in the Constitution.<sup>23</sup>

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11. 411 U.S. 1 (1973).

12. *Id.* at 6–7.

13. *Id.* at 11–17.

14. *Id.* at 12–14.

15. *Id.*

16. *Id.* at 22.

17. *Rodriguez*, 411 U.S. at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

18. *Id.* at 30.

19. *Id.*

20. *Id.* at 31.

21. *Id.*

22. *Id.* at 35.

23. *Rodriguez*, 411 U.S. at 35.

Following precedent, the Court also ruled that only complete deprivation of education implicates constitutional protection and triggers the Court to rule on education and indigence.<sup>24</sup> Here, the lack of funding for a certain school district, regardless of the dominance of certain races or wealth, “has not occasioned an absolute deprivation of the desired benefit.”<sup>25</sup> Furthermore, the Court reasoned that “the Equal Protection Clause does not require absolute equality or precisely equal advantages” in education.<sup>26</sup> Thus, the Court does not require equal education for students under the Equal Protection Clause, but instead the Court held that an adequate education will suffice.

According to the Court, Texas provided its students with an adequate education by offering twelve years of free education, books, teachers, and transportation.<sup>27</sup> Therefore, the Court found that education is not protected under the Fourteenth Amendment for those who live in districts with less taxable property wealth, and the Constitution only requires that all students receive an adequate education—not an equal education.<sup>28</sup>

*B. Committee for Educational Rights v. Edgar: Judicial Activism in Interpreting an Adequate Education*

In *Committee for Educational Rights v. Edgar*, public school funding was allocated from property taxes and “various federal, state and local sources.”<sup>29</sup> Under Illinois’s “financing scheme, vast differences in educational resources and opportunities exist[ed] among the State’s school districts.”<sup>30</sup> The plaintiffs claimed that the disparities in funding and resources meant that children living in districts with lower property wealth received inadequate educations in comparison to students living in districts with higher property wealth.<sup>31</sup> The plaintiffs requested a declaratory judgment, namely that the Governor and the state superintendent violated the state constitution by providing stu-

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24. *Id.* at 23–24. In its reasoning, the Court looked to precedent to show that heightened scrutiny is required where “because of their impecunity [individuals] were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.” *Id.* at 21. Specifically, the Court in its analysis cited to the following cases: *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Illinois*, 399 U.S. 235 (1970); and *Bullock v. Carter*, 405 U.S. 134 (1972). *Id.* at 21–23.

25. *Id.* at 23.

26. *Id.* at 24.

27. *Id.*

28. *Id.* at 23–24, 28.

29. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1181 (Ill. 1996).

30. *Id.* at 1182.

31. *Id.*

dents with a low-quality education due to the public school funding scheme.<sup>32</sup>

The defendants asserted that adequacy in educational funding and opportunity is analogous to equality in funding and opportunity and that a district's property wealth should be "educationally irrelevant" as a consideration for the amount of resources granted.<sup>33</sup> The plaintiffs rebutted that if a district's property wealth is high, then the amount of taxes used to support the school district will be high.<sup>34</sup> Therefore, students in a district with higher property taxes will receive more funding. The more funding a district receives, the greater the number of teachers with master's degrees and more teaching experience the district can hire because the district can afford to offer higher salaries.<sup>35</sup> The increase in school funding would add extra value because it would allow these districts to offer broader course offerings.<sup>36</sup>

However, the court ruled that adequacy should be defined in terms of "various specific substantive educational goals" rather than based on the amount of money districts receive in comparison to one another.<sup>37</sup> Plaintiffs argued that funding should provide a minimum level of education to equip students so that they become good citizens and competitors in the labor market.<sup>38</sup> The court reasoned that it did not matter that some schools exceeded efficiency and some did not.<sup>39</sup> The framers of the funding policy were aware of the disparities at the time they were produced by the local property tax funding system.<sup>40</sup> Despite this, the court still felt that this funding system would be enough to provide an adequate education. Therefore, the court ruled that efficiency had been established and no violation occurred.<sup>41</sup> The court

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32. *Id.*

33. *Id.* at 1184. The term "efficiency" is used in *Edgar* to describe the state constitution educational standard, and this term is analogous to the term "adequacy" that is used throughout this Note—meaning less than an equal education.

34. *See id.* at 1181 ("Obviously, the amount which a school district is able to raise through property taxes is determined by the taxable property wealth within the district. Wealthy districts—those with substantial taxable property wealth per pupil—are able to raise more revenue per pupil at a given tax rate than poor districts."); *id.* at 1182 ("During the 1989–90 school year, the average tax base in the wealthiest 10% of elementary schools was over 13 times the average tax base in the poorest 10%. For high school and unit school districts, the ratios of the average tax bases in the wealthiest and poorest districts were 8.1 to 1 and 7 to 1, respectively, during the 1989–90 school year.").

35. *Edgar*, 672 N.E.2d at 1182.

36. *Id.*

37. *Id.* at 1188.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Edgar*, 672 N.E.2d at 1188.

reasoned that this “efficiency” standard would stand because the Illinois Constitution required an efficient education, not an equal one.<sup>42</sup>

Also in *Edgar*, the court held that “[w]hat constitutes a ‘high quality’ education, and how it may best be provided cannot be ascertained by any judicially discoverable or manageable standards.”<sup>43</sup> It instead reasoned that educational quality is a policy which involves “philosophical and practical considerations” that should be reasoned through and analyzed by legislators at their discretion.<sup>44</sup> The court decided that it should take “an exceedingly limited role in matters relating to public education, recognizing that educational policy is almost exclusively within the province of the legislative branch.”<sup>45</sup> Therefore, the court held that it would not “under the guise of constitutional interpretation, presume to lay down guidelines or ultimatums for [the legislature]” in regard to public school funding.<sup>46</sup> This decision to refrain from judicial activism in educational litigation is an essential factor in the stagnancy of public school funding litigation that is still seen today.

### C. *Swan v. Board of Education of the City of Chicago: Disparate Impact*

In *Rauner*, the court followed the Title VI of the Civil Rights Act disparate impact analysis that requires the plaintiff to show a *prima facie* case of discrimination by a preponderance of the evidence, including an adverse harm and a specific policy that created the adverse harm.<sup>47</sup> Like the Title VII analysis, under Title VI the burden of proving a *prima facie* case of discrimination is not onerous. The defendant may rebut it by simply producing some evidence that it had a legitimate, nondiscriminatory reason for adopting the specific policy that caused the disparate impact.<sup>48</sup> Once the disparate impact has been es-

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42. *Id.* at 1187 (“[T]he framers of the 1970 Constitution viewed educational equality and ‘efficiency’ to be separate and distinct subjects. . . . To ignore this careful and deliberate choice by interpreting the efficiency requirement as an enforceable guarantee of equality would do violence to the framers’ understanding of the education article.”).

43. *Id.* at 1191.

44. *Id.*

45. *Id.* at 1189.

46. *Id.* at 1192 (quoting *Seattle Sch. Dist. v. Washington*, 585 P.2d 71, 128 (Wash. 1978)).

47. See *Title VI Legal Manual: Section VII: Proving Discrimination – Disparate Impact*, U.S. DEP’T OF JUSTICE 11, <https://www.justice.gov/crt/case-document/file/923556/download> (last visited Apr. 8, 2019) [hereinafter *Title VI Legal Manual*]; see also *Bd. of Educ. v. Rauner*, No. 2017 CH 2157, 2017 WL 2407356, at \*29–32 (Ill. Cir. Ct. 2017) (describing how the Illinois Civil Rights Act (ICRA) is the state codification of Title VI of the Civil Rights Act of 1964 and that a private right of action can be brought under ICRA based upon a disparate impact).

48. *Farrell v. Butler Univ.*, 421 F.3d 609, 613 (7th Cir. 2005).

tablished by the plaintiff, the defendant must articulate a substantial, legitimate justification for the policy.<sup>49</sup> This is similar to the business necessity reasoning required in the Title VII analysis, but it differs because of the broader practices under Title VI.<sup>50</sup> Once a justification is identified, the burden then shifts back to the plaintiff to determine whether there were less discriminatory alternatives available for the defendant.<sup>51</sup> The burden of persuasion remains with the plaintiff throughout this analysis.<sup>52</sup>

In *Swan v. Board of Education of the City of Chicago*, the plaintiffs filed a claim under the Illinois Civil Rights Act (ICRA) stating that the city's closure of forty-nine elementary schools in an effort to address reduced student enrollment, decreased revenues, and increased operating costs was discrimination.<sup>53</sup> The plaintiffs claimed that the harms of the school closures are felt disproportionately by Black students and sought a preliminary injunction to prevent the schools from closing.<sup>54</sup> The moving party must satisfy three requirements to meet the threshold for a preliminary injunction.<sup>55</sup> Under this test, "[i]f the party cannot show each of these threshold requirements, the preliminary injunction must be denied."<sup>56</sup> Here, the court held that the plaintiffs failed to prove the third requirement for a preliminary injunction because they failed to establish that the disparate impact claim would have a likelihood of success on the merits.<sup>57</sup>

### 1. *Disparate Impact*

To prove a disparate impact under ICRA, the "[p]laintiffs are responsible for 'isolating and identifying the specific . . . practices that are allegedly responsible for any observed statistical disparities.'"<sup>58</sup> The plaintiffs must establish causation by presenting statistical evidence sufficient to show that the policy or practice at issue is the cause of the plaintiff's exclusion because of their membership in a protected

49. *Title VI Legal Manual*, *supra* note 47, at 32.

50. *Id.* at 33.

51. *Id.* at 40.

52. *Id.*

53. *Swan v. Bd. of Educ.*, No. 13 C 3623, 2013 WL 4401439, at \*1 (N.D. Ill. Aug. 15, 2013); 740 Ill. Comp. Stat. 23/5 (2010).

54. *Swan*, 2013 WL 4401439, at \*1, 11.

55. *Id.* ("First, the party must show that it will suffer irreparable harm without the injunction. Second, that the traditional legal remedies would be inadequate. And third, that its claim has a likelihood of success on the merits.")

56. *Id.*

57. *Id.* at \*27.

58. *Id.* at \*19 (quoting *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 717 (7th Cir. 2012)).

group.<sup>59</sup> If the plaintiffs meet this initial hurdle, then the burden shifts to the defendants “to show a legitimate, nondiscriminatory reason for [their] actions.”<sup>60</sup> Finally, if the defendants can justify their actions, the burden shifts back to the plaintiffs to “prove the existence of an ‘equally valid and less discriminatory practice’ that [d]efendants refused to use.”<sup>61</sup>

#### i. Discriminatory Policy

The *Swan* plaintiffs argued that the defendant Board’s decision to close schools based on underutilization led to disproportionately closing schools with predominantly Black student bodies.<sup>62</sup> The city felt that the buildings and schools were being underutilized because CPS enrolled only 430,000 students despite the 510,000 available seats.<sup>63</sup> The Board defined the utilization rate by dividing a given school’s total enrollment figure as of the twentieth day of the school year by the given school’s “ideal capacity.”<sup>64</sup> Further, to find the school’s “ideal capacity,” the first step is to calculate a school’s number of “allotted homerooms.”<sup>65</sup> For this first step, CPS multiplied the number of classrooms by 76%.<sup>66</sup> For the second step, CPS then multiplies the “allotted homerooms” figure by thirty, resulting in the school’s “ideal capacity.”<sup>67</sup> If a school’s utilization rate was less than 80%, then it was considered “underutilized,” and if the rate was between 80%–120%, then the school was considered “efficient.”<sup>68</sup> To support their claim of a disparate impact, the plaintiffs provided that 87% of the students in the closed schools were Black, while CPS’s total student population was 40.5% Black.<sup>69</sup> The court held that this statistic was insufficient to establish causation.<sup>70</sup>

The court reasoned that the statistic proffered by the plaintiffs did not support their theory of a disparate impact because “the process of winnowing down the list of 330 underutilized schools to the 49 schools

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59. *Id.*

60. *Swan*, 2013 WL 4401439, at \*19.

61. *Id.*

62. *Id.*

63. *Id.* at \*2.

64. *Id.* at \*3.

65. *Id.*

66. *Swan*, 2013 WL 4401439, at \*3 (“Seventy-six percent represents the percentage of all classrooms used as ‘homerooms’ in a prototype school . . .”).

67. *Id.* Thirty is “the number of students in what the Board believed was an efficiently-utilized classroom.” *Id.*

68. *Id.*

69. *Id.* at \*19.

70. *Id.* at \*20.

at issue,” was based on other factors unrelated to utilization.<sup>71</sup> This process included insulating high schools and Level 1 schools from closure and adopting guiding principles such as: “maintaining higher quality facilities with a lower cost to maintain, and avoiding the creation of areas with no neighborhood schools due to distance or other geographic boundaries, which further decreased the number of schools eligible for closure.”<sup>72</sup> The court stressed that because of these other principles used to determine closures, the plaintiffs have not established that the underutilization criteria was the cause of the racial imbalance.<sup>73</sup> The court further reasoned that the plaintiffs failed to prove a racial imbalance between the list of schools that could possibly be closed, and the list of schools ultimately chosen to be closed.<sup>74</sup> Also, the evidence alleging that Black students make up 40.5% of the students in CPS was skewed because this percentage included high schools and charter schools, while the school closings covered only elementary and middle schools.<sup>75</sup> Therefore, the court held that the underutilization criteria was a generalized policy and not specifically sufficient to prove a disparate impact.<sup>76</sup>

## ii. Actionable Harm

The plaintiffs must also prove that there was an actionable harm to succeed on an ICRA claim.<sup>77</sup> The court, however, ruled that the plaintiff’s evidence was insufficient to establish that Black students suffered an actionable harm from the school closures because the common occurrence of simply closing a school did not constitute an actionable harm.<sup>78</sup> The court generalized that while forcing children to change schools may be traumatic, it is not a recognized injury the law can remedy.<sup>79</sup> There was also overwhelming evidence that students may actually gain academic benefits from the school closures, including the plaintiff’s expert testimony and two studies showing that school clo-

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71. *Id.*

72. *Swan*, 2013 WL 4401439, at \*20.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at \*21.

78. *Swan*, 2013 WL 4401439, at \*21.

79. *Id.* To make its point, the court cites the Eastern District of New York in *Incantulupo v. Lawrence Union Free School District No. 15*, in which that court stated: “Unquestionably, any plan that forces children to change schools may be dramatic for children and parents alike. . . . But this Court cannot enjoin conduct unless that harm is a ‘cognizable injury’ that the law protects against. . . .” 652 F. Supp. 2d 314, 329 (E.D.N.Y. 2009); *see also Swan*, 2013 WL 4401439, at \*21.

asures did not enjoin students with any long-term effects regarding academic achievement.<sup>80</sup>

### iii. Legitimate, Nondiscriminatory Reason

If an actionable harm has been established, then the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason by a preponderance of evidence—here, the defendants succeeded in articulating a legitimate, nondiscriminatory reason.<sup>81</sup> The defendants’ legitimate, nondiscriminatory reason for the school closures was the underutilization of school buildings that was a result of declining enrollment and a \$1 billion structural deficit.<sup>82</sup> By closing these underutilized buildings, the defendants rationalized that they could divert the resources being used to maintain those buildings to benefit students directly instead.<sup>83</sup> The Board estimated “that the school closings will save between \$40 and \$43 million annually in operating costs and \$438 million over the next ten years.”<sup>84</sup> The plaintiffs challenged these amounts stating that the defendants erred in calculating certain funds and that the numbers were unrealistic.<sup>85</sup> However, the court found that regardless of whether the amount of money saved was minimal or not, reallocating resources into efficiently utilized buildings to benefit students is a legitimate, nondiscriminatory reason.<sup>86</sup>

### iv. Equally Valid, Less Discriminatory Alternative

The plaintiffs also failed to establish a less discriminatory alternative channel the defendants could have utilized to accomplish their legitimate, nondiscriminatory goal.<sup>87</sup> Courts typically decide if the proffered alternative is valid by evaluating the burdens that are produced from its execution.<sup>88</sup> The court viewed the plaintiffs’ argument that maintaining the status quo is a better alternative as unpersuasive because it does not remedy the harm of wasting resources on an underutilized building.<sup>89</sup> This is an issue because several witnesses testified that these funds could be reallocated to support other educational

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80. *Swan*, 2013 WL 4401439, at \*21–22.

81. *Id.* at \*19, \*24.

82. *Id.* at \*24.

83. *Id.*

84. *Id.*

85. *Id.* at \*25.

86. *Swan*, 2013 WL 4401439, at \*25. The legitimate nondiscriminatory reason is only a burden of production, not a burden of persuasion. *Id.* at \*19.

87. *Id.* at \*25.

88. *Id.*

89. *Id.* at \*26.

goals such as financing enough teachers to support a teacher for each grade.<sup>90</sup> Without this support, a single teacher would be forced to teach two different curriculums, “dividing the teacher’s attention and depriving students of grade-level instruction and full teacher interaction.”<sup>91</sup>

The court also rejected the plaintiffs’ argument that the Board should have simply moved the surplus students into the underutilized buildings.<sup>92</sup> This alternative was not feasible because the underutilized schools and overcrowded schools were an unreasonable distance from each other.<sup>93</sup> CPS operates under the requirement “that students should not be required to travel more than a mile to their neighborhood school.”<sup>94</sup> The plaintiffs failed to prove that there was any pretext present.<sup>95</sup>

The plaintiffs failed to prove the four elements for disparate impact under ICRA, and therefore, the court found that the plaintiffs were not likely to succeed on their disparate impact claim and did not fulfill the requirements for a preliminary injunction. The analysis of the disparate impact claim in *Swan* is the same standard applied in the analysis used in the *Board of Education v. Rauner* case.

### III. SUBJECT OPINION: *BOARD OF EDUCATION V. RAUNER*

In *Board of Education v. Rauner*, the court considered whether the State’s funding for public education, which included the pension fund requirements, had a disparate impact on CPS and its students.<sup>96</sup> This Note focuses on the Pension Fund Code in *Rauner*. Sections 16 and 17 of the Illinois Pension Code provide that the State must fund teacher retirement systems (TRS) if the district’s population is under 500,000.<sup>97</sup> Therefore, the Board of Education of the City of Chicago must fund the teacher pensions for all teachers in Chicago pursuant to Section 17 of the Illinois Pension Fund.<sup>98</sup> CPS is the only school dis-

90. *Id.*

91. *Id.*

92. *Swan*, 2013 WL 4401439, at \*26.

93. *Id.*

94. *Id.*

95. *Id.* at \*27.

96. No. 2017 CH 2157, 2017 WL 2407356, at \*2 (Ill. Cir. Ct. 2017).

97. *Id.* at \*2; 40 ILL. COMP. STAT. 5/16-158 (2013 & Supp. 2018); 40 ILL. COMP. STAT. 5/16-102 (2013 & Supp. 2018) (“This Article shall not apply to cities and school districts of more than 500,000 population as shown by the last preceding Federal census.”).

98. *Rauner*, 2017 WL 2407356, at \*2 (“The ultimate responsibility for funding a public school teacher pension fund governed by article 17 is the board of education for the city in which the fund is maintained and operated.”); 40 ILL. COMP. STAT. 5/17-129 (2013).

trict in Illinois that must fund its own teacher pensions, ultimately depleting the district’s budget, leaving CPS in a huge financial deficit.<sup>99</sup>

The plaintiffs alleged that, “CPS anticipate[d] that it will spend \$1,891 per student of [the Chicago Teachers Pension Fund], while the State will have contributed \$32 per student” in contrast to other districts which “are spending \$86 per student on TRS pensions, while the State is spending \$2,437 per student.”<sup>100</sup> CPS is made up of predominantly Black and Hispanic students, while only 4% of the State’s white children in public schools attend a CPS school.<sup>101</sup> CPS was in such dire need that the Illinois House of Representatives recommended a bill to include \$215 million to help with the teacher pension payments.<sup>102</sup> However, Governor Rauner vetoed the bill on December 1, 2016.<sup>103</sup>

The plaintiffs brought this action asserting that the public school funding, specifically the unequal allocation of funding for the teacher pension funds, had a disparate impact on students in CPS.<sup>104</sup> This discrepancy “reduce[d] the amount of resources available to CPS for educational purposes,” which lowered the educational value of CPS students.<sup>105</sup> The plaintiffs requested a declaration that the State’s funding scheme, as a result incidental to the allocation of pension funds, violated ICRA.<sup>106</sup> They also sought an injunction against the defendants to halt the distribution of state funds.<sup>107</sup> The court granted the defendants’ motion to dismiss, mainly because of the defendants’ assertion that the plaintiffs “fail[ed] to identify the alleged ‘discriminatory practices’ and fail[ed] to link their allegation to any program or activity.”<sup>108</sup> The court also ruled that “the plaintiffs [did] not connect the allegation to criteria or methods of administration.”<sup>109</sup> Therefore, the court held that the plaintiffs were not likely to succeed on the

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99. *Rauner*, 2017 WL 2407356, at \*3.

100. *Id.*

101. *Id.* at \*2 (“Approximately 90% of CPS students are children of color, while 10% of students are white. . . . Among public school students in Illinois, an African American child is approximately 11 times more likely than a white child to attend CPS, and a Hispanic child is 9 times more likely than a white child to attend CPS.”).

102. *Id.* at \*3 (“On June 30, 2016, the Illinois House amended Senate Bill 2822 to include additional State contribution of \$215 million dollars to assist CPS to meet its required Fiscal Year 2017 teacher pension payment of \$721 million.”).

103. *Id.*

104. *Id.* at \*14.

105. *Rauner*, 2017 WL 2407356, at \*14.

106. *Id.* at \*4.

107. *Id.*

108. *Id.* at \*36.

109. *Id.*

merits of their claims, thus not satisfying the requirements for a preliminary injunction.<sup>110</sup>

The plaintiffs brought a disparate impact claim challenging the allocation of the teacher pension funding policy as having a “disproportionately adverse effect on minorities” and claiming there was no legitimate reason for the State to implement it.<sup>111</sup> “Section 5(a)(2) of ICRA prohibits any unit of government in the State of Illinois from utilizing any criteria or method of administration in any program or activity that has the effect of subjecting individuals to discrimination on the basis of their race, color, national, origin, or gender.”<sup>112</sup> ICRA was enacted to provide individuals “claims based on a disparate impact theory of liability.”<sup>113</sup> ICRA is analogous to the Civil Rights Act of 1964 and thus is interpreted in a similar manner.<sup>114</sup> Federal courts deciding cases litigated under the Civil Rights Act of 1964 use a three-step analysis for discrimination claims under the disparate impact theory.<sup>115</sup> First, the plaintiff must establish that “a facially neutral policy ha[d] a significant adverse impact on members of a protected minority group.”<sup>116</sup> Next, the defendant must show that the practice “had [a] ‘manifest relationship’ to a legitimate, nondiscriminatory policy objective and was necessary to the attainment of that objective.”<sup>117</sup> Finally, if the defendant satisfies that criteria, the plaintiff must show that there is an alternative means to achieve that same objective without discriminatory effects.<sup>118</sup> However, the court did not get that far in its analysis.

The plaintiffs argued that the public funding and teacher pension funding had a “‘disproportionately adverse effect on minorities’ and are otherwise unjustified to a legitimate rationale.”<sup>119</sup> The defendants rebutted that the plaintiffs did not identify a specific criteria or method, and the plaintiffs solely made a conclusory allegation of discrimination and instead relied on a bottom-line theory of disparate impact.<sup>120</sup> The plaintiffs responded by characterizing the “practice of

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110. *Id.* at \*36.

111. *Rauner*, 2017 WL 2407356, at \*32 (quoting *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015)).

112. *Id.*; see also 740 ILL. COMP. STAT. 23/5(a)(2) (2010).

113. *Rauner*, 2017 WL 2407356, at \*31.

114. *Id.* at \*32.

115. *Id.*

116. *Id.* (quoting *Gallagher v. Magner*, 619 F.3d 823, 833 (8th Cir. 2010)).

117. *Id.* (quoting *Gallagher*, 619 F.3d at 833).

118. *Id.*

119. *Rauner*, 2017 WL 2407356, at \*32 (quoting *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015)).

120. *Id.* at \*33.

appropriating 99.7% of the State’s teacher pension contributions to TRS, while directing 0.3% of those contributions” to the Chicago Teachers’ Pension Fund as the “method” that created a discriminatory impact.<sup>121</sup> The plaintiffs bolstered their argument that the State’s funding scheme violated Section 5(a)(2) of ICRA when determining that CPS receives approximately 15% of the funding, while serving 20% of the State’s students.<sup>122</sup> The court, however, differentiated between the state financial aid that is pursuant to the School Code and contributions to the public school teacher pensions that are pursuant to the Pension Code.<sup>123</sup> They determined that there was no “specific, overarching criteria or methods of administering the various sources of funding public schools and public school teacher pensions that have a disparate impact prohibited by ICRA;” it was simply the Pension Code and School Code that imposed discriminatory obligations on CPS.<sup>124</sup> Accordingly, the plaintiffs did not allege in the complaint that “the [d]efendants administer[ed] the School Code’s general state aid through criteria or methods that result[ed] in a disparate impact,” but instead only that the School Code itself created a disparate impact.<sup>125</sup>

Here, the case was dismissed on the grounds that under ICRA, the general state funding and pension funding does not constitute a specific method or administration that caused disparate effects.<sup>126</sup> The court admitted that, “To say that the State’s current scheme of funding public education is broken is to state the obvious. Plaintiffs’ Complaint, however, as constituted is not the vehicle to redress this inequity.”<sup>127</sup>

#### IV. ANALYSIS

A *broken* system of funding public education, however, has had abhorrent effects on minority children in Chicago. In analyzing how to create an equal public school funding system, this Part evaluates the ideologies and obstacles that have allowed the past discriminatory practices to manifest. Therefore, this Part emphasizes the issues with an adequate education being the standard in public school funding litigation. Second, this Part analyzes the importance of judicial activism in public school funding litigation. Third, this Part reassesses the

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121. *Id.* at \*29.

122. *Id.* at \*33.

123. *Id.* at \*33–34.

124. *Id.* at \*33.

125. *Rauner*, 2017 WL 2407356, at \*34.

126. *Id.*

127. *Id.* at \*38.

disparate impact standard in *Rauner* in accordance with *Swan*. Finally, after these major hurdles are discussed, this Part advocates for the alteration of the disparate impact standard in public school funding litigation because it effects a vulnerable societal group. The courts should emphasize the starkness of the impact created as a result of the funding scheme when evaluating all public school funding litigation by creating a balancing test instead. This change in the analysis will help remedy the discrimination that has survived under the current procedure for public school funding litigation.

### A. *The Inefficiencies of Adequacy*

There has been much debate, but little change, about whether *adequacy* of education is a proper benchmark in regard to public school funding.<sup>128</sup> Similar to the Illinois school funding system supported by *Rauner*, as discussed above, “adequacy” is developed in every state constitution because states only require an education to be free, liberal, efficient, or thorough.<sup>129</sup> “Adequacy” means that “all children have access to a certain threshold of educational opportunities.”<sup>130</sup> “Equality,” by contrast, is where “all children have equal educational opportunities.”<sup>131</sup> The idea of adequacy is severely criticized because it is inherently ambiguous.<sup>132</sup> It also maintains a cavalier disregard to the inequalities that occur once the threshold is attained—inequalities that “exacerbate the positional advantage” of students in more affluent school districts.<sup>133</sup> Adequacy as a legal standard for education enables privileged groups to segregate themselves from those less privileged.<sup>134</sup>

The standard of adequacy originates from the positive thesis of the sufficiency doctrine, which “stresses the importance of people living above a certain threshold.”<sup>135</sup> Many do not find it objectionable for parents and school districts to decide to spend more money on their

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128. See generally Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014).

129. *Id.* at 517 (“The language of these one-dormant education clauses vary. Some require simply a ‘free’ or ‘liberal’ school system; others demand an education that is ‘general,’ ‘uniform,’ ‘thorough,’ ‘efficient,’ or some permutation thereof . . . .” (quoting Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 289 n.20 (2007))).

130. *Id.* at 478.

131. *Id.*

132. *Id.* at 482.

133. *Id.* (quoting Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351, 368 (2011)).

134. Weishart, *supra* note 128, at 515–16.

135. Paula Casal, *Why Sufficiency Is Not Enough*, 117 ETHICS 296, 297–98 (2007).

own children’s education, provided that the threshold is met for all children.<sup>136</sup> However, this is highly unfair because it creates an achievement gap, especially in regard to higher education.<sup>137</sup> The selection process in our country is founded on the idea that an applicant will be competitive only if the educational attainment is equivalent to or greater than that of her peers.<sup>138</sup> But getting “enough” is not fair if others are getting more opportunities and are able to protect and enhance their advantage among the competition and in society as time continues.<sup>139</sup> In *Rodriguez*, Justice Marshall dissented stating that, “it is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning.”<sup>140</sup> A child forced to attend an underfunded school will endure bad facilities, less experienced teachers, and a narrower course offering.<sup>141</sup> Justice Marshall proclaimed that “this Court has never suggested that because some ‘adequate’ level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable.”<sup>142</sup> Some argue that this sort of injustice can be combated by affirmative action programs.<sup>143</sup> Colleges should discount those who had an advantage in their previous education, thereby evening the stakes between the affluent and non-affluent school districts.<sup>144</sup> American history, however, has not proven the willingness of the privileged to put their education needs second to help the disadvantaged group.<sup>145</sup> Therefore, the public school funding cases

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136. See Elizabeth Anderson, *Rethinking Equality of Opportunity: Comment on Adam Swift’s How Not to Be a Hypocrite*, 2 THEORY & RES. EDUC. 99, 103–07 (2004). Anderson ultimately rejects Adam Swift’s notion that two people with “equal underlying potential should have their talents and motivations developed to the same degree” regardless of parental resources. *Id.* at 104. She supports the idea that students do not need equal opportunities; rather, they just need enough opportunities. *Id.* at 105–06.

137. Weishart, *supra* note 128, at 522 n.242 (“[T]here is some evidence to support the positional nature of education. For instance, students from private schools or wealthy school districts hold an advantage over students from low-income families and poorly financed public schools in the competition for admission to selective universities and graduate schools.” (internal citation omitted)).

138. *Id.* at 522.

139. *Id.*

140. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 83–84 (1973) (Marshall, J., dissenting).

141. *Id.* at 84.

142. *Id.* at 89.

143. Weishart, *supra* note 128, at 523.

144. *Id.*

145. A theory by Derrick Bell indicates that in America, civil rights are not typically altered unless it is in the interest of the privileged. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 513, 523–26 (1980). The interest convergence theory posits that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of white[ elites].” *Id.* at 523. The argument is that

that have relied on this sort of adequate education standard must be reevaluated, as should *Rauner*. The disparate impact theory of liability only requires the showing of a “disproportionate adverse effect on minorities” that is “otherwise unjustified to a legitimate rationale” to prove discrimination.<sup>146</sup> However, the disparate impact analysis places the burden of persuasion on the plaintiff instead of the defendant, enabling this crippling ideology of an adequate education to prosper.<sup>147</sup> In *Rauner*, the court required a specific method of administration that was discriminatory instead of the broad underpinnings of the public funding allocation that indicated a low-quality education, ultimately causing a poverty-stricken cycle.<sup>148</sup> This is because the court relied upon the idea of an adequate education for all, not an equal education for all.

### B. *The Importance of Judicial Activism Public School Funding Litigation*

When the legislature missteps, it is the court’s responsibility to step in. An intense debate about judicial activism in education began with the decision in *Brown v. Board of Education* because it substantially affected public policy.<sup>149</sup> Federal courts have promoted institutional reform in schools regarding race, gender, and special education,<sup>150</sup> yet continue to allow states to fail in finding a solution for public school funding. In reality, judicial activism in state reform is necessary to enforce rights.<sup>151</sup> Also, education is critical to the exercise of fundamental rights because it gives everyone “the ability to effectively petition the government for redress of grievances” that have been imposed on

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it was only due to white interests coincidentally colliding with racial equality measures that broke the Court’s long-held position on these issues in *Brown v. Board of Education*. *Id.* at 524. White elites had three interests in ending segregation: (1) it would provide credibility to America against communist factions to win the hearts of third world people, who were mostly people of color at the time when the United States was fighting in the Cold War to stop the spread of communism; (2) the decision would offer reassurance to Black soldiers that when they returned from World War II, they would not continue to face discrimination; and (3) the realization of some whites that transitioning from a rural, segregated South to a more profitable, desegregated South that could tap into the potential of industrialization. *Id.* at 523–25.

146. *Bd. of Educ. v. Rauner*, No. 2017 CH 2157, 2017 WL 2407356, at \*32 (Ill. Cir. Ct. 2017) (quoting *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015)).

147. *Id.* (explaining that the plaintiff bears the initial burden to establish a *prima facie* case under a disparate impact theory of liability).

148. *Id.* at \*33.

149. Michael A. Rebell, “*Judicial Activism*” and *Public Policy*, 50 *JUDGES’ J.* 9, 9 (2011).

150. *Id.*

151. *Id.* at 10.

their rights.<sup>152</sup> Some argue that all policy decisions should be determined by the legislature because of the political process it is founded upon.<sup>153</sup> However, courts have always delved into complicated issues, and the election of judges and their appointments do not render them without any political experience in attaining what is needed for their constituents.<sup>154</sup> In fact, studies show that judicial involvement in remedying education issues is “both less intrusive and more competent than generally assumed.”<sup>155</sup> It seems that the legislature wants the courts to take on more policy-making responsibility. This is evidenced by the legislature’s continued creation of broad statutes that can be widely interpreted, especially in regard to education and funding, as seen in *Rauner*.<sup>156</sup> The Illinois Civil Rights Act reads that:

No unit of the State, county, or local government in Illinois shall . . . exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person’s race, color, national origin, or gender . . . .<sup>157</sup>

The Act, however, does not define “program” or “activity.”<sup>158</sup> The allocation of education funding by way of property taxes should constitute an “activity.” Also, the policy that assigns CPS the responsibility of funding teacher pensions should be considered a “program” that falls under the statute. However, the *Rauner* court ruled that the above did not qualify as “specific criteria or method of administering,” but the court refrained from defining these statutory terms.<sup>159</sup> This ambiguous language is precisely why a judicial remedy is necessary. Instead, the only reason given in the opinion was built around rebutting any argument that the specific methods or programs were used to discriminate.<sup>160</sup> Therefore, judicial activism in public school funding litigation is essential to promulgating equality in education.

### C. *Disparate Impact and Perpetuating an “Adequate” Education*

The *Swan* case is analogous to the *Rauner* case in its application of the disparate impact scrutiny. In fact, the *Rauner* case cited the *Swan*

152. Watson, *supra* note 3, at 402–03.

153. Rebell, *supra* note 149, at 10.

154. *Id.*

155. *Id.*

156. See, e.g., *id.* at 11 (noting “the legislative trend toward creating new statutory rights that expand the enforcement responsibility of the courts”).

157. 740 ILL. COMP. STAT. 23/5 (2010).

158. *Id.*

159. *Rauner*, 2017 WL 2407356, at \*33–36.

160. *Id.* at \*36.

case in numerous occasions but did not apply it correctly.<sup>161</sup> Similar to *Swan*, the *Rauner* plaintiffs were seeking a preliminary injunction.<sup>162</sup> The *Rauner* and *Swan* courts both failed to find a likelihood that the districts' funding created a disparate impact under ICRA.<sup>163</sup>

### 1. Discrimination Policy

Under Title VI, to prove an adverse disparate impact, the plaintiff must identify a discriminatory policy or practice that resulted in a disparate harm to those in a protected class.<sup>164</sup> In *Swan*, the court concluded that school closures disproportionately affecting Black majority schools did not show that the Board's underutilization calculation caused any disparate impact.<sup>165</sup> It stressed that this statistic was insufficient to prove a disparate impact because the underutilization method was a generalized policy and numerous other criteria were used to decide which schools to close.<sup>166</sup> This is distinguishable from *Rauner* because the plaintiffs there alleged that the allocation in the Pension Code was more than just a general policy.<sup>167</sup> Under the Pension Code, the State provides funding for teacher retirement systems only if the district's population is under 500,000.<sup>168</sup> Therefore, CPS has to fund its own teacher pensions and is the only district in Illinois that must divert a portion of its budget to teacher pensions.<sup>169</sup> This is a specific criterion used because there is no other criteria except population as stated in the statute. The Pension Code and School Code only allow the State to fund teacher pension funds for cities with a population over 500,000, but it is not required. Therefore, the State's specific method that is causing a disparate impact is its choice to appropriate 99.7% of pension funds to every other district, while only supplying 0.3% to CPS's pension funds.<sup>170</sup>

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161. *Id.* at \*29.

162. *Id.* at \*6. There are three requirements to a preliminary injunction: (1) the plaintiffs must show that it will suffer irreparable harm without the injunction, (2) that the traditional legal remedies would be inadequate, and (3) that its claim has some likelihood of succeeding on the merits. *Id.*

163. See generally *id.*; *Swan v. Bd. of Educ.*, No. 13 C 3623, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013).

164. *Title VI Legal Manual*, *supra* note 47, at 11.

165. See *Swan*, 2013 WL 4401439, at \*19 ("Plaintiffs offer a single statistic: African-American students make up 87% of the students in the closing schools, but only 40.5% of the students in CPS as a whole.").

166. See *id.* at \*20.

167. See *Rauner*, 2017 WL 2407356, at \*29.

168. See *id.* at \*2.

169. See *id.* at \*3.

170. See *id.* at \*29.

The *Swan* court also reasoned that the plaintiffs failed to show a statistical imbalance between the racial composition of the schools eligible for closure and those actually chosen for closure.<sup>171</sup> In contrast, the *Rauner* plaintiffs clearly alleged a statistical imbalance between the number of districts that receive funding for their teacher pensions and those that do not.<sup>172</sup> The school districts with a majority non-minority population have pensions funded by the State. However, CPS, which has a large Black population and only 10% white students, does not receive funding from the State and mostly uses its own budget for teacher pensions.<sup>173</sup> The State contributes \$2,437 per student to teacher pension funds in Illinois school districts outside of CPS, in comparison to only contributing \$32 per student to the CPS teacher pension fund, thus this criteria has created a disparate impact.<sup>174</sup> In *Rauner*, the court stopped its analysis of disparate impact here, finding that there was no specific method the defendants employed, and therefore, the disparate impact claim was not feasible.<sup>175</sup> However, as shown, there *was* a specific method, therefore this Note will continue to evaluate the pension fund allocation policy under the disparate impact analysis, as the court should have.

## 2. Actionable Harm

The plaintiffs must next prove that there was an actionable harm to succeed on an ICRA claim.<sup>176</sup> An actionable harm is sufficiently established when the court can determine that the “nature, size, or likelihood of the impact” is sufficient to be considered adverse or harmful.<sup>177</sup> In *Swan*, the court held that school closures themselves were not an actionable harm.<sup>178</sup> The Board closed the schools to better utilize the resources to help create better schools and better educational systems, and therefore, the court reasoned that the school closures were an academic benefit and not detrimental or harmful to the students.<sup>179</sup> The court defined an actionable harm as “a ‘cogniza-

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171. See *Swan*, 2013 WL 4401439, at \*20.

172. *Rauner*, 2017 WL 2407356, at \*29 (“[In] *Swan*, . . . Plaintiffs w[ere] concerned with a ‘bottom line’ statistical imbalance which was caused by numerous factors. By contrast, assert Plaintiffs, in this case only one factor has caused the bottom line disparity, to wit: the States’ decision to continue funding TRS in full, while declining to provide any material funding to CTPF.”).

173. See *id.* at \*2–3.

174. See *id.* at \*3.

175. See *id.* at \*33.

176. See *id.* at \*15; see also *Title VI Legal Manual*, *supra* note 47, at 14.

177. *Title VI Legal Manual*, *supra* note 47, at 14.

178. *Swan v. Bd. of Educ.*, No. 13 C 3623, 2013 WL 4401439, at \*21 (N.D. Ill. Aug. 15, 2013).

179. *Id.*

ble injury' that the law protects against."<sup>180</sup> In *Rauner*, however, the adverse effects include: school closings, a lack of resources, and underfunding. However, the unfair allocation of pension funds that created these adverse effects is not justified by the so-called benefits established in *Swan*. Instead, these were detrimental harms that were perpetuated by CPS's debt, which was created by its responsibility to fund teacher pensions. The money that was diverted to pay the teacher pension fund could have been used for textbooks, more experienced teachers, safety measures, and other systems. Therefore, there was an actionable harm established in *Rauner*.

### 3. *Legitimate, Nondiscriminatory Reason*

In a disparate impact claim under ICRA, the burden of production is on the defendant to provide a legitimate, nondiscriminatory reason for their actions. In *Swan*, the court held that the Board had a legitimate, nondiscriminatory reason for its implementation of the underutilization criteria, as it was used to reallocate the resources being spent on the now-closed buildings.<sup>181</sup> In *Rauner*, however, there is no legitimate reason stated for "appropriating 99.7% of the State's teacher pension contributions to TRS, while directing 0.3% of those contributions to CTPF."<sup>182</sup> In fact, any reason proffered could be seen as pretext because the city with the highest percentage of Blacks in Illinois is also the only city in Illinois that has a population over 500,000. Children attending Illinois public schools other than CPS are 58% white, while 12% are Black and 21% are Hispanic.<sup>183</sup> On the other hand, "Approximately 42% of the State's African American public school children, 34% of the State's Hispanic public school children, and 4% of the State's white public school children attend CPS."<sup>184</sup> Black children are 11 times more likely than white children to attend CPS, and Hispanic children are 9 times more likely than white children to attend CPS.<sup>185</sup> CPS also contains more minorities than any other district in Illinois.<sup>186</sup> Therefore, the defendants do not have a legitimate, nondiscriminatory reason for the pension fund allocation criteria of a

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180. *Id.* (quoting *Incantalupo v. Lawrence Union Free Sch. Dist.* No. 15, 652 F. Supp. 2d 314, 329 (E.D.N.Y. 2009)).

181. *Id.* at \*24–25.

182. *Bd. of Educ. v. Rauner*, No. 2017 CH 2157, 2017 WL 2407356, at \*29 (Ill. Cir. Ct. 2017).

183. *Id.* at \*2.

184. *Id.*

185. *Id.*

186. *Id.* ("Approximately 90% of CPS students are children of color, while 10% of students are white.").

500,000 population, and even if they brought such a reason forward it is possible and likely that the court would construe it as pretextual.

#### 4. *Equally Valid, Less Discriminatory Alternative*

If the defendants did justify their decision, then the burden shifts back to the plaintiffs to establish that there was an equally valid, less discriminatory alternative the defendants could have employed.<sup>187</sup> In *Swan*, the court rejected the idea that doing nothing in lieu of closing schools would be an alternative because doing nothing would ignore the harms done to the students.<sup>188</sup> However, this is distinguishable from what is happening in *Rauner*. As the State continues to appropriate pension funds in such an indiscreet manner between the predominantly white school districts and CPS, CPS continues to fall into deeper and deeper financial debt.<sup>189</sup> The Illinois House of Representatives believed this debt could only be cured by a \$215 million bailout bill.<sup>190</sup> Therefore, doing nothing, as the *Rauner* defendants and the State of Illinois chose, was reckless and further perpetuates the idea that giving minority children an adequate education instead of an equal education to their white counterparts is justified.

Throughout many public school funding litigation cases, there were several alternatives that could create a more equitable allocation system for certain districts. Disproportionately allocating pension funds is not one of them. The *Edgar* court discussed a proposed constitutional provision “designed to reduce funding disparities among districts by limiting the amount of funds that could be raised from local property taxes.”<sup>191</sup> This idea was previously discussed in *McInnis v. Shapiro*, where the court stated that only the Illinois legislature can make this funding adjustment because only the legislature can conduct studies, hold discussions, and continuously revise the statute.<sup>192</sup> The *Edgar* court also advised that “[s]olutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.”<sup>193</sup> Plaintiffs in both cases urged that the discussion of education funding should always center

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187. *Id.* at \*32.

188. *Swan v. Bd. of Educ.*, No. 13 C 3623, 2013 WL 4401439, at \*26 (N.D. Ill. Aug. 15, 2013).

189. *See Rauner*, 2017 WL 2407356, at \*3 (describing the financial situation of CPS during Fiscal Years 2016 and 2017 and stating that “CPS began Fiscal Year 2017 with a \$300 million operating deficit”).

190. *See id.* (discussing proposed legislation, which would have increased the State’s contribution to CPS to \$215 million, but was ultimately vetoed by Governor Rauner).

191. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1184 (Ill. 1996).

192. 293 F. Supp. 327, 336 (N.D. Ill. 1968).

193. *Edgar*, 672 N.E.2d at 1191.

around the students' needs because this will guarantee equal education opportunities to all students without depriving the quality of education in more affluent neighborhoods.<sup>194</sup> These alternatives focus on the broader goal of education, and the next Part will discuss more specific plans for public school funding.

Another option to create a more equitable public school funding system would be to raise the individual income tax as a collective of the State to make up for the discrepancy between the different districts.<sup>195</sup> Therefore, the gap between poorer school districts would be closer due to the surplus in funds available.<sup>196</sup> The State could also expand the sales tax base to include certain services and neighboring states, and the proceeds could be allocated to public school funding.<sup>197</sup> In Illinois, there are only seventeen services that are taxed, and there is room for more to be implemented so that more money can be allocated to fix the discrepancy between affluent and non-affluent school districts.<sup>198</sup> Finally, another alternative is to implement a financial transaction tax.<sup>199</sup> A financial transaction tax is levied on stocks, bonds, mutual funds, and other securities.<sup>200</sup> This was used during the Great Depression and doubled revenue.<sup>201</sup> It is currently used in more than thirty countries worldwide.<sup>202</sup> Most of these countries use the money to fund essential government programs and education.<sup>203</sup> The regressive public school funding in Illinois is going to get worse unless an alternative is used. If not, the disparities between the affluent school districts and non-affluent school districts, the poor and wealthy, and minority students' and white students' educational opportunities will grow.

Currently, the burden of persuasion always stays with the plaintiff; therefore, the defendant is not required to prove that these alternatives will not work, but instead the plaintiff is required to show by a preponderance of evidence that the alternatives will work.<sup>204</sup> How-

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194. *See id.* at 1183; *McInnis*, 293 F. Supp. at 336.

195. JILL MANZO, FRANK MANZO IV, & ROBERT BRUNO, ALTERNATIVE STATE AND LOCAL OPTIONS TO FUND PUBLIC K-12 EDUCATION IN ILLINOIS 1, 4 (2017), <https://ler.illinois.edu/wp-content/uploads/2017/03/ILEPI-PMCR-Alternative-State-and-Local-Options-to-Fund-Education-in-Illinois-FINAL.pdf>.

196. *Id.* at 1, 4, 7.

197. *Id.* at 6.

198. *Id.*

199. *Id.* at 8.

200. *Id.*

201. MANZO, MANZO, & BRUNO, *supra* note 195, at 8.

202. *Id.*

203. *Id.*

204. *Title VI Legal Manual*, *supra* note 47, at 40.

ever, due to the evidentiary burden largely weighing on the plaintiff’s shoulders, this Note continues by discussing the importance of the courts placing more weight on the starkness of the discriminatory impact.

*D. A New Application of Disparate Impact Evaluating Starkness*

The three-step analysis for discrimination claims under the disparate impact theory is typically used to evaluate discrimination in the context of employment.<sup>205</sup> However, the disparate impact in *Rauner* is so extreme that the three-step analysis needs to be altered to put more emphasis on the starkness of the impact between the protected class and the majority. The burden-shifting analysis also should be replaced by balancing the defendant’s legitimate, nondiscriminatory reason for implementing the discriminatory policy against the resulting disparate impact. This would alleviate some of the burden placed on the plaintiff in public school funding litigation and force the defendant to not only articulate a nondiscriminatory reason for the policy but to demonstrate that the reason outweighs the impact placed on these vulnerable children. The starkness of the impact should hold extreme leverage in this analysis.

Achievement gaps are “not a reflection on students’ ability to learn, but rather on the inadequacies of our education system” that has perpetuated “the legacy of racism” in the United States.<sup>206</sup> The disparate impact theory “challenges practices that have a ‘disproportionately adverse effect on minorities’ and are otherwise unjustified to a legitimate rationale” without intent needed.<sup>207</sup> The disparate impact theory relies on the idea that in some cases, a statute’s disproportionate impact will be “‘stark’ enough to prove the act’s purpose.”<sup>208</sup> Many believe that you can determine the real intent of the legislature by examining the discriminatory impact of the statute.<sup>209</sup> Take *Griggs v. Duke Power*, where the employer required that those who were seeking jobs or promotions must have a high school diploma and pass an intelligence test.<sup>210</sup> These requirements were applied equally to all

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205. See, e.g., *id.* at 13–14.

206. Sarah Albertson, Comment, *The Achievement Gap and Disparate Impact Discrimination in Washington Schools*, 36 SEATTLE U. L. REV. 1919, 1921 (2013).

207. Bd. of Educ. v. Rauner, No. 2017 CH 2157, 2017 WL 2407356, at \*32 (Ill. Cir. Ct. 2017) (quoting Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2513 (2015)).

208. Scott E. Rosenow, *Heightened Equal-Protection Scrutiny Applies to Disparate-Impact Doctrine*, 20 TEX. J. ON C.L. & C.R. 163, 181 (2015).

209. *Id.* at 181–84.

210. 401 U.S. 424, 427–28 (1971).

racers but had a disproportionate impact on Blacks due to the inferior education they received in segregated schools.<sup>211</sup> The Supreme Court held that the requirements violated the Civil Rights Act of 1964 because it prohibited “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”<sup>212</sup> These tests would have allowed for those with advanced education to be hired, which many could argue would better the business. However, the Court knew that this test would discriminatorily impact minority applicants that had legally been given a second-class education up until the Civil Rights Acts of 1964 was passed. The Court should have balanced the stark impact versus the justification given by the defendants. In *Griggs*, the Court ruled in the plaintiffs’ favor without balancing the two, and instead it used the burden-shifting analysis.<sup>213</sup> But in public school funding litigation the courts rarely side with the plaintiffs. Therefore, a change is needed in how we analyze public school funding litigation.

The *Rauner* court should have evaluated the public-school funding in Chicago by placing the weight of the discrepancy of the impact at the forefront and balancing it against the defendants’ justification. The disparate impact theory was best suited for the facts of *Rauner* because it highlights the racial disparities that have detrimental effects on minorities regardless of the legislature’s intentions. The plaintiffs would have needed to prove a starkly uneven impact along a particular line with negation of any other purpose.<sup>214</sup> The following cases demonstrate examples of how the disparate impact theory can and should be utilized when determining discrimination by looking at the starkness of the impact.

In *Guinn v. United States*, the Supreme Court struck down a law that imposed a literacy requirement on voters by exempting voters whose ancestors were not able to vote before the ratification of the Fifteenth Amendment.<sup>215</sup> The Fifteenth Amendment prohibited the denial for the right to vote based on race, resulting in *zero* Black voters being eligible.<sup>216</sup> In *Yick Wo v. Hopkins*, the defendant granted business permits to all but one of the non-Chinese applicants, while denying permits to over 200 Chinese applicants despite their compliance with all requirements.<sup>217</sup> Because officials gave no reason for

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211. *Id.* at 430.

212. *Id.* at 431.

213. *Id.* at 432–36.

214. Albertson, *supra* note 206, at 1924–25.

215. 238 U.S. 347, 357, 363–64 (1915).

216. *Id.* at 358.

217. 118 U.S. 356, 359 (1886).

these denials, the Court held that the defendant discriminatorily applied a facially neutral law, thus violating the Fourteenth Amendment.<sup>218</sup> In *Gomillion v. Lightfoot*, a state legislature reshaped the voting boundaries from a square to a twenty-eight sided figure that removed 395 out of 400 Black votes, but removed no white votes from the city election.<sup>219</sup> These cases are analogous to *Rauner* because of the stark line drawn between the treatment of two different groups. Here, the legislature drew a line dividing populations of over 500,000 from those under 500,000, but the State decided to appropriate only 0.3% of the pension funds to CPS teachers.<sup>220</sup> “Coincidentally,” this line also divided the rich from the poor, and white students from minority students.<sup>221</sup>

These stark differences are comparable to the denial of Chinese applicants in *Yick Wo* and the denial of voting rights to Black voters in *Gomillion* and *Guinn*. Similarly, the Illinois statute’s discriminatory impact is justified neither by using population as a criterion nor by assigning CPS the responsibility to fund teacher funds instead of the State.

Across the United States, the public school system “is failing millions of children—especially children of color, poor children, English learners, and those with disabilities”<sup>222</sup> and Chicago is exemplary. A study conducted by the Fordham Institute found that 39% of teachers in Chicago send their own children to private schools outside of the district where they teach.<sup>223</sup> Of CPS students, 90% are students of color, while only 10% are white.<sup>224</sup> More specifically, 38% of the students are Black, 47% are Hispanic, and 6% are other minorities.<sup>225</sup> CPS received just 15% of the state’s total education funding despite having nearly 20% of public school students.<sup>226</sup> Illinois has one of the largest gaps in the country between the funding of wealthy school dis-

218. *Id.* at 373–74.

219. 364 U.S. 339, 341 (1960).

220. *Bd. of Educ. v. Rauner*, No. 2017 CH 2157, 2017 WL 2407356, at \*2, \*29 (Ill. Cir. Ct. 2017).

221. See *infra* Part V for a discussion of how poor education reaffirms the cycle of poverty.

222. Dianne Piché et al., *Remedying Disparate Impact in Education*, 38 HUMAN RIGHTS 15, 16 (2011).

223. Scott Reeder, *A Study Found that 39 Percent of CPS Teachers Send Their Children to Private Schools*, CHI. TRIB. (Mar. 10, 2017, 4:37 PM), <https://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-reeder-column-st-0312-20170310-story.html>.

224. *Rauner*, 2017 WL 2407356, at \*2; Adeshina Emmanuel, *Here’s Some Advice for CPS’ Future Chief of Equity Officer in Year One*, CHALKBEAT (July 24, 2018), <https://chalkbeat.org/posts/chicago/2018/07/24/heres-some-advice-for-cps-future-chief-equity-officer-in-year-one/>.

225. *Rauner*, 2017 WL 2407356, at \*2; *CPS Stats and Facts: Students*, CHI. PUB. SCHS., [https://cps.edu/About\\_CPS/At-a-glance/Pages/Stats\\_and\\_facts.aspx](https://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx) (last updated Oct. 2018).

226. *Rauner*, 2017 WL 2407356, at \*33.

tricts versus poor school districts.<sup>227</sup> Additionally, CPS students score below the state average in all subjects tested by the ACT.<sup>228</sup> These astronomically different statistics hit minority students the hardest because they make up the dominant demographic in these schools. In the future, if public school funding cases look to the starkness of the discriminatory impact placed on vulnerable groups, such as minority children, and balance it against the defendant's proffered reason, it will likely find the impact outweighs the reason for the discriminatory policy.

A key counter argument to using the disparate impact theory when evaluating achievement gaps in education is that several factors other than race lead to an achievement gap.<sup>229</sup> Studies show that achievement can differ depending on age, disability, gender, background, or language.<sup>230</sup> However, we have seen these disparities cross racial lines the most often. For instance, in CPS, 74% of white and Asian students in the district are enrolled in International Baccalaureate or Advanced Placement (IB/AP) classes, whereas only 43% of students of color are enrolled.<sup>231</sup> Also, in the rest of Illinois 50% of students are college-ready in comparison to the 29% that are college-ready in CPS.<sup>232</sup> Regardless of whether race is the only factor, racial imbalance is frequently intertwined with a low quality of education given in certain school districts such as CPS.

#### V. IMPACT OF REEVALUATING PUBLIC FUNDING ALLOCATION: CYCLE OF EDUCATION AND POVERTY

The need for courts to reevaluate public school funding cases like *Rauner* is critical because the impact of an *adequate* education in the United States aggravates the cycle of poverty. By applying the dispa-

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227. Lorraine Bailey, *Illinois Governor Signs 'Historic' Education Funding Bill*, COURTHOUSE NEWS (Aug. 31, 2017), <https://www.courthousenews.com/illinois-governor-signs-historic-education-funding-bill/>.

228. See generally CITY OF CHI. SD 299, 15-016-2990-25-0000, 2017 ILLINOIS DISTRICT REPORT CARD (2017), [http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=150162990\\_e.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=150162990_e.pdf) (providing statistics for students' achievements calculated for various categories).

229. Brandis Friedman, *How CPS Is Hoping to Bridge Another Achievement Gap*, WTTW NEWS (Oct. 26, 2017, 7:43 PM), <https://chicagotonight.wttw.com/2017/10/26/how-cps-hoping-bridge-another-achievement-gap>.

230. *Id.*

231. Press Release, Chi. Pub. Schs., CPS Joins Initiative to Close the Participation Gap in College-Level Courses (Oct. 26, 2017), [https://cps.edu/News/Press\\_releases/Pages/PR1\\_10\\_26\\_17.aspx](https://cps.edu/News/Press_releases/Pages/PR1_10_26_17.aspx) (indicating that these statistics are calculated for the 11th and 12th grade populations in CPS).

232. CITY OF CHI. SD 299, *supra* note 228, at 4.

rate impact theory of liability to education, substantial disparities between racial groups in schools will be treated as legal wrongs that must be remedied.<sup>233</sup> “While opponents of equal educational funding argue that crime, poverty, complacency and the inability to educate poor minorities are the causes of inferior education, . . . [it is] actually the result of an inferior education.”<sup>234</sup> A person’s level of education directly impacts her economic potential.<sup>235</sup> “[B]y providing better educational opportunities to children with wealthier parents and neighbors,” the public school funding system is inhibiting the upward mobility of minority children in Chicago.<sup>236</sup> Minority children from disadvantaged communities already have to overcome internal complexes that they are inferior to their white counterparts.<sup>237</sup> Improving the quality of education is necessary to address the social realities of higher crime rates, higher unemployment rates, racism, and the absence of positive role models.<sup>238</sup> Teachers with lower wages usually have less experience and are more predominant in communities of color and poverty.<sup>239</sup> These teachers tend to blame poor performance on the students instead of communicating a clear purpose and voicing high expectations, which have been shown to be essential for high educational achievement.<sup>240</sup> Education clearly affects poverty and creates a cycle that minority children cannot escape.

The system under which Illinois currently operates rewards those who need it the least and dismisses those who live in poor areas, suggesting that the only way out is to relocate. This ultimately undermines the idea that education operates as an equalizer.<sup>241</sup> Students attending schools in high poverty neighborhoods tend to confront more issues with school environment including absenteeism, truancy, and bullying.<sup>242</sup> Approximately 25% of students in CPS live in poverty, while approximately 15% of students from other Illinois school

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233. Piché et al., *supra* note 222, at 16.

234. Watson, *supra* note 3, at 402.

235. *Id.* at 403.

236. *Id.* at 404.

237. *See id.* at 405.

238. *Id.*

239. *See generally* Douglas Gagnon & Marybeth J. Mattingly, *Beginning Teachers Are More Common in Rural, High-Poverty, and Racially Diverse Schools*, ISSUE BRIEF NO. 53 (Carsey Inst., Durham, N.H.), Summer 2012.

240. Watson, *supra* note 3, at 405.

241. Sean Slade, *Poverty Affects Education—And Our Systems Perpetuate It*, HUFFINGTON POST (July 24, 2016, 3:23 PM), [https://www.huffingtonpost.com/sean-slade/poverty-affects-education\\_b\\_7861778.html](https://www.huffingtonpost.com/sean-slade/poverty-affects-education_b_7861778.html).

242. *Id.*

districts live in poverty.<sup>243</sup> These students also tend to go hungry, and at some point having an inadequate supply of food throughout the school year can lead to attention and behavioral problems.<sup>244</sup> The stress of living in poverty affects children's ability to memorize and learn.<sup>245</sup> Statistically, children who are living in poverty, which is a large portion of the students in CPS, are at a greater risk for poor academic achievement and dropping out.<sup>246</sup> This academic achievement gap is more pronounced in Black and Hispanic students due to the underfunding of public schools districts like CPS.<sup>247</sup> This achievement gap sprouts from the fewer resources in CPS because it offers fewer IB/AP programs and special enrollment opportunities. Inadequate education funding leads to low-quality education that reinforces a cycle of poverty.<sup>248</sup>

These education disparities maintain a cycle of poverty that is already intrinsically tied with race. Even though white Americans make up the largest group of Americans living in poverty, minorities are statistically overrepresented.<sup>249</sup> For example, in the United States, 27% of all Blacks and 26% of all Hispanics live in poverty, in comparison to 10% of white Americans.<sup>250</sup> The cycle continues when you look at incarceration rates. The government invests a lot of money in jail systems. This can be interpreted as a tradeoff to funding public education.<sup>251</sup> Some of these detainees are streamlined from some of these poorly funded schools. Studies show that the lack of funding in these schools leads to underqualified teachers, which ultimately leads to delinquency, drop outs, and eventual criminal behavior.<sup>252</sup>

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243. *SAIPE School District Estimates for 2016*, CENSUS.GOV (2017), <https://www2.census.gov/programs-surveys/saipe/datasets/2016/2016-school-districts/sd16-il.txt> (select "Illinois" hyperlink).

244. *Id.*

245. *Id.*

246. *See Effects of Poverty, Hunger and Homelessness on Children and Youth*, *supra* note 4 ("The National Center for Education Statistics reports that in 2008, the dropout rate of students living in low-income families was about four and one-half times greater than the rate of children from higher-income families (8.7 percent versus 2.0 percent).").

247. *See id.*

248. *See id.*

249. *Id.*

250. *Id.*

251. Steven Hawkins, *Education vs. Incarceration*, AM. PROSPECT (Dec. 6, 2010), <http://prospect.org/article/education-vs-incarceration> ("With tens of billions of dollars in prison spending annually, states are finding that there is simply less discretionary money available to invest in education . . .").

252. *See Caitlin Curley, School Funding: How a Broken System Deepens the School-to-Prison Pipeline*, GENFKD (July 19, 2016, 2:30 PM), <http://www.genfkd.org/school-funding-broken-system-deepens-school-prison-pipeline>.

In 2017, the graduation rate for CPS was 75.6%<sup>253</sup> in comparison to the rest of Illinois, wherein the graduation rate was 87%.<sup>254</sup> However, one in every three Black male students at CPS drop out, and this typically leads to imprisonment.<sup>255</sup> Though beyond the scope of this Note, issues of incarceration and race are perpetuated by low-quality education and drive the cycle of poverty. Even Governor Rauner himself referred to schools in CPS as “basically almost crumbling prisons” due to the broken formula of school funding.<sup>256</sup> This broken formula leads these same students to prison, when they could be in classes. The actual cost of imprisoning students is more than equipping them with an equal education.<sup>257</sup> In Chicago, 56.2% of the prison population of the Illinois Department of Corrections are Black,<sup>258</sup> while only 14.6% of Chicago residents are Black.<sup>259</sup> These numbers can be seen as results of the inadequate public school funding litigation that perpetuates these discrepancies.

The change in school funding starts with changing how courts litigate public school funding issues under the disparate impact analysis. Public school funding litigation must be reformed to liberate minority children from discrimination and “adequate” education. This reform of public school litigation will create equal outcomes and opportunities regardless of race. Courts should begin to evaluate these public funding issues on the basis of a disparate impact claim, thus balancing the starkness of the impact versus the nondiscriminatory reason proffered by the defendants. It is long past time for the judiciary to alter

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253. Greg Hinz, *CPS Graduation Rate Hits New High, but a Third of Black Males Still Drop Out*, CHI. BUS. (Sept. 4, 2018, 5:00 AM), <https://www.chicagobusiness.com/greg-hinz-politics/cps-graduation-rate-hits-new-high-third-black-males-still-drop-out>.

254. Corina Curry, *Area High Schools See Graduation Rates Go Up*, RRSTAR.COM (Nov. 4, 2017, 11:58 PM), <https://www.rrstar.com/news/20171103/area-high-schools-see-graduation-rates-go-up>.

255. See Hinz, *supra* note 253 (“[M]ore than a third of black males still are dropping out, an action that severely limits career opportunities and often is a precursor to criminal and other negative activity.”).

256. Tom Schuba, *Rauner Compares Some CPS Schools to ‘Crumbling Prisons’*, NBC CHI. (June 6, 2016, 6:01 PM), <https://www.nbcchicago.com/blogs/ward-room/Rauner-Compares-Some-CPS-Schools-to-Crumbling-Prisons-382008031.html>.

257. In 2013, a study showed “Cook County spent \$600 a day to detain a youth at the Juvenile Temporary Detention Center,” while it only “cost[s] \$75 a day to educate a student in Chicago Public Schools . . . .” Project NIA, *Chicago School-to-Prison Pipeline Fact Sheet*, CHI. YOUTH JUST. (Sept. 2013), <https://chiyouthjustice.files.wordpress.com/2013/10/chicago-school-to-prison-updated-9-13-w-lgbt.pdf>.

258. Dede Short, Ill. Dep’t of Corrections, *Fiscal Year 2017 Annual Report*, ILLINOIS.GOV 79 (July 2018), <https://www2.illinois.gov/idoc/reportsandstatistics/Documents/FY2017%20IDOC%20Annual%20Report%20FINAL.pdf>.

259. *QuickFacts: Illinois*, CENSUS.GOV, <https://www.census.gov/quickfacts/il> (last visited Apr. 14, 2019).

the analysis for underfunding in education and overrule the argument that an adequate education is all that our country owes to its children.

## VI. CONCLUSION

This Note evaluates the decision in *Rauner* to not interfere or disrupt the current public school funding in CPS schools because of its insufficient application of a disparate impact analysis. This Note argues that the burden-shifting analysis should be replaced by balancing the starkness of the impact of a discriminatory policy with the justification articulated by the defendants in all public school funding litigation cases. Courts should be active in public school funding cases because it is their responsibility to take a stance when a group of people are being continually marginalized absent justifications. Courts should also take an active role in public funding litigation because several statutes like ICRA share ambiguous language governing the level of education required for all.

The standard that has been applied to public school funding litigation is not effectively insulating minority children from discrimination and must be altered. Public school funding litigation reform is necessary to remedy this stagnancy. The vicious cycle between inferior education and poverty should be remedied by public school funding; it should not be perpetuating it. Poverty coincides with low-quality education in every way, but high-quality education will ultimately sanction that all students regardless of race have the opportunity to succeed. By remaining silent bystanders, as an ancient and sometimes selective disparate impact standard continues to place minority children in a never-ending cycle of poverty, the Chicago courts are ensuring that minority children never receive a pencil.

*Ashlee Germany*