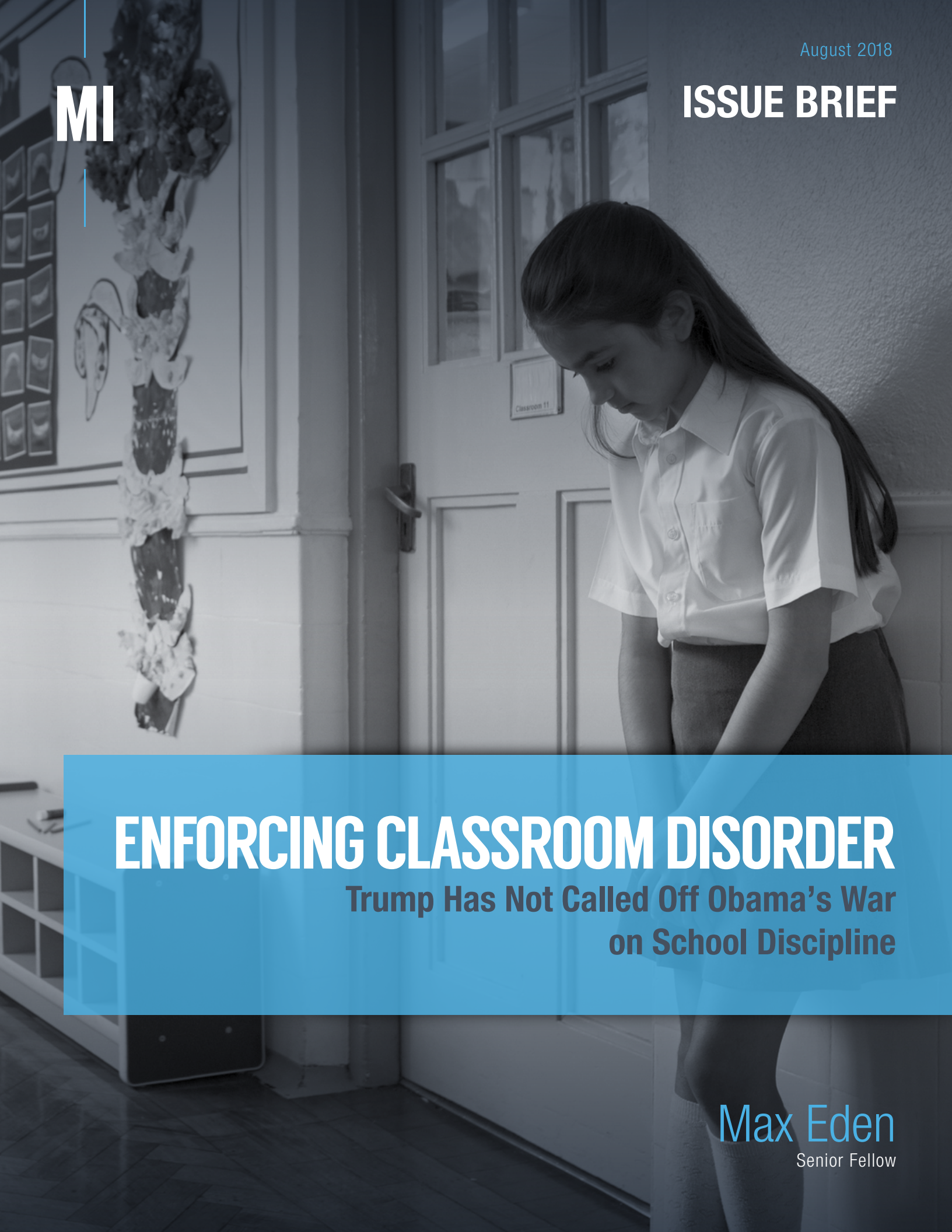

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ISSUE BRIEF

ENFORCING CLASSROOM DISORDER

Trump Has Not Called Off Obama's War on School Discipline

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Executive Summary

In January 2014, the Obama administration issued a Dear Colleague Letter (DCL) on school discipline. The DCL—prepared by the U.S. Department of Justice and the U.S. Department of Education's Office for Civil Rights (OCR)—claimed that: (1) school districts rely excessively on suspensions; (2) black students are suspended at disproportionately high rates primarily because of educators' racial bias; (3) suspensions cause substantial long-term harm to students; and (4) schools should curtail traditional discipline (suspensions) in favor of new "restorative" approaches that emphasize dialogue over punishment.

Critics of the DCL contend that it directly triggered a reduction in school suspensions nationwide, which has led to a rise in classroom disorder and violence.[1] Supporters argue that the DCL is merely "nonbinding guidance," a simple reminder to school districts to administer school discipline in a nondiscriminatory manner, and that the declining use of suspensions in America has been mostly spurred at the grassroots level.

Who's right? The facts leave little doubt that the DCL has been instrumental in reducing suspensions. But there is more to the story than is typically recognized.

As early as 2010, the Obama administration had begun breaking long-standing precedent by shifting OCR's mission—from ensuring that school districts apply their own discipline policies evenhandedly to pressuring them into adopting the administration's favored progressive discipline policies under threat of losing federal funding.

After the DCL was issued in 2014, OCR's new mission was formalized and sharply expanded—as confirmed by an internal document (released to this author by a whistle-blower and former OCR employee) guiding OCR investigations of school districts. A Freedom of Information Act request on all disciplinary investigations from January 2009 to October 2017 reveals just how widespread OCR's policy reach was.

During this period, at least 350 school districts—serving nearly 10 million children, or about one-fifth of all public elementary and secondary school students in the U.S.—were investigated for the express purpose of coercing districts into changing their discipline policies. Among the districts investigated were 52 of America's 100 largest, including Atlanta, Boston, Charlotte, Denver, Houston, Los Angeles, Milwaukee, New York City, Philadelphia, Sacramento, San Francisco, and Seattle. The result: a further tightening of federal control over U.S. education, largely without parents' knowledge or teachers' consent, and the imposition of discipline policies that appear to be making America's schools more disorderly and violent.[2]

To date, the Trump administration has neither rescinded the DCL nor ended OCR's coercive investigations. As of June 29, 2018, 363 investigations were ongoing in 43 states, of which 79 have been open for four or more years, including those of the school districts of New Haven, Charlotte-Mecklenburg, Columbus, San Francisco, New York City, Seattle, and Denver.[3]

Introduction

In January 2014, the U.S Department of Education (ED) and U.S. Department of Justice (DOJ) issued a joint Dear Colleague Letter (DCL) on school discipline. In a speech announcing the policy, then–secretary of education Arne Duncan declared: "Racial discrimination in school discipline is a real problem today, and not just an issue from 40 to 50 years ago."[4]

According to Duncan, societal ills such as poverty, broken families, and neighborhood crime have little effect on student behavior. Rather, racism among teachers and administrators is responsible for the fact that black students are more than three times as likely as white students to be suspended.[5] Noting the correlation between students who are suspended and students who drop out of high school, Duncan argued that traditional discipline creates a "school to prison pipeline." Today, Duncan's hostility to suspensions as a tool for maintaining discipline has been institutionalized at the ED, whose website now states: "Suspensions don't work for schools, teachers, or students."[6]

Title VI of the Civil Rights Act of 1964 forbids discrimination on the basis of race in institutions that receive federal funding. The 2014 DCL warns school districts: "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 ['disparate treatment'], 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"[7] (emphasis in original).

The DCL informs school districts that if ED's Office for Civil Rights (OCR) determines, after an investigation, that students face disparate treatment based on race, *or* if students of a particular race receive suspensions at a higher rate under a neutral, evenhanded policy, then school districts can lose their federal funding unless they sign a resolution agreement with OCR. It is the second assertion—that OCR can find schools in violation of the Civil Rights Act based on disparate impact—that has aroused intense controversy.

Supporters of the DCL contend that it is not a noteworthy departure from precedent, that it merely clarifies long-standing disparate-impact obligations under Title VI,[8] that it has not produced significant negative unintended consequences, and that it is "nonbinding guidance" that does not promulgate policy mandates.[9]

Critics of the DCL contend that it represents an unprecedented expansion of federal control over school districts' disciplinary policies, that it misapplies disparate-impact theory, and that it places an unreasonable burden on school districts to prove that policies that are neutral and administered evenhandedly are legitimate and lawful.[10] Critics also argue that OCR investigations, as well as the mere threat of them, have caused school districts to change their discipline policies with insufficient regard for school safety and achievement.[11]

President Trump has directed current secretary of education Betsy DeVos to consider whether to repeal the DCL. Whereas the DCL has been the subject of heated debate, little attention is being paid to OCR's investigations, which have also continued under the Trump administration. As of June 29, 2018, 363 investigations were ongoing in 43 states, of which 79 have been open for four or more years, including those of the school districts of New Haven, Charlotte-Mecklenburg, Columbus, San Francisco, New York City, Seattle, and Denver.[12]

Can OCR Pursue Disparate-Impact Investigations?

Vanita Gupta, a former assistant secretary in the DOJ, and Catherine Lhamon, a former assistant secretary of OCR, argue that the DCL merely "explains long-standing federal law prohibiting racial discrimination in school discipline and concretely outlines how schools can satisfy this law while maintaining classroom peace."[13] When the DCL was issued in 2014, however, Lhamon overturned a 1981 memo by Clarence Thomas, then ED's Assistant Secretary for Civil Rights:

> Where there is evenhandedness in the application of discipline criteria, there can be no finding of a Title VI violation, even when black students or other minorities are disciplined at a disproportionately high rate. Conversely, the discriminatory disciplining of a single minority student can be a violation of Title VI if that student is treated more harshly than a white student or students with similar disciplinary records who committed a similar or greater offense. As a general rule, however, statistics play a minor role in determining whether or not a violation of Title VI has occurred.[14]

In other words, before the 2014 DCL, OCR's mission was to investigate and address claims of disparate treatment; it explicitly rejected both the notion that discrimination could occur when school discipline is administered evenhandedly and the notion that OCR ought to play a role in determining the details of discipline policy. In contrast, the DCL declares that disparate impact *is* unlawful discrimination and that suspension statistics *should* play a significant role in determining if such discrimination has occurred: "Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations."[15]

Does OCR have the legal authority to apply disparate-impact theory in this manner? No, say Gail Heriot and Alison Somin of the U.S. Commission on Civil Rights, who point out that the Administrative Procedure Act stipulates that such a major policy shift must be promulgated as a formal regulation after notice and comment rule-making (under which a proposed rule is published in the Federal Register and is open to public comment and scrutiny). The DCL, note Heriot and Somin, rewrites policy by "Dear Colleague" fiat; further, whereas the DCL takes its authority from Title VI, "one thing that can be said with confidence is that the authority to prohibit disparate impact does not come directly from Title VI itself."[16] In *Alexander v. Sandoval* (2001), the U.S. Supreme Court agreed: "[It is] beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination."[17]

While OCR argues that its legal authority derives not from Title VI but from two later regulations issued in 1966,[18] Heriot and Somin reply that these later regulations still do *not* transform Title VI into a disparate-impact statute. Even if Title VI were such a statute, they add, OCR would still require evidence that an individual has been a victim of disparate treatment. Somin and Heriot conclude their analysis by arguing that the DCL presumes that any school-discipline policy is illegal unless a federal bureaucrat condones it, a view "contrary to the American spirit" and "incompatible with the rule of law."[19]

How does the DCL purport to determine if a disparate-impact violation has occurred? It applies a three-question test, as outlined in *Elston v. Talladega County Board of Education* (1993):

1. Does the discipline policy have a disproportionate, adverse impact on one group?
2. If so, is the policy designed for a legitimate educational goal?
3. Are there comparably effective alternatives that would achieve the goal with less of an adverse burden on a particular group?[20]

An answer of yes to the first question and either no to the second or yes to the third is proof of a violation. In a court of law, however, a judge applying this test would offer reasonable deference to school districts. But under the DCL, OCR serves as both prosecutor and judge in a closed administrative investigation.

What's more, the outcome of OCR investigations is largely predetermined. As noted, ED believes that "suspensions don't work" and that school districts should adopt "restorative" practices (a yes to question 3 of the test, above), which emphasize

dialogue over punishment. Thus, any school district that OCR investigates where suspension rates are not proportional (a yes to question 1 of the test) would be presumed guilty of a disparate-impact violation. Together, the DCL and attendant investigations send a message to school districts that they had better adopt the ED's nontraditional approach to school discipline if they want to keep their federal funding, generally about 10% of district spending.

OCR Investigations

The DCL coincided with a nationwide shift in school discipline.[21] But to what extent was it responsible for the shift? A 2018 survey of 950 superintendents by the School Superintendents Association (AASA) found that 16% of superintendents reported changing their discipline policies in response to the DCL; 20% (and 43% of urban superintendents) said that pressure from OCR—but not necessarily from the DCL itself—led them to adopt policy changes; and 25% said that they were not sure whether changes to their policies were a result of local pressure, state pressure, or federal pressure.[22]

These responses reflect the various ways that OCR has affected policymaking. For some school districts, the DCL itself precipitated a shift in policy; for others, an OCR investigation spurred policy change; for still others, policy change occurred in a broader context that was fostered by both the DCL and investigations.

School districts take OCR investigations seriously. According to AASA, investigations are a "powerful lever in influencing districts to reduce out-of-school time [suspensions] for students even if teachers, parents or students preferred for that specific child to be removed from class."[23] A March 2018 Government Accountability Office (GAO) report notes that OCR can "withhold federal funds if a recipient [school district] is determined to be in violation of the civil rights laws and the agency [OCR] is unable to reach agreement with the parties involved."[24]

Under the Obama and Trump administrations, OCR has not revoked federal funding for a violation. But the threat that it might do so has been enough. The GAO report provides case studies of closed OCR investigations; in all cases, the school district agreed to implement new policies "designed to reduce exclusionary discipline [suspensions]," with the goal of "addressing [racial] disparities in school discipline."[25]

The earliest publicly available resolution agreement for an OCR school-discipline investigation under the Obama administration is a compliance review into the Los Angeles Unified School District, initiated in February 2010 and resolved in October 2011.[26] (Most OCR actions are investigations in response to a complaint; compliance reviews are initiated at OCR's discretion.) The resolution stipulated, among others, that "the District shall develop and implement a comprehensive plan to eliminate the disproportionality in the discipline imposed on African American students (comprehensive disciplinary plan)."[27]

The next publicly available resolution agreement is a compliance review of the Oakland Unified School District, initiated in May 2012 and closed in September 2012. The 20-page agreement mandates detailed steps to reduce the suspension rate of black students.[28]

The resolution agreements signed by Oakland and Los Angeles show that OCR investigations resulted in major shifts in school-discipline policy even before the 2014 DCL. The DCL itself was a public warning shot that policy was changing. Shortly thereafter, OCR employees would receive a confidential primer on how their role had changed.

OCR's Internal Guidelines

In February 2014, one month after the DCL was issued, OCR issued internal guidelines ("OCR's Approach to the Evaluation, Investigation, and Resolution of Title VI Discipline Complaints") that formalized the coercive nature of its school-discipline investigations: to pressure school districts to reduce suspensions in favor of softer alternatives favored by the Obama administration. These guidelines were not made public.[29] OCR labeled them as a "draft deliberative document," which meant that they were not subject to the Freedom of Information Act. I obtained the guidelines from a whistle-blower who previously worked in OCR.

The guidelines articulate the predetermined, prescriptive nature of OCR investigations: "Removing students from a classroom not only prevents them from accessing educational instruction, but may also send them on a school-to-prison pipeline. OCR's work in investigating these complaints and successfully implementing the agreements has the potential to be life-changing; this is an opportunity for OCR to make a truly significant difference in the lives of students."

The guidelines declare that school districts should not be allowed to implement traditional discipline except for the most egregious offenses: "Districts should only utilize exclusionary sanctions 'as a last resort.'... OCR must ensure that ...'the school's written discipline policy explicitly limits the use of out of school suspensions, expulsions, and alternative placements to the most severe disciplinary infractions that threaten school safety or to those circumstances where mandated by Federal or State law.' Accordingly, OCR will require districts whose exclusionary sanctions are not limited to the most severe disciplinary infractions that threaten school safety or to those required by Federal or State law to revise them to conform to these standards."

According to the guidelines, individual complaints of discrimination automatically became district-wide investigations, requiring three years' worth of data analysis, based on the racial ratios of school suspensions. If the "number of suspended minority students" / "number of minority students" is more than twice the value of "number of suspended white students" / "number of white students," then a districtwide investigation proceeds. Student demographic factors, such as poverty, are not to be taken into account.

Investigators are to analyze not only major disciplinary measures, such as suspensions, but also minor disciplinary measures, such as in-class time-outs and loss of recess privileges. They are also to examine instances when students are referred for discipline but where no action is taken. This is necessary because in any decision, "the administrator ... is relying solely on the referring teachers' perception, which only exacerbates the discrimination."

The guidelines as a whole evince a profound distrust for teachers' judgment. They inform investigators: "Subjective criteria and discretion in the administration of discipline procedures are not per se illegal or violative of Title VI"; however, "subjectivity and discretion in the process should ... be carefully reviewed to ensure that such factors are not being used in a discriminatory manner." Teachers are to be scrutinized to determine "whether individual teachers are more likely to refer students of a particular race for behavior which students of another race are referred," and in this analysis, "the race of the greatest contributory teachers could be seen as relevant." The guidelines imply that white teachers ought to be subject for special scrutiny.

Recognizing that the search for statistical disparities could be complicated in predominantly minority schools with predominantly minority teachers, the guidelines suggest comparing schools of different racial compositions with one another (no mention is made of other demographic factors). As for entire school districts that are effectively segregated, the guidelines recommend that investigators compare them with other school districts. (Of course, comparing one district with another in an effort to find statistical disparities approaches analytic absurdity; yet it does all but assure that OCR investigators will be able to find school districts in violation of the first part of the three-part disparate-impact test.)

According to the guidelines, after finding evidence of a statistical disparity, OCR investigators must interview teachers and administrators to ascertain whether the discipline policies are justified. This doesn't always happen, though.

Oklahoma City Public Schools faced a two-year investigation that failed to find evidence of disparate treatment but nevertheless resulted in the school district signing a resolution agreement and overhauling its discipline policy. In the resolution agreement, OCR admitted that it did not interview staff to "establish whether or not there is a legitimate nondiscriminatory reason for the disparate numbers."

OCR also shows a striking disregard for the consequences of systematically forcing school districts to implement discipline policies that they disagree with. Shortly after Oklahoma City Public Schools adopted OCR's desired discipline policies, a poll of teachers in the district found that 60% reported a decline in order and safety. One year later, the school district signed the resolution agreement, formalizing and finalizing the policy shift.[30]

When OCR does get around to conducting interviews, intimidation seems to be its modus operandi. According to Heriot and Somin of the U.S. Commission on Civil Rights, OCR often seems "eager to threaten additional cost and inconvenience for school districts unwilling to settle."[31] According to the previously noted AASA survey, "teachers and principals discussed feeling undermined and scared by the [interview] process. Several high-performing teachers were so shook-up after the interviews they questioned whether they should remain in the teaching profession. There was a noticeable decline in staff morale after these investigations concluded that did not fade."[32]

Superintendents describe investigations as "unprecedented, intimidating, and costly."[33] An administrator in Rochester, Minnesota, whose school district was investigated, writes: "The fact that this matter [investigation] has dragged on for 5 years requiring the expenditure of enormous resources on the part of the District, without any evidence of wrongdoing, is unconscionable."[34] When Rochester eventually caved to OCR pressure, the school district's resolution agreement overhauled its discipline policy but did not mention a single disparate-treatment violation.

The guidelines also stipulate that school districts that sign resolution agreements hire consultants to develop student-behavior strategies that "do not require engagement with the discipline system." Further, districts must hold meetings to "advise parents of the importance of due process in connection with disciplinary actions (including referrals)" and to "explain how to file complaints about the administration of discipline." And, after it closes investigations, OCR reserves the right to "review any changes that a district proposes … [and] if OCR is not satisfied with them, we [OCR] will require further correction."

According to the guidelines, two policy mandates are especially likely to be resisted by school districts. The first is that districts should establish "collaborative agreements" with law enforcement on the understanding that districts will be held liable for discriminatory actions by "school resource officers," as determined by OCR. District objections that the Department of Education has no authority over local law enforcement should be dismissed. The second mandate involves onerous reporting requirements for a range of minor disciplinary sanctions (see sidebar, **Record-Keeping Requirements**). (These requirements assuredly affected what they measured, providing a disincentive to taking, or recording, disciplinary action.)

OCR investigations often occur without the knowledge of administrators, teachers, and parents, too. Until Milwaukee signed its resolution agreement, for example, several of its *board* members were not aware of OCR's four-year investigation of the school district. When asked why Milwaukee signed its resolution agreement, superintendent Darienne Driver stated simply: "We have to. It's not optional."[35]

How Many School Districts Has OCR Investigated?

Through a Freedom of Information Act request, I obtained data on all OCR disciplinary investigations from January 20, 2009, the start of the Obama administration, through October 1, 2017, nearly nine months into the Trump administration. I estimate that at least 350 school districts—serving approximately 10 million children, or about one-fifth of all K–12 students in the U.S.—were investigated during this period for the purpose of intimidating them into adopting discipline policies favored by the Obama administration. (Because some of these pre-2014 investigations may have continued under OCR's original mission of targeting only disparate-treatment violations, it is not possible to do a precise tally.)[36] Among the school districts investigated were 52 of America's 100 largest, including Atlanta, Boston, Charlotte, Denver, Houston, Los Angeles, Milwaukee, New York City, Philadelphia, Sacramento, San Francisco, and Seattle.[37]

During the Obama administration, OCR received 2,272 school-discipline-related complaints: 1,597 were dismissed (1,119 before the 2014 DCL, 478 after); 80 ended with an expedited resolution agreement (67 before, 12 after); and 153 were resolved with a normal resolution agreement (109 before, 44 after). Of the 153, eight saw OCR reach a conclusive finding of discrimination (6 before, 2 after). When the Trump administration entered office, 442 Obama-era complaints were still under investigation.

The Trump administration has since revised OCR's case-processing manual. Now, individual cases need not automatically become system-wide investigations,[38] while regional OCR offices have more discretion to handle investigations.[39] As a result,

cases have been dismissed for lack of evidence at a higher rate under the Trump administration.[40] However, as noted, 363 cases remain open, many of which have been ongoing for years. Cases that have been closed through resolution agreement under the Trump administration, such as for Milwaukee and Durham, have seen school districts agree to an essentially identical list of policy prescriptions as those required by the Obama administration's internal guidelines.[41]

Record-Keeping Requirements

The guidelines mandate that school districts that sign resolution agreements maintain exhaustive disciplinary records, including when students are merely considered for sanction. "The data collected will include, but not be limited to, the following:

1. The name/identification number, race, ethnicity, sex, age, disability and/or English Language Learner status, and grade level of each student referred for discipline;
2. For each referral, the name/identification number, race, ethnicity, sex, age, grade level, disability and/or ELL status, as applicable, and grade level of all other students involved in the incident, whether or not they were referred for discipline themselves;
3. A detailed description of the misconduct;
4. A description of all approaches that were attempted in order to address the behavior at issue prior to referral for discipline;
5. The date of the referral;
6. The specific Code violation for which the referral was made;
7. The referring staff member (by staff identification/employee number);
8. The school and type of class from which the referral was made or other specific settings (e.g., bus referral, hallway referral);
9. Whether there were any student and/or adult witness(es) of the incident; names of witness(es); number of witnesses;
10. The prior disciplinary history of the student;
11. The specific code violation for which the student was punished and the penalty/sanction imposed, or, if no violation was charged or penalty/sanction imposed, the reason why;
12. The outcome of the manifestation hearing determination, if applicable;
13. The date the penalty/sanction was imposed;
14. The length of the penalty/sanction (in number of days);
15. The staff member who assigned the penalty/sanction (by staff identification/employee number);
16. Whether the student was transferred to the alternative school or to a different school site;
17. Whether school-based or local law enforcement were involved (e.g., law enforcement was notified of the offense);
18. Whether the referral to law enforcement was mandatory and, if so, the statute or ordinance governing the referral;
19. Whether the student was arrested as a result of school-based or law enforcement referral;
20. Any other non-punitive outcomes arising out of each referral incident, including, but not limited to, referral for homebound services, disability evaluation; and
21. Whether a student was given access to appropriate due process procedures in connection with the penalty/sanction, including but not limited to being given the opportunity to present his or her version of events and/or an explanation for their conduct prior to the imposition of sanctions and whether, when, and how their parents were contacted in connection with each referral incident.
22. Implement school-level discussions each semester to examine how referrals and sanctions at the school compare to those at other schools; identify race-based disproportions, and implement remedial measures, as appropriate."

Source: "OCR's Approach to the Evaluation, Investigation, and Resolution of Title VI Discipline Complaints." See nn.29

Conclusion

Through its 2014 Dear Colleague Letter and attendant investigations, the Department of Education's Office for Civil Rights has coerced hundreds of school districts, serving millions of students, into changing school-discipline policies. In the process, the Obama administration transformed OCR's mission—from its traditional role ensuring due process for students who allege discrimination into an entity that utilizes investigations to force school districts to adopt a particular approach to school discipline.

The administration did all this through subterfuge, pretending that the DCL and attendant investigations are not coercive, even as it labeled an internal document detailing its true intent as "draft deliberative" to block FOIA requests. The Trump administration—despite its efforts elsewhere to roll back Obama-era red tape and despite its stated desire to reduce federal control over education—has neither rescinded the DCL nor ended the investigations. As a result, OCR has continued its stealth campaign to force schools to adopt the Obama administration's progressive discipline policies.

But even if the Trump administration rescinds the DCL and ends the investigations, a future administration could easily reinstate both, or it could leave the DCL buried and simply resume the investigations out of the public's eye. If the Trump administration wants school districts to be allowed to craft impartial discipline policies that best meet the needs of their teachers and students, it should enter formal "notice-and-comment" rule-making to promulgate an official regulation setting the scope of OCR investigations.

As for what the regulation should say, there is no need to reinvent the wheel. "OCR's primary concern," wrote Clarence Thomas in 1981, "with school discipline is not with the substance of the discipline policy of a school or a school district, but with the discriminatory application of the policy." A fine mission then, and a fine mission now.

Endnotes

1 See, e.g., Max Eden, "School Discipline Reform and Disorder: Evidence from New York City Public Schools, 2012–16," Manhattan Institute, Mar. 14, 2017; Mario Koran, "The Learning Curve: Restorative Justice Can Make Schools More Violent if Not Done Right," Voices of San Diego, Mar. 29, 2018; Megan O'Matz and Scott Travis, "Schools' Culture of Leniency Lets Students Like Nikolas Cruz Slide," *South Florida Sun-Sentinel*, May 12, 2018; and Elizabeth Doran, "DA: Syracuse Schools Must Drop Changes That Cut Suspensions, Get Tough on Discipline," *Syracuse Post-Standard,* May 26, 2017.

2 For a survey of the evidence, see, e.g., Max Eden, "Federal School Discipline Directives," Heritage Foundation, Mar. 12, 2018.

3 ED, "Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of June 29, 2018."

4 ED, "Rethinking School Discipline: Remarks of U.S. Secretary of Education Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package," Jan. 8, 2014.

5 ED, "Civil Rights Data Collection Data Snapshot: School Discipline," March 2014.

6 Ibid.

7 DOJ and ED, "Joint 'Dear Colleague' Letter," Jan. 8, 2014.

8 Vanita Gupta and Catherine E. Lhamon, "Dear Betsy DeVos, Don't Bring Back Discrimination in School Discipline," *Education Week*, Mar. 27, 2018.

9 Peter Cunningham, "If You're Going to Argue About Reforming School Discipline, at Least Use Facts," *Education Post*, Apr. 1, 2018.

10 See, e.g., Hans Bader, "Legal Reformers Call for Repeal of Race-Based School Discipline Guidance," Competitive Enterprise Institute, Apr. 17, 2017; and Michael J. Petrilli, "A Supposed Discipline Fix Threatens School Cultures," *Education Next,* Mar. 7, 2018.

11 See, e.g., Max Eden, "'Disparate Impact' for School Discipline? Never Has Been, Never Should Be," Thomas B. Fordham Institute, Jan. 17, 2018.

12 ED, "Pending Cases Currently Under Investigation."

13 Gupta and Lhamon, "Dear Betsy DeVos."

14 See Clarence Thomas, "Memorandum to U.S. Secretary of Education: Civil Rights Aspects of Discipline in the Public Schools," Sept. 18, 1981; and Mark Keierleber, "Is DeVos Near Ending School Discipline Reform After Talks on Race, Safety?" The 74, Nov. 20, 2017.

15 DOJ and ED, "Joint 'Dear Colleague' Letter."

16 Gail L. Heriot and Alison Somin, "The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law," San Diego Legal Studies Paper 18–321, January 2018.

17 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

18 Id. (citing 28 C.F.R. § 104(b)(2) (2014) and 34 C.F.R. § 100.3(b)(2) (2014)).

19 Heriot and Somin, "The Department of Education's Obama-Era Initiative."

20 U.S. Court of Appeals, Eleventh Circuit, *Elston v. Talladega County Board of Education,* 997 F.2d 1394, Aug. 31, 1993.

21 See, e.g., Eden, "School Discipline Reform and Disorder"; Koran, "The Learning Curve"; O'Matz and Travis, "Schools' Culture of Leniency"; and Doran, "DA: Syracuse Schools Must Drop Changes That Cut Suspensions."

22 School Superintendents Association, "2018 AASA Discipline Survey," April 2018.

23 Ibid.

24 GAO, "Discipline Disparities for Black Students, Boys, and Students with Disabilities," March 2018.

25 Ibid.

26 ED, "Agreement to Resolve: Between the Los Angeles Unified School District and the U.S. Department of Education, Office for Civil Rights," Oct. 11, 2011.

27 Ibid.

28 ED, "Agreement to Resolve: Oakland Unified School District," Sept. 17, 2012.

[29] "OCR's Approach to the Evaluation, Investigation, and Resolution of Title VI Discipline Complaints." See https://www.manhattan-institute.org/sites/default/files/OCR-disciplineguide-2014.pdf.

[30] Tim Willert, "Many Oklahoma City School District Teachers Criticize Discipline Policies in Survey," *The Oklahoman,* Oct. 31, 2015.

[31] Heriot and Somin, "The Department of Education's Obama-Era Initiative."

[32] School Superintendents Association, "2018 AASA Discipline Survey."

[33] Ibid.

[34] Heriot and Somin, "The Department of Education's Obama-Era Initiative."

[35] Annysa Johnson, "MPS Agrees to Settle U.S. Civil Rights Complaint over Discipline of Black Students," *Milwaukee Journal Sentinel,* Jan. 17, 2018. Notably, this agreement was signed in January 2018. Whereas the Trump administration has provided OCR regional offices additional discretion to close cases where they find no evidence of discrimination, the practice of prescribing the Obama administration's preferred policies has continued.

[36] To obtain a more precise tally, I made further FOIA requests into the particulars of these investigations. As of this writing, my requests have not been answered. The (conservative) estimate in this paper is made by examining the start dates and lengths of investigations that have been resolved, as well as those that are still open. In March 2018, the Trump administration began publishing a list of open OCR investigations, available at: ED, "Pending Cases Currently Under Investigation."

[37] The 52 school districts are: Albuquerque Public School District, Anne Arundel County Public Schools, Atlanta Public Schools, Boston Public Schools, Brevard Public Schools, Charlotte-Mecklenburg Schools, Cherry Creek School District, Chesterfield County Public Schools, Clark County School District, Clayton County Public Schools, Cobb County School District, Columbus Public Schools, Cypress-Fairbanks Independent School District, DeKalb County School District, Denver Public Schools, Douglas County School District, El Paso Independent School District, Elk Grove Unified School District, Fairfax County Public Schools, Fort Bend Independent School District, Fort Worth Independent School District, Fresno Unified School District, Gwinnett County Public Schools, Henrico County Public Schools, School District of Hillsborough County, Houston Independent School District, Jefferson County Public Schools, Knox County Schools, School District of Lee County, Lewisville Independent School District, Los Angeles Unified School District, Milwaukee Public Schools, Montgomery County Public Schools, New York City Public Schools, North East Independent School District, School District of Osceola County, School District of Palm Beach County, Pasco County School District, School District of Philadelphia, Pinellas County Schools, Plano Independent School District, Sacramento City Unified School District, San Antonio Independent School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, Shelby County Schools, Tucson Unified School District, Virginia Beach City Public Schools, Volusia County School District, Wake County Public School System, and Winston-Salem/Forsyth County Schools.

[38] Jessica Huseman and Annie Waldman, "Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government," ProPublica, June 15, 2017.

[39] Christina Samuels, "New Guidelines Let Civil Rights Office Ignore Cases from Serial Complainers," *Education Week,* Mar. 22, 2018.

[40] Annie Waldman, "Shutdown of Texas Schools Probe Shows Trump Administration Pullback on Civil Rights," ProPublica, Apr. 25, 2018.

[41] Kelly Hinchcliffe, "Federal Education Officials to Monitor Durham Public Schools after Discipline Complaint," WRAL.com, Feb. 22, 2018.