



Civil Rights Enforcement

Gone Haywire Haywire

The federal government's new school-discipline policy

On January 8, 2014, the Civil Rights Division of the Department of Justice (DOJ) and the Office for Civil Rights in the Department of Education (ED) issued a joint “Dear Colleague Letter” to K–12 schools. The topic discussed in their joint letter is whether administrators are punishing minority children more harshly than white children for the same infractions. Unfortunately, the Dear Colleague letter does not squarely address that issue. Instead, it offers instructions on how schools should strengthen oversight of their disciplinary processes in order to meet their obligations under Title IV and Title VI of the Civil Rights Act, as applied to discrimination on grounds of race. The agencies advise,

The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to different treatment based on the student’s race, and second, if a policy is neutral on its face—meaning that the policy itself does not mention race—and is administered in an evenhanded manner but has a disparate impact, i.e., a disproportionate and unjustified effect on students of a particular race.

Much of the analysis turns on the word “unjustified.” Disproportionate rates should not be regarded as unjustified merely because they reflect higher rates of improper behavior by minority students than by white students. But this point is never explicitly acknowledged in the ED and DOJ guidance,


which was prompted by their joint dissatisfaction with zero-tolerance policies. Such policies, by definition, impose the same penalty for a given infraction, regardless of the student involved.

When implemented in some school districts, the policies have led to levels of school suspension and expulsions that differ markedly by race. According to data collected by the Office for Civil Rights and cited in the letter, black students, who make up about 15 percent of the student population nationwide, receive about 35 percent of one-time suspensions and 36 percent of expulsions from school. DOJ and ED offer no estimate of the number of school districts that experience these problems, or the number of schools or students affected. No matter what the aggregate numbers demonstrate, imposing a nationwide policy would certainly compromise the operation of schools that have no taint of any purported civil-rights violation. Nonetheless, the letter applies to all school districts indiscriminately and requires them to put in place expensive compliance systems.

Zero-tolerance policies in school give straightforward discipline guidance to administrators by removing discretion in the enforcement of a rule. They can also, in some instances, lead to punishments that fail to “fit the crime.” Wholly apart from the Civil Rights Act of 1964, it is fair to ask whether zero tolerance makes sense in an educational context. But the DOJ and ED

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err in arguing against the policies on the basis of “disparate impact,” a phrase with a legal history that, when applied to schools, imputes race-conscious behavior on the part of school administrators. For one thing, zero tolerance has no monopoly on potential violations of the civil rights laws. The switch to a policy that substitutes lesser sanctions for suspension or expulsion raises the same civil-rights



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problem if the incidence of disciplinary action also captures a fraction of black students that is larger than their proportion of the student body.

In this article, I examine some of the practical and legal issues that informed the preparation of the guidance letter from ED and DOJ, including the zero-tolerance and disparate impact theories that form its foundation. I look at the legal issues that emerge from the aggressive interpretation of Title IV and Title VI of the Civil Rights Act and also at the procedures by which ED and DOJ seek to impose their proposals.

Zero Tolerance

The ED and DOJ guidance letter takes particular aim at zero-tolerance policies as implemented by school districts. The application of particular disciplinary policies in schools surely matters: some 3 million students in grades K–12 were suspended, for example, in 2009.

The notion of zero tolerance has considerable political support. The straightforward link between an infraction and its consequences gives fair warning to students what the consequences will be should they break a particular rule. By limiting administrator discretion, zero-tolerance policies make it harder for administrators to play favorites than under a system that requires them to adjust punishment according to the specific facts and circumstances. Whether such policies improve student behavior or school climate overall is a separate question. Hard-and-fast rules may reduce the rate of infraction so much that it is easier to accept the occasional instance of a punishment that seems far too severe. It may also be that where rules are frequently breached, officials are hesitant to follow through and backtrack on enforcement or just pretend that the minor offenses never occurred in the first place.

Their history shows that zero-tolerance policies work best in those settings where a clear on/off switch triggers the relevant violation, such as a policy that requires suspension of any student who brings a gun or drugs into school. The rule gives all students fair notice and encourages them to behave appropriately. The detection of a weapon will in most cases not present any questions of degree. In practice, the on/off

switch required by the rule maps well into the on/off nature of the penalty.

The gains from such a system may be substantial. Removing a difficult student from the classroom may make the environment safer for other students, who now have less to fear from threats of rule breakers. For these cases, there appear to be good reasons for invoking a hard-edged rule. But even in these cases, generalizations could prove

hasty in the absence of thorough knowledge of alternative strategies. It is very difficult for any outsider—even ED and DOJ—to make a definitive judgment that would be applicable to all schools.

Zero-tolerance policies look less attractive when applied to offenses that are less easily defined, such as harassment. The phrases “unwelcome advances” and “hostile environment” leave a lot of room for interpretation. The same can be said about rules on hate speech, which covers “bigoted speech, which attacks or disparages a social or ethnic group, or one of its members.” The high probability of borderline cases may benefit from administrators having discretion in the penalties that they impose.

The hard question is, quite simply, why do zero-tolerance policies come under attack under the civil rights laws? One possible explanation is that the application of these rules is “overbroad,” and leads, as the *New York Times* has argued, to serious and lasting consequences for the students who are suspended or expelled. They can face an added risk “of being held back, dropping out or ending up in the criminal justice system.” Such race-neutral effects of suspension and expulsion may be sufficient to justify a modification or elimination of the policy. But even that judgment cannot be made solely by looking at the impact of these rules on the punished students. One must also factor in the effect that keeping difficult students in school has on *other* students, many of whom may now be subject to *increased probabilities* of being held back, dropping out, or ending up in the criminal system. It is the net effect that matters.

This net effect is systematically ignored by the ED and DOJ in promulgating their new civil-rights guidance. The government points only to studies that show the proportion of black students who receive certain penalties to

be greater than their proportion of the students in the government's data set.

At this point, it is a real puzzle to decide what should be done if every single permutation of discipline policy shows differential impact by race. Clearly, it cannot be that all discipline procedures must be put on hold, especially in schools with the greatest discipline problems. What then is the alternative?

Disparate Impact

Something is amiss in the ED-DOJ analysis. The agencies' joint error rests on the peculiar way in which they apply the standard of disparate impact. The origin of the disparate impact test was the 1971 Supreme Court case of *Griggs v. Duke Power Co.*, decided under Title VII of the Civil Rights Act, which governs employment relations. That decision marked, to say the least, a major expansion of the scope of the 1964 act and was driven in large measure by the fear that using only a disparate-treatment test (which entailed proof of some form of race-conscious behavior) would allow discrimination by private firms with a history of discrimination by race to slip through the cracks. The unanimous Supreme Court decision in *Griggs* was prepared to tolerate some overenforcement of the civil rights law in employment cases, lest underenforcement allow too many wrongdoers to escape these rules. Accordingly, under a key 1982 decision in *Connecticut v. Teal*, employers could not administer various educational and achievement tests that had strong predictive value within both white and black populations to rate job candidates across races—or indeed within the group of black applicants.

We are of course in very different circumstances today, for the days of systematic forms of race discrimination defended at the highest level of government are mercifully behind us. The disparate-impact standard therefore is only weakly justified on the grounds that it is necessary to uncover hidden forms of unconscious race bias against minority students.

But it is imperative that the ED and DOJ show more than differential punishment rates by race to establish some latent patterns of discrimination in their studies.

One source of the difficulty is that the data ED and DOJ use to justify their guidance are aggregated across schools and therefore provide no insight into the kinds of behavior that are observed inside *particular* schools. To see the problem, assume for the moment that there are two schools, one with an all-white population and the other with an all-black population. Assume further that the rate of suspension and expulsion in the all-white school is only one-half of what that figure is

in the all-black school. The only inference that can be drawn from these statistics is that, on average, the discipline problem is more severe in the all-black school than in the all-white school. One cannot infer that any administrators treat white and black students differently, because all administrators are dealing with students of only one race.

It could be argued that this unrealistic objection proves little because many schools have students of different races. But even if one school has a student population that is 75 percent black and 25 percent white, and the other has those percentages reversed, there is still no evidence of any form of discrimination if the school with the majority black students has a higher overall discipline rate. That is most obviously the case if the black students and white students are both punished at a higher rate in the majority-black school than in the other school. And it is even the case if a close empirical investigation showed in each school that a scrupulous color-blind system produced differential rates. One could press further and ask whether black or white administrators had different rates of issuing suspensions. If they are the same, again, the disparate impact case is undercut. If they are different, the evidence is still very weak unless there is some evidence of bias. The simple proposition here is that so long as like cases are treated alike regardless of race, discrimination is not to blame for disparate discipline levels.

How should a school go about correcting the imbalance? Just what sanction should apply to a

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school where discipline is imposed on a color-blind standard yet has statistically imperfect outcomes? Should some white students be summarily suspended, expelled, or otherwise sanctioned to make the numbers come out correctly? Or should schools give a pass to black students who have committed serious offenses in order to achieve the same ends?

The point here is bitterly ironic because U.S. secretary of education Arne Duncan has claimed that the guidance package is needed because it “provides resources for creating safe and positive school climates, which are essential for boosting student



academic success and closing achievement gaps.” He conceded that “incidents of school violence have decreased overall,” so why should he advocate policies that have as their likely consequence exposing the good kids who have avoided violence to the greater fear from others who engage in it? The sad truth is that this muddled analysis of zero tolerance and disparate impact is likely to reverse the hard-earned gains of earlier years.


Statutory and Administrative Authority

In its Dear Colleague letter, ED and DOJ refer to Title IV and Title VI of the Civil Rights Act without quoting their language or discussing their scope. The letter insists that Title IV and Title VI protect students over the entire course of the disciplinary process, “from behavior management in the classroom, to referral to an authority outside the classroom because of misconduct—a crucial step in the student discipline process—to resolution of the discipline incident.”

The statutory authority is far less clear than this assertion of authority suggests. Title IV is largely intended to provide schools in the process of desegregating with various forms of personnel advice or hiring specialists and to make grants to achieve that end, topics that are distinct from zero-tolerance policies. Enforcement of the new disciplinary policy does not appear covered by these provisions.

The entire case for government control therefore rests on Title VI, which contains the general prohibition that “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.” It

is a very broad reading to take the last clause—subjected to discrimination—as allowing the government to usher in a comprehensive program in an effort



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to rectify disparate results of legitimate government actions. Indeed, it is hard to see how the disparate impact standard, which the Supreme Court adopted in *Griggs v. Duke Power* for employer testing, could be carried over to actions under Title VI. In this context, its application is far more intrusive, given that no school has the option of not engaging

in some form of discipline. More specifically, the guidance offers no safe harbor for conducting routine discipline, free of constant federal oversight. Under the Dear Colleague letter, ED has virtually unlimited discretion in deciding, for example, whether “[s]elective enforcement of a facially neutral policy against students of one race is also prohibited intentional discrimination.” Schools will be reluctant to take these cases to court for they always face the risk that ED and DOJ will claim that the observed differences in behavior were themselves caused by racially insensitive or inappropriate district policies.

The Dear Colleague does not put any of these concerns to rest. Instead, the letter gives as illustrations single incidents between two persons of different races where, in the absence of an explanation, differential sanctions can give rise to an inference of racial discrimination. Yet virtually every disputed case could give rise to some inference of actual or intended discrimination. In addition, it is highly likely that any such investigation will extend to cover supposedly similar incidents involving nonminority students. This aggressive ruling therefore pushes enforcement to the outer edge of the legal authority under Title VI.

This general pronouncement itself appears to introduce race distinctions into the system. Although stated in race-neutral terms, none of its carefully selected examples indicate that ED or DOJ will ever intervene on behalf of white students claiming to be victims of discrimination, even though Title VI, which starts with the words “no person” was consciously drafted in race-neutral terms. It is likely that in practice, both ED and DOJ will use different standards in different kinds of cases.

Dangerous Use of Administrative Guidance

The difficulties with this aggressive interpretation of the statutes are further compounded by the use of the guidance mechanism to promulgate these rules. These guidance practices are nowhere mentioned by name in the Administrative Procedure Act (APA), which governs how federal agencies may propose and establish new regulations. The act assumes that the implementation of complex regulatory schemes will be done only after a formal rule-making procedure (which is like a full trial) or more truncated notice-and-comment proceedings, which require the government to first announce

its position so that others may comment on it. These procedures were intended to offer interested parties a chance to weigh in on proposed rules before they are put into place. Notice and comment takes time, but by the same token the comments often supply useful information that could, and should, influence the shape of the final regulation.

Guidances are an agency invention to circumvent the notice-and-comment procedures. To the government, guidances are just “interpretative rules, general statements of policy, or rules of agency organization procedure or practice,” which need not meet the procedural requirements for regulations under the APA. If this Dear Colleague letter fits within those terms, then so too does any other massive pronouncement by any government agency.

But woe unto any targeted party that wishes to ignore the guidance on the grounds that it does not enjoy the force of law! At every point in the process, the government retains the options to apply these guidance documents to the recalcitrant, just as if they had been formally promulgated, and the parties who resist them will be dealt with harshly because they have been given notice of what to expect in the future. To be sure, there is an outside chance that some portion of these guidances will be rejected in court, but it takes a strong stomach to risk the heavy sanctions that the government will impose if it prevails, as it usually does now that these guidances are part of the basic regulatory toolkit in every area from food-and-drug to environmental law. To be sure, a school district could seek to clarify the guidance before it has the force of law. But at that point, ED and DOJ (which have long memories) will claim that they do not have standing to attack the law prior to the

time of its direct enforcement. In the meantime, the failure to take steps to conform to the requirements of the guidance will count heavily against any school district that refuses to play the game in accordance with the new rules. The guidance will likely be treated as binding for all practical purposes.

In sum, the ED and DOJ action forces school districts to comply with a substantive rule of dubious legal validity and practical soundness. Their “guidance” represents the worst in federal policy on K–12 education. At every stage, the government pushes its case to the limit: It fails to inquire whether zero-tolerance policies are defensible on their own terms. It applies dubious measures of disparate impact to deal with alleged civil-rights difficulties. The DOJ and ED then compound the problem by using the guidance technique to avoid the notice-and-comment protections built into the Administrative Procedure Act. Any legal challenge to these regulations faces an uphill battle, yet judicial efforts may be needed to prevent ED and DOJ from using the civil rights laws to federalize all issues of discipline in the nation’s schools.

Our children deserve better.

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