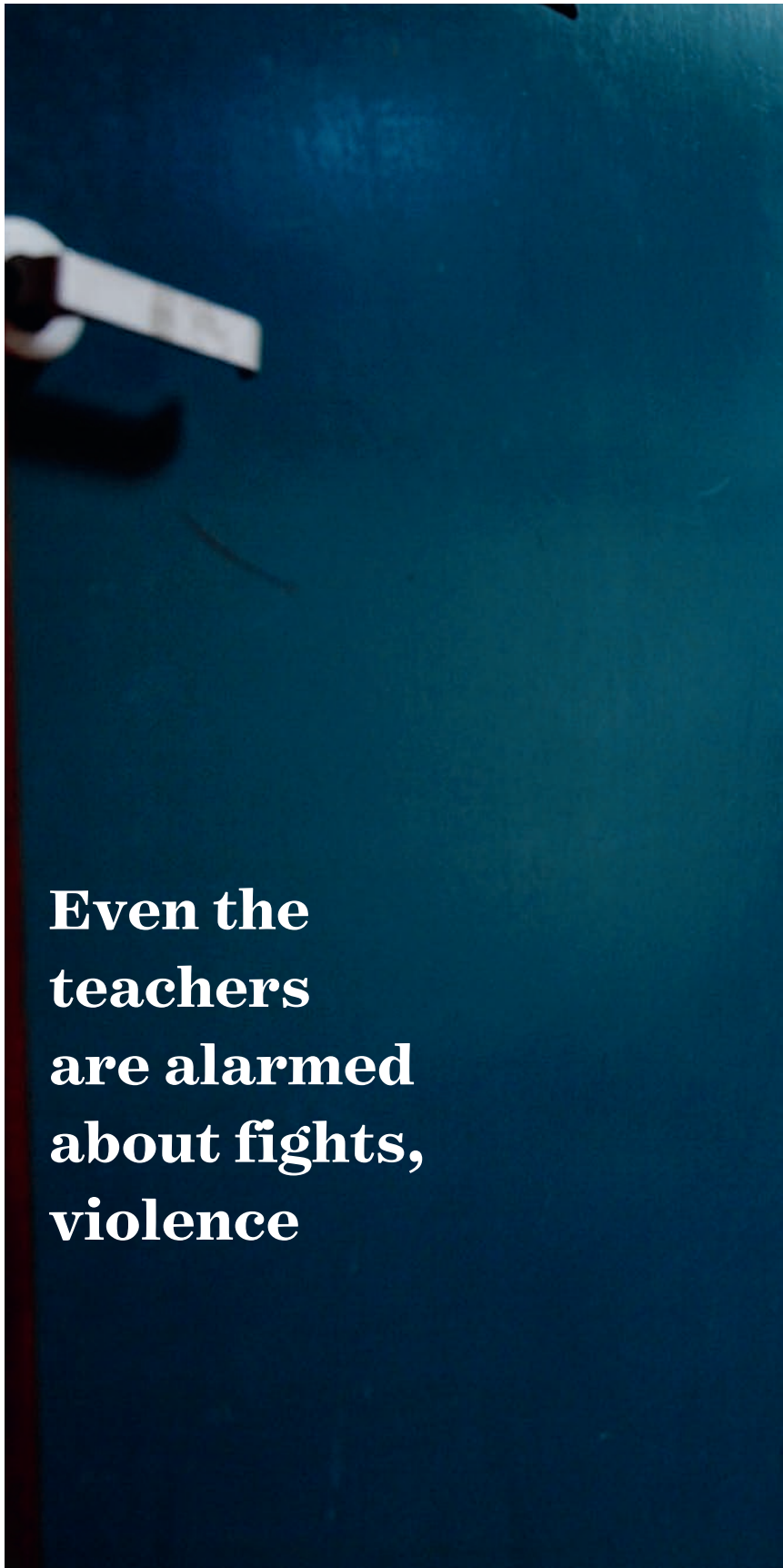


FEATURE

Behind Biden Administration's Retreat on Race and School Discipline, Real Concern on Student Behavior

AS K-12 SCHOOL OFFICIALS struggle to address a post-Covid surge of student misbehavior and violence, they must also navigate rapid swings in civil rights directives from the U.S. Department of Education. A decade ago, the Obama administration issued lengthy guidelines on bullying, sexual harassment, and racial disparities in school discipline. It also launched hundreds of protracted investigations to enforce these demands. The Trump administration withdrew many of these guidelines and substantially reduced the number of systemic investigations. The Biden administration has promised to return to a more aggressive approach to civil rights rulemaking

By **R. SHEP MELNICK**



Even the teachers are alarmed about fights, violence

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U.S. schools have seen a surge in student misconduct since reopening post-Covid, from bullying to fights to more serious acts of violence.

and enforcement. A year ago, the Department of Education proposed new rules on sexual harassment and announced new guidelines on discipline for students with disabilities. In May 2023 the departments of Justice and Education took yet another step, releasing a policy statement with the enigmatic title, “Resources on Confronting Racial Discrimination in Student Discipline.”

Neither a formal regulation nor even a standard guidance document, “Resources” describes 14 investigations of school discipline practices completed by the Department of Education between 2012 and 2022. It includes an account of an academy in Arizona that told a student with an Afro to get a haircut. It also includes the case of a school district in Utah that referred a Black student to law enforcement while giving a white student a conference for the same offense. Oddly, the two departments insist upon the limited legal significance of their report: “It does not constitute final agency action, and it does not have an immediate and direct legal effect. It does not create any new rights or obligations, and it is not enforceable. Neither the Departments’ investigations nor the summaries included below constitute a binding precedent.” “This document,” they explain, “is for informational and technical purposes only.” What guidance, then, does this report offer? Largely a set of steps school districts can take to stay in the departments’ good graces.

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To understand the ongoing controversy over school discipline mandates, it is important to recognize just how limited the federal government’s power is in this area. Outside of special education, the federal government only has authority to prohibit disciplinary practices that discriminate on the basis of race, national origin, or sex. (The Individuals with Disabilities Education Act, in contrast, creates specific rules for disciplining students with individualized education plans). In 2014 the Obama administration launched an aggressive effort to substantially curtail the use of out-of-school disciplinary measures (that is, suspensions and expulsions), which many claim have no educational value and contribute to the “school-to-prison pipeline.” But the only way federal regulators could address the issue was by claiming that these punishments were being applied in a racially discriminatory manner.

There is no question that if school officials punish a Black student more harshly than a similarly situated white student, they have engaged in unlawful discrimination and violated Title VI of the 1964 Civil Rights Act. But what does “similarly situated” mean? Not only that the two students engaged in the same type and degree of misconduct, but also that they had a similar history of prior transgressions. Proving “different treatment” requires detailed investigation of individual cases. Given the subjective nature of many forms of misbehavior and the fact that most such behavior is viewed only by a few people, seldom are these easy calls.

Consequently, the Obama administration’s 2014 Dear Colleague Letter announced that schools “also violate Federal law when they *evenhandedly* implement *facially neutral* policies and practices that, although not adopted with the intent to discriminate,



The U.S. Department of Education has pulled back from its stance of a decade ago when it issued mandates to redress school discipline concerns with federal civil-rights investigations.

CREATIVE COMMONS

nonetheless have an *unjustified effect* of discriminating on the basis of race.” (emphasis added). A school’s disciplinary policies and practices would be deemed to have an “adverse impact” on minority students if those students are “disproportionately” punished at higher rates or “subject to longer sanctions or more severe penalties.”

Once that *prima facie* case has been made, the school bears the burden of demonstrating that its policy is “necessary to meet an important educational goal,” and that there exist no “comparably effective alternative policies or practices that would meet the school’s stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group.” The Department of Education’s Office of Civil Rights explained that it would take a particularly hard look at policies that “impose mandatory suspension, expulsion or citations” for specified offenses, especially truancy. Such punishments, federal regulators strongly suggested, are seldom either “necessary” or “effective.”

Black students are subject to disciplinary action more frequently than white, Asian, or Hispanic students. This might be the result of discrimination, but it might also be a consequence of difference in socioeconomic status, family structure, neighborhood influences, youth subcultures, and policies adopted by schools in high-crime areas. Although the 2014 Dear Colleague Letter acknowledged that racial disparities “may be caused by a range of factors,” its “disparate impact” analysis said little about them. Its primary goal was to curtail the use of out-of-school punishments. The Trump administration withdrew that Dear Colleague Letter in 2018. The Biden administration subsequently announced that the withdrawal was “under review.”

The 2014 Dear Colleague Letter was announced by the Assistant Secretary of Education for Civil Rights Catherine Lhamon. When she was nominated to regain that position in 2021, she told a Senate committee, “It’s crucial to reinstate guidance on the topic.” What is most notable about the 2023 document, though, is the extent to which it backs away both from the 2014 Dear Colleague Letter’s “disparate impact” analysis and from its blanket condemnation of out-of-school punishments. Helpful suggestions have replaced legally binding obligations. Although this shift does not preclude a return to the aggressive enforcement strategy of the Obama administration, it does seem to signal a more conciliatory federal approach to discipline issues as public schools struggle to respond to heightened levels of violence and misbehavior.

By focusing on case resolutions that span the Obama, Trump, and Biden administrations, the report seeks to downplay the obvious policy shifts of the past decade.



HAROLD SHAPIRO

Catherine Lhamon oversaw the release of the 2014 Dear Colleague Letter as Assistant Secretary of Education for Civil Rights in the Obama Administration.

Most of the policy changes recommended in the report are sensible and relatively uncontroversial. They include

- collecting and regularly reviewing data on disciplinary actions to identify possible discrimination;
- establishing clearer, less subjective rules on what constitutes misconduct and appropriate the punishments for various levels of misconduct;
- making sure that school policies are consistent with state law;
- reducing the role of School Resource Officials (i.e. law enforcement personnel with arrest power located within schools) in routine disciplinary matters;
- improving communications with parents, especially those with limited English proficiency;
- developing alternatives to out-of-school punishments;
- providing better training to school personnel;
- hiring more school counselors and mental health professionals; and
- providing students with “tutoring, afterschool and summer learning, and enrichment programs to help students make meaningful academic and behavioral progress.”

Note that most of these items are worthy aspirations, not enforceable rules. Whether schools will have the resources and the commitment to put them into effect is one big question. How the Department of Education will try to nudge them in that direction is another.

Why has the department retreated from its hardline 2014 stance? Perhaps the White House has pressured the department to avoid hot-button educational issues prior to the 2024 election—as it seems to have done with the department’s recent proposal on transgender students’ assignment

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to sports teams. So far, though, we have little information on the nature of the debate within the administration. Nonetheless, it is possible to identify four factors that likely influenced its deliberations.

The first is growing alarm among school officials and parents about post-Covid disorder in our schools. According to a report by the Brookings Institution's Brown Center, "Schools across the country are reporting increased levels of misbehavior, including fights and more serious acts of violence." A survey conducted by *Education Week's* Research Center found that "nearly half of all school and district leaders (44 percent) say they are receiving more threats of violence by students now than they did in the fall of 2019 . . . [T]wo out of three teachers, principals, and district leaders say that students are misbehaving more these days than they did in the fall of 2019." In this context, restricting the availability of disciplinary measures would encounter strong resistance.

The second is concern among rank-and-file teachers about their own safety and the difficulty of maintaining order in classrooms and hallways. The department's 2014 Dear Colleague Letter initially received support from the national leadership of teachers unions but eventually drew angry opposition from teachers subject to lengthy investigations and restrictions on out-of-school punishments. With teachers facing greater threats of violence within the classroom, such opposition could not be ignored—especially since it comes from a key Democratic constituency.

Third, initial research on the main alternative to out-of-school punishments—restorative justice—found that this approach to dealing with misbehavior falls far short of its supporters' expectations. Subsequent to the 2014 Dear Colleague Letter, the RAND Corporation sponsored two randomized control studies comparing schools that instituted restorative justice programs with those that employed traditional disciplinary practices. RAND's study of several

schools in Maine found that "the middle-school student who received Restorative Practices Intervention did not report more school connectedness, better school climate, more positive peer relationships and developmental outcomes or less victimization than students in control schools did." A second, more extensive study of schools in Pittsburgh found that the number and length of suspensions declined in elementary schools instituting restorative justice programs. However,

[d]espite fewer suspensions, academic outcomes did not improve in PERC schools [those instituting restorative justice programs]. At the middle grade level (grades 6–8) academic outcomes actually worsened in the treatment schools. Neither did we find fewer suspensions in middle grades. . . . We did not see fewer suspensions for male students, for students with individual education plans, or for incidents of violence or weapons violation. Neither did we see a reduction in arrests.

According to a summary of the evidence in *The Hechinger Report*, "The biggest insight from the Maine study was how hard it is for schools to implement restorative justice even after days of teacher training, monthly consultations and visits by coaches."

Finally, studies of the implementation of the Obama administration's policies found a wide gap between the policies announced in formal agreements between school leaders and federal officials on the one hand and the actual practices of teachers and principals on the other. Within a single school district, compliance and reporting differed substantially from one school to another. That experience suggests that without substantial support from teachers and principals on the front lines, directives on discipline from Washington are likely to be ignored.

The fact that federal regulators have addressed the school discipline issue by describing the results of past investigations rather than by issuing explicit rules emphasizes the central role that such investigations play in federal civil rights policy. Especially during the Obama administration, the Department of Education has used lengthy and intrusive investigations to pressure schools to sign detailed resolution agreements. The process was the punishment, and federal policy was in effect the sum of these individually negotiated agreements. The May 2023 report does little to constrain the Department of Education. But it seems to indicate that the department has adopted a more nuanced and pragmatic approach to the school discipline issue than it did a decade ago.

R. Shep Melnick is the Thomas P. O'Neill, Jr. Professor of American Politics at Boston College and author, most recently, of The Crucible of Desegregation: The Uncertain Search for Educational Equality (University of Chicago Press, 2023).