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CIVIL WRONGS

Federal equity initiative promotes paperwork, not equality

IN OCTOBER 2014, U.S. secretary of education Arne Duncan announced the Obama administration's new "education equity initiative," explaining that the president could not "continue to wait" for Congress to act "on behalf of vulnerable children." The centerpiece of this initiative was a 37-page "Dear Colleague" letter (DCL) detailing what public schools must do to ensure that all children have "equal access to educational resources without regard to race, color, or national origin." The Education Department's Office for Civil Rights (OCR), which developed the letter, contends that Title VI of the 1964 Civil Rights Act authorized this far-reaching regulatory action. Not only is that a highly dubious assertion, but the mandate is more likely to produce political controversy and a blizzard of paperwork than to improve the education of minority children.

The letter is the latest in a series of controversial DCLs that the Office for Civil Rights has issued since 2010. Past letters have focused on sexual harassment, programs for English language learners, and school discipline (see "Civil Rights Enforcement Gone Haywire," *features*, Fall 2014). In each instance, OCR has used a letter circulated to public education officials nationwide to establish regulatory policy unilaterally, providing no opportunity for public comment or interagency review. Last year's equity DCL was signed by the assistant

secretary for civil rights, Catherine E. Lhamon, who prior to joining OCR had served as lead attorney for the American Civil Liberties Union in a major California school-finance case.

Flawed Assumptions

Not since the late 1960s has OCR wielded Title VI guidelines so aggressively. The effort to end de jure segregation back then enjoyed broad public and judicial support; OCR worked hand in hand with the federal courts to desegregate southern schools.

This time around, OCR cannot expect such judicial cooperation, because the agency has strayed so far from the Supreme Court's interpretation of the Constitution and the Civil Rights Act. Just as important, OCR's demand that each school district provide a detailed accounting of resources available to schools with varying racial demographics is more likely to overwhelm school officials with administrative burdens than to create a groundswell of support for redistributing education funds.

The Office for Civil Rights' equity DCL is a throwback to the 1960s in another way: at its heart lies the assumption that spending more money on minority students will reduce the racial achievement gap. OCR focuses entirely on inputs, tacitly assuming that outcomes will improve if more

by R. SHEP MELNICK

resources are channeled to existing schools.

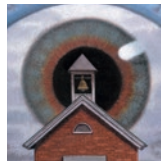
There are three problems inherent in this assumption: 1) since the early 1970s, real per-capita spending on K–12 public education has nearly doubled, yet student performance in the 12th grade has barely budged, and the U.S. has fallen further behind other nations; 2) at the same time, states have reformed their funding processes to allocate more money to schools with high percentages of poor children, yet the racial achievement gap has hardly changed; and 3) a wide array of academic studies show that what matters most is not *how much* money is spent but *how well* it is spent. From hard experience we have learned that simply sending more money to failing schools will not improve them.

Cited in the DCL’s 63 footnotes are studies indicating that targeting large sums to high-quality programs can help disadvantaged children. But the letter virtually ignores a key question: what constitutes a high-quality program? To make matters worse, the material in the footnotes often casts doubt on the bold pronouncements made in the text. For example, to support its claim that “participation in high-quality arts programs...is valuable to all students,” the letter cites four articles, one titled, “Mute Those Claims: No Evidence (Yet) for a Causal Link between Arts Study and Academic Achievement.”

The one exception to this flawed invocation of research is the DCL’s discussion of teacher quality. Citing multiple studies by reputable scholars, it reports that schools with large numbers of minority students tend to employ less-experienced and less-effective teachers, which adversely affects student achievement. To his credit, Secretary Duncan has focused on this crucial source of inequality. But given employment contracts, union rules, and the tendency of experienced teachers to prefer working in less-challenging school environments, this disparity in teacher quality will be particularly hard to change. Schools will find it easier to satisfy the terms of the DCL by moving around a few dollars than by making significant changes in personnel policy.

Shaky Legal Ground

OCR’s legal analysis is on par with its review of the academic literature. Beginning with the obligatory nod to *Brown v. Board of Education*, OCR goes on to cite several of the Supreme Court’s equal protection decisions to buttress



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its legal authority. Yet each case cited spells out the *remedies* appropriate for school systems already found *guilty* of de jure segregation. Every law student knows that schools that come before the Court with dirty hands are subject to much more onerous conditions than those never found guilty of any constitutional or statutory violation.

The same footnote that contains those citations also offers OCR’s most questionable legal argument: “Numerous State courts have also deemed inequitable access to these educational resources unlawful under their State constitutions.” True—many state supreme courts have required major changes in state education-finance laws. But why did school finance reformers turn to *state* courts after 1973? Because that year the U.S. Supreme Court issued its most important ruling on the topic, in *San Antonio v. Rodriguez* (see “Fool’s Gold,” *legal beat*, Summer 2015). In that landmark case, the Court clearly stated its refusal to enter the school finance thicket. Not once in the DCL’s footnotes does the name of that crucial case appear. Its omission is the specter that haunts the entire document.

In a nutshell, OCR’s legal argument is that school districts and state governments “violate Title VI if they adopt facially neutral policies that are not intended to discriminate...but do have an unjustified, adverse disparate impact on students based on race, color, or national origin.” Under this “disparate impact analysis,” once federal officials determine that the distribution of *any* resource disadvantages a protected minority, schools must not only “demonstrate that the policy or practice is necessary to meet an important educational goal,” but also show that there is no “comparably effective alternative policy or practice that would meet the school district’s stated educational goal with less of a discriminatory effect.” OCR borrowed much of this language from court decisions on hiring practices based on Title VII of the Civil Rights Act. In the education context, this subjective test grants almost complete control to federal regulators to decide what constitutes an “important educational goal” and a “comparably effective alternative.” In effect, OCR has invented a test that no school district or state department of education can pass, and then given itself authority to determine the appropriate remedy.

What makes OCR's disparate impact analysis all the more remarkable is that it has already been soundly rejected by the Supreme Court. For years the Court has expressed displeasure with the use of disparate impact analysis in employment cases. In *Alexander v. Sandoval* (2001), the Court insisted that the section of Title VI prohibiting recipients of federal funds from discriminating on the basis of race "prohibits only *intentional* [emphasis added] discrimination." The Court refused to enforce Department of Justice rules incorporating the very sort of disparate impact analysis employed here by the Department of Education's Office for Civil Rights.

OCR will no doubt assert that the Supreme Court's June 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, supports its position (see "Disparate Impact Indeed," *legal beat*, Fall 2015). It does not. That decision was based on the peculiar wording and legislative history of the Fair Housing Act. To make matters worse for OCR, Justice Anthony Kennedy's majority opinion endorses a limited, deferential understanding of disparate impact analysis, one that bears little resemblance to the demanding test created by the equity DCL.

In *Alexander v. Sandoval*, the Court did not address whether disparate impact regulations issued under a subsequent section of Title VI could be enforced through nonjudicial means—but only because no one had raised that issue in the case. Spotting a possible loophole in the Court's rejection of disparate impact analysis, OCR tries to drive its entire regulatory enterprise through it. But here the agency faces another legal problem: OCR claims to use the rule-making authority granted by Title VI, but fails to follow the rule-making procedures mandated by the Administrative Procedure Act (APA) and by Title VI itself. Title VI plainly states that "no such rule, regulation, or order shall become effective unless and until approved by the President." Only an assistant



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More important, the APA's notice-and-comment rule-making procedures clearly apply to regulations of this magnitude. Not since the 1960s has OCR used these standard procedures for establishing Title VI rules. It prefers unilateral announcements of agency policy without any form of public participation or review by other government agencies. Another reason it employs this truncated procedure is to avoid judicial review. Any school district bold enough to confront OCR and clever enough to get its case before a federal judge will put the equity DCL in serious legal jeopardy. Meanwhile,

OCR will do whatever it can to stay out of court.

Measuring Education Equity

The heart of the equity DCL is its enumeration of the factors that schools and OCR investigators must take into account when determining whether equity has been achieved. Schools are expected to engage in "periodic self-evaluation" to "identify barriers to equal educational opportunity." Those failing to undertake adequate "self-assessments" will be subject to full-scale investigations by OCR staff. If anything is clear about the effect of the DCL, it is that schools will be spending a great deal of time performing self-assessments to keep OCR investigators at bay.

What must these self-assessments include? Almost everything. "Simplistic comparisons of per-pupil expenditure levels," OCR explains, "are often a poor measure of resource comparability" because "there are many factual circumstances that can create varying funding needs that justify differential spending patterns among schools." Disadvantaged students, it emphasizes, often need more resources than other students. "The ultimate issue is whether funding is provided to each school in the district so as to provide equal educational opportunity for all students." What goes into this determination? Here is a quick inventory:

Curriculum. To assess “the types, quantity, and quality of programs available to students” of different races, OCR will examine “the range of specialized programs, such as early childhood programs including preschool and Head Start, Advanced Placement and International Baccalaureate courses, gifted and talented programs, career and technical education programs, language immersion programs, online and distance learning opportunities, performing and visual arts...science, technology, engineering, and mathematics (STEM) courses...[and] the overall quality and adequacy of special education programs.”

How will OCR assess and compare the quality of all these programs? How will it determine if a school has enough AP or visual arts courses? The DCL does not say.

Extra- and co-curricular programs. OCR will also evaluate “whether students of different races...participate in a comparable variety of specialized programs—whether curricular, co-curricular, or extracurricular.” To do so, it will consider “the number of extracurricular activities as well as their intensity and content,” “the expertise of teachers, coaches, and advisors,” and “the availability of the necessary materials.”

How does one measure the “intensity” of a drama club or a school band? The “expertise” of a baseball coach or a school newspaper adviser? More unanswered, and unanswerable, questions.

Teachers. OCR will examine “a broad range of information sources when assessing whether a district discriminates based on race in providing access to strong teaching.” This could include “teachers’ licensure and certification status, whether teachers have completed appropriate training and professional development, whether teachers are inexperienced, [and] whether they are teaching out of their field.” Or OCR could “focus on a small subset of these criteria when appropriate.” Still “other investigations will rely upon a holistic analysis of these criteria to better gauge the totality of teacher and staff characteristics and the quality of instruction.” OCR strongly encourages schools to develop “high-quality evaluation systems” that “use multiple measures, including student growth.”

Of course, OCR does not indicate what such a “high-quality evaluation” would look



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like because it is so difficult to construct and so controversial.

School leadership. OCR will investigate whether there are racial disparities “in student access to effective, well-prepared, and stable school leadership.” OCR rightly claims that such leaders play a key role in attracting, retaining, and motivating good teachers and creating “climates of high expectations and a sense of community.”

But how does one identify “effective” leaders? OCR will consider “their levels of experience, their credentials and certification, [and] whether they have completed appropriate training and professional development”—none of which have proven particularly useful in identifying effective principals in the past. Beyond that OCR has nothing to say on the topic.

Support staff. OCR will examine “the staff-to-student ratios, training, certification, and years of experience of the support staff.” This includes not just guidance counselors, psychologists, librarians, and specialized therapy providers for students with disabilities, but also social workers, health professionals, and paraprofessionals.

Since the range of support staff will differ widely based on student needs, quantitative inter-school comparisons will be nearly impossible.

School facilities. Based on the claim that “research has shown that the quality and condition of the physical spaces of a school are tied to student achievement and teacher retention,” OCR will evaluate “the overall physical condition of the school, including features such as paint, maintenance of carpet and lockers, and the absence of vandalism.” Among the factors it will consider are “the location and surrounding environment of school buildings,” “the availability and quality of transportation services,” and “specialized spaces such as laboratories, auditoriums, and athletic facilities.” While recognizing that schools will have different programs and facility needs, it cautions that “the diverse needs of a district cannot justify distributing facilities” in a discriminatory fashion.

OCR fails to explain how it intends to compare the quality of paint, carpeting, practice and performing spaces, laboratories, and the rest of these diverse facilities.

Technology and instructional materials. OCR will “evaluate whether all students,

regardless of race, have comparable access to...technological tools.” This analysis will include not only the speed of Internet access, the technical training of teachers, how many hours a day students have access to computers, and whether this technology is available to students with disabilities, but also whether “students have access to necessary technology outside of school and how school districts support students who do not have Internet access at home.” OCR will examine the quantity and quality of instructional materials and their “alignment with the curriculum,” “the size, content, and age of a school’s library collection,” and “how often students and teachers have the opportunity to use a library.”

Collecting all this information for every school in a district will be difficult enough. Providing a nonarbitrary comparison of schools on even one criterion will be nearly impossible, given the extent to which OCR requires assessment of the “quality” of educational programs. Nor is there any nonarbitrary way of assigning weights to each of the seven criteria—making any “holistic” assessment a chimera.

The End of Local Control?

Although most of the DCL is devoted to differences among schools in the same district, the Office for Civil Rights emphasizes that it will also examine differences *within* schools as well as differences among school districts in a state. How OCR will do the former remains a mystery. Will it look at the racial composition of each class and at the “quality” of each teacher? Will it look at the racial composition of AP and advanced math courses, drama clubs, sports teams, and school newspapers? If, as is likely to be the case, fewer black and Hispanic students are enrolled in advanced courses, will that finding be interpreted as discriminatory or a nearly inevitable result of the very racial achievement gap we



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are trying to reduce? OCR has made its investigatory power so open-ended that it can look at everything and anything that goes on in a school, and it has created a disparate impact standard so rigid that it can always find a violation of federal law.

Buried in a footnote early in the DCL is this political time bomb: “State education officials should examine policies and practices for resource allocation *among districts* [emphasis added] to ensure that differences among districts do not have the unjustified effect of discriminating on the basis of race.” Remember that under OCR’s disparate impact analysis any disparity in resources must be justified by an “important educational goal.” Funding differences among school districts are based in large part on the

differing tax bases of the districts and the political choices made by voters and school boards. In other words, they do not reflect “important educational goals.” This implies that *all* education funding decisions should be made at the state level, with no room for local discretion. Of course, OCR never explicitly states that its new rules are at odds with the very structure of the American education system—but based on the standards it has established, it is hard to see how local control can survive.

Political Realities

The DCL’s concluding section on remedies makes it clear that OCR expects states to spend more money on schools with high percentages of black and Hispanic children. Correcting discriminatory practices “may require significant financial investment from the district,” and “lack of funding is not a defense for noncompliance with Federal civil rights obligations.” Comparative spending levels should reflect the “extra costs often associated with educating low-income children, English language learners, and students with disabilities.” Yet OCR asserts that it “will not consider Title I funds in a resource equity analysis”—despite the fact that those federal funds are specifically designed

to help school districts meet the needs of such disadvantaged students.

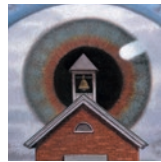
It is hard to believe that a letter written by an assistant secretary of OCR will lead states to significantly increase their spending on urban schools or to restructure their education-finance laws. In several large states, schools already face a crisis in the funding of teachers' pensions. Many state legislatures have gone through years of turmoil responding to education-finance decisions by state supreme courts. The head of OCR recently told Congress that the agency needs a major increase in funding just to investigate the complaints currently before it. The Office for Civil Rights simply does not have the resources to undertake the massive investigations proposed by the equity DCL. Nor does it have the political capital it needs to follow through on its threats.

Both the National Education Association and the American Federation of Teachers have enthusiastically endorsed the equity initiative, but it is highly unlikely that they—or OCR itself—will stand behind this statement in the DCL: “When a district’s adherence to collective bargaining agreements or State law has caused or contributed to discrimination against students on the basis of race, color, or national origin, Federal civil rights obligations may require a school district to renegotiate agreements, revise its personnel policies, or take other steps to remedy the discrimination.” If OCR ever attempted to enforce that mandate, it would invite the judicial review it has every reason to avoid.

How would an investigation of resource allocation in a large school system play out in practice? OCR actually tried this once before, in its ill-fated “Big City Reviews” of the mid-1970s. Despite the fact that Michael Rebell is one of the most enthusiastic and successful of all school finance litigators, his 1985 book written with Arthur Block, *Equality and Education*, provides a cautionary tale for ambitious federal regulators. In excruciating detail, Rebell and Block show how OCR’s effort to apply disparate impact analysis to schools in New York and four other large cities produced an “eclectic package of standards and methods” that “did not prove viable in practice.” Despite the fact that it achieved



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only minimal change within the New York City schools, OCR managed to infuriate almost every major figure in the state, ranging from United Federation of Teachers president Albert Shanker to U.S. senator Daniel Patrick Moynihan to U.S. district judge Jack Weinstein, a noted liberal activist. The director of OCR appointed by President Jimmy Carter eventually concluded that the effort had been a serious waste of agency resources.

How Will Schools Respond?

School leaders face a choice. On the one hand, they can devote abundant time and money to collecting the information that OCR demands, massaging the data to make themselves look good, and shifting money around here and there to show they are making “progress.” (For instance, the quickest way to appease OCR will be to increase the number of AP courses available to minority students, regardless of whether this is the school’s most pressing need.)

On the other hand, schools can call OCR’s bluff. They can say, “We applaud your goals and agree that addressing the racial achievement gap must be our top priority. We also agree that improving the quality of teachers in schools with high percentages of minority students is particularly important. But we do not intend to engage in the extensive bean counting that you demand. We prefer to spend money on teachers than on accountants. Remember that if you attempt to terminate our federal funds, we have the opportunity to seek judicial review. We will almost surely win in federal court. Remember also that an adverse judicial ruling will put all your other DCLs in jeopardy. Go ahead—make our day.”

Now *that* would be interesting.

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