

Fool's Gold

Office of Civil Rights takes on school finance

by JOSHUA DUNN



School finance reformers have long lamented the Supreme Court's 1973 decision in *San Antonio v. Rodriguez*, which held that absent intentional discrimination, unequal school spending is not unconstitutional. With federal courts closed, reformers brought litigation in state courts, where they

have had uneven degrees of legal success. They have long desired to escape the states and find a federal route for their ambitions. Last fall, the Department of Education's Office of Civil Rights (OCR) obliged.

On October 1, 2014, OCR issued an astonishing "Dear Colleague" letter (DCL) that promises to draw the federal government into the minutest details of school administration. In its letter, OCR announced that any disparities in education resources related to race or national origin, such as English language proficiency, could trigger an investigation by the agency. Tellingly, the letter, which was disguised as an offer to "help" states and school districts "address those disparities," did not provide any standards for determining when a school district or state was denying "equal access" to resources. Instead, it gave examples of possible violations. Those examples illustrate both the danger to education and groundlessness of OCR's unprecedented federal intrusion.

OCR's primary example is access to Advanced Placement (AP) courses. The agency noted that schools serving minority students and English Language Learners (ELL) are "under-represented" in AP courses. In particular, OCR noted that ELL students make up 5 percent of public school students but only 2 percent of students in AP courses. But this apparently alarming fact has an obvious explanation. Taking an AP course while learning English is difficult. Having any ELL students in any AP classes could be considered impressive. OCR would apparently require schools to offer AP classes whether or not they have students to fill them. But ignoring the obvious might well be the point. Excluding reasonable explanations potentially allows every school district in the country to come under OCR scrutiny.

So how else will OCR measure equality of resources? OCR quickly rejected per-pupil spending as "simplistic." Thus, a finding of unequal resources oddly might not be based on actual resources. But that leaves the problem that has afflicted school finance litigation for decades: if money is not the measure of resources and opportunity, then what is? At this point OCR wanders deep into the swamps of supervising

The letter does not provide any standards for determining when a school district is denying "equal access" to resources.

and managing schools. It says that it will consider a variety of factors that affect educational outcomes, including paint, carpets, lockers, heating and air-conditioning, laboratory facilities, performing arts spaces, library resources, audiovisual equipment, availability of laptops and tablets, access to Wi-Fi hot spots, graphing calculators, digital simulations, extracurricular activities,

and effective teaching and leadership. With OCR we will have no need for school boards and superintendents or even state boards of education, governors, and legislatures. One is left to wonder how one federal agency, let alone one that complains of being understaffed, is supposed to provide this kind of "holistic" evaluation of school resources across the country.

If these practical problems with OCR's letter were not enough, the agency also provides no reasonable legal foundation for its adventures in educational management. OCR ignores inconvenient legal authority such as *San Antonio v. Rodriguez* and instead discusses a range of less relevant cases and Title VI of the Civil Rights Act. In *Rodriguez*, the Supreme Court made it clear that varying levels of school spending are an inevitable consequence of the Constitution's system of federalism. And if Title VI actually contained what OCR says it does, school finance advocates wasted their time for four decades. Why toil in state courts when Title VI has all that you need?

Setting aside these problems, OCR's letter, despite its histrionics, fails to address one vexing issue. Nationally, the greatest disparities in educational resources are found across state lines, not within them. Even if OCR manages to coerce states into providing more Wi-Fi hot spots and aesthetically pleasing paint for some schools, its point of reference remains resources within a single state. It has not claimed that Colorado must provide the same resources as Wyoming. And as long as one state can spend less than its neighbor, the alleged problem OCR claims to address will persist.

Joshua Dunn is associate professor of political science at the University of Colorado-Colorado Springs.