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Misusing "Disparate Impact" to Discriminate Against Students in School Discipline

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KEY TAKEAWAYS

The Left often uses "disparate impact" to find discrimination where none exists. The Obama Administration did this to upend how public schools discipline students.

Officials justified racial quotas in school discipline. This is not only illegal and unjustified, but it also hurts well-behaved students and their teachers.

Lawmakers must give students and educators the ability to respond to student misconduct without regulations rooted in social justice theories that corrupt justice.

Disparate impact is the dubious approach to civil rights enforcement that claims that an entirely neutral policy that does not discriminate on its face, is not intended to discriminate, and does not actually treat individuals differently based on their race *still* constitutes illegal racial discrimination if it has a "disproportionate" statistical effect among different racial and ethnic groups. This theory has been used, most notably by the Obama Administration, to justify racial quotas in school discipline, including suspensions and expulsions—ignoring the many other factors that may be responsible. Adopting racial quotas in school discipline is not only illegal and unjustified, it is counterproductive.

Because such a policy changes the discipline applied to students for the same misbehavior depending on their race, it hurts misbehaving students since such disparate treatment or a lack of corrective action

may encourage even more disruptive and dangerous behavior. Moreover, such policies hurt well-behaved students and their teachers because forcing schools to keep misbehaving students in the classroom will invariably disrupt the learning environment.

School Safety and Student Discipline: Are Educators Biased?

Progressive advocates in favor of limiting student suspensions and expulsions, otherwise known as "exclusionary discipline," in K–12 schools argue that such limitations are necessary because minority students are suspended at higher rates than their white or Asian peers. Some claim that if the expulsion and suspension rates of minority students for misbehavior are higher than the per capita ratio of such students (broken down by race and ethnicity) in the general population, this is due to racism and not attributable to socio-economic, cultural, community, or other circumstances, such as exposure to violence or being raised in single-parent households.

We all agree that racist acts are a blight on our society whenever and wherever they occur. Yet researchers have not isolated causal findings between educator racism and student discipline. Thus the data on classroom behavior and high concentrations of students living in poverty and from non-intact families who are assigned to traditional schools according to a student's residence are essential to designing and evaluating student discipline policies.

On January 8, 2014, the Obama Administration issued a "Dear Colleague" letter containing guidance on school discipline policies. In that letter, which has since been rescinded, the U.S. Departments of Education and Justice claimed that:

> African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended. Although African-American students represent 15 [percent] of students in the CRDC [Civil Rights Data Collections], they make up 35 [percent] of students suspended once, 44 [percent] of those suspended more than once, and 36 [percent] of students expelled. Further, over 50 [percent] of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.[1]

However, social science researchers—even those who argue that exclusionary discipline has negative outcomes for affected students—are not able to establish that educator bias against minorities is responsible for any differences in discipline rates; they can only hypothesize about whether bias is involved.[2] In fact, the federal agencies behind the Dear Colleague letter cited an *Urban Review* article in which researchers wrote:

> In and of itself, disproportionate representation in school discipline is not sufficient to prove bias. Rather, determinations of bias might be seen as probabilistic: that is, as more alternative hypotheses that might explain disproportionality can be discounted, the greater the likelihood that statistical disparities between groups represent some form of systematic bias.[3]

In a *Journal of Law and Criminology* study from 2011 (and which was also cited in the federal letter), the authors tried to isolate the causes for disproportionality and wrote, "We can only speculate about the reasons for disproportionate punishment of African Americans in school."[4]

Researchers continue to look for causality between discipline rates and educator bias. A university news release describing a 2019 report by researchers at Princeton ("Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias") said the authors "highlight the correlational nature of the study, noting they are unable to identify a cause-and-effect relationship because of the data limitations."[5]

Notably, the *Law and Criminology* study "speculating about the reasons for disproportionate punishment" posits that the disproportionality is "not explained by differential behavior." Yet a substantial body of data and research indicates otherwise. A study published in the *American Journal of Education* in 2010 argues that prior research that had not taken into account student behavior when considering different rates of student discipline overestimated the ability of "illegitimate factors" such as educator bias to explain different rates of student discipline.[6]

Prominent researchers and academics such as the Manhattan Institute's Heather Mac Donald and the University of San Diego's Gail Heriot (a member of the U.S. Commission on Civil Rights) have cited the U.S. Department of Education's *Indicators of School Crime and Safety* to demonstrate that students from different backgrounds do, in fact, exhibit different behaviors and report different levels of school safety.[7] To wit:

- **Physical Fights**. The Indicators of School Crime and Safety data show that 33 percent of black students in grades nine through 12 reported being in a physical fight in school or outside school in the past year, compared to only 21 percent of white students.[8] A figure that MacDonald cited in the 2017 *Indicators* report remains true for the 2018 edition of the report: The percentage of black students who reported being in a fight on school property was more than double the figure for white students (15 percent versus 6.5 percent).[9]

- **Fear for Personal Safety.** Nearly twice as many black students (7 percent) reported being "afraid of attack or harm at school" compared to white or Hispanic students (4 percent each).[10]

- **Gang Activity.** Seventeen percent of black students ages 12–18 reported gangs "were present" at school, compared to 12 percent of Hispanic students and 5 percent of white students.[11]

- **Drugs.** Nineteen percent of black students and 25 percent of Hispanic students said "illegal drugs were made available to them on school property" in the past year, compared to 18 percent of white students.[12]

Note that students of different races are not evenly distributed across the country. Fifty-eight percent of black students and sixty percent of Hispanic students attend schools in which 75 percent or more of student enrollment is comprised of minority students.[13] Just 6 percent of white students attend such schools. With a higher percentage of black and Hispanic students living in single-parent homes and/or in poverty concentrated together in majority–minority schools, policymakers must evaluate the figures on student fights, gang activity, and other safety indicators with respect to student backgrounds, school assignment, and the lack of high-quality learning options available to these students.[14]

In a 2018 report, Heriot and co-author Alison Somin cited a study that challenges the claim that disproportionate discipline rates are due to racism.[15] In the *Journal of Criminal Justice*, researchers wrote, "The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth."[16] Heriot and Somin further note that these researchers "found that once prior misbehavior is taken into account, the racial differences in severity of discipline melt away."[17]

Education Secretary Betsy DeVos discussed these findings at a congressional hearing in 2019, where Representative Katherine Clark (D–MA) criticized the research and accused Secretary DeVos of saying that "black children are just more of a discipline problem."[18] However, the lead researcher of the study in question, J. P. Wright, told *U.S. News & World Report* that "I would never say that black children are, categorically, more of a discipline problem than other students," but "any number of studies show that problem behavior, including juvenile delinquency, is not uniformly distributed across racial groups." Furthermore, "many African-American youth remain socially and economically disadvantaged," and "broad-based, one-size-fits-all policies can generate some fairly negative consequences when applied broadly across districts."[19]

Other studies find correlations between student behaviors and socioeconomic factors. A study of Chicago children attributes different student actions to neighborhood characteristics and the system of K–12 school assignment according to ZIP code. The authors of that study wrote, "Because residential segregation leads schools in Chicago to be very segregated by race, differences in suspension rates across schools lead to differences in suspension rates by race" and "the concentration of many low-achieving students from high-poverty neighborhoods...seems to increase the likelihood that a school will have high suspension rates."[20] Researchers from the University of Pennsylvania have also linked school assignment and drawing students from violent neighborhoods to higher rates of discipline.[21] In the *Education Policy Analysis Archives,* a study from researchers at the University of Arkansas using data from Arkansas schools found that though minority students were more likely to receive exclusionary discipline statewide, the differences in discipline by race were not statistically significant within schools.[22] Furthermore, "the disproportionalities in exclusionary discipline are driven primarily by non-race factors such as free-and reduced-price lunch (FRL) eligibility and special education status."

Such findings support state and local policies that turn discipline-related decisions over to school officials and teachers instead of federal and state bureaucrats. Parents and educators should consider disruptive behavior on a case-by-case basis and make decisions in the best interests of the offending students and his or her peers—without fear of reprisal from federal or state lawmakers. Research from Princeton scientists using data from non-intact families says "it would be over simplistic to say that policy efforts should focus on a single mechanism" for dealing with student behavior, and the authors write that "facilitating school involvement from minority parents may be the most efficacious way to reduce racial disparities in suspension."[23]

Even reports that favor limiting exclusionary discipline say that families should have a central role regarding K–12 student sanctions. The Zero Tolerance Task Force of the American Psychological Association says, "Teachers and other professional staff who have regular contact with students on a personal level should be the first line of communication with parents and caregivers regarding disciplinary incidents."[24]

The Federal Commission on School Safety, convened after the tragic shooting in Parkland, Florida in 2018, agrees. After touring the country and collecting testimony from state and local education officials, the Commission said that the adults who are closest to students should be responsible for making choices to protect all children, instead of federal policymakers or education personnel who do not have regular contact with the children involved. The Commission's final report to the White House said:

> Local approaches and priorities are most important. Because teachers, in partnership with principals and other school leaders, know their schools, students, and classrooms best, they should be able to make decisions about school discipline without unnecessary worry about undue federal repercussions.[25]

Research does not support recent attempts to remove student discipline and school safety decisionmaking from parents and educators. Nor does social science evidence substantiate claims that disproportionate rates of discipline according to race are the result of adults' bias. All parents want their children to succeed in school and to be safe, and families should be able collaborate with their children's teachers and other educators who interact with students on a regular basis to determine the best course of action when discipline is appropriate.

As Secretary DeVos said when the Trump Administration rescinded the "Dear Colleague" letter, students have "the right to attend school free from discrimination."[26] Instead, the Obama Administration's guidance "led to school environments where discipline decisions were based on a student's race and where statistics became more important than the safety of students and teachers." DeVos made it clear that her decision to rescind the guidance was because "discipline is a matter on which classroom teachers and local school leaders deserve and need autonomy."[27]

Legal Analysis

Not only is the use of disparate impact and statistical disparities in school disciplinary policies not justified or supported by the research on student behavior, it also cannot be used to demonstrate a violation of federal law.

"Disparate Impact." The Obama Administration used the "disparate impact" theory to support its 2014 "Dear Colleague" letter. The letter correctly notes that Title IV and Title VI of the Civil Rights Act of 1964 "prohibit schools from *intentionally* disciplining students differently based on race."[28] In fact, Section 601 of Title VI provides that no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" on the "grounds of race, color, or national origin."[29]

Section 602 of Title VI gives federal agencies that provide "Federal financial assistance to any program or activity" the authority to ensure compliance with Section 601. Since public schools receive federal education grants and funds, this provision gives the federal government leverage to threaten the withholding of federal funds unless local school boards follow such "guidance."

However, in addition to intentional discrimination—differential treatment based on race—the "Dear Colleague" letter claimed that the Civil Rights Act prohibited disparate impact. The letter defined disparate impact as any policy that is "neutral on its face—meaning that the policy itself does not mention race—and is administered in an evenhanded manner" but has "a disproportionate and unjustified *effect* on students of a particular race."[30]

Differentiating between intentional discrimination and disparate impact is relatively easy. There is obviously differential treatment if a teacher overlooks misbehavior by one student because of his race, but sends another student of a different race out of the classroom to school administrators to be disciplined for the same type of misbehavior or if violations of school policies are strictly enforced only against students of a particular race or ethnicity.

But trying to determine if an entirely neutral policy that was implemented with no intent to discriminate, which disciplines students similarly for the same misbehavior regardless of their race, is discriminatory because it may or may not have a disparate impact lands teachers and administrators in an extremely murky and confusing legal morass.

The "Dear Colleague" letter, for example, said that imposing certain standard policies that seem integral to maintaining an orderly, disciplined, and organized school environment "raise disparate concerns." It gave as examples the imposition of mandatory suspension, expulsion, or citation of students for committing specific offenses such as "being tardy to class, being in possession of a cellular phone, being found insubordinate, acting out, or not wearing the proper school uniform." Also included was any form of corporal punishment or any discipline policy that prevents a "youth returning from involvement in the justice system from reenrolling in school."[31]

Such a policy seemed to ensure anarchy in public schools, making basic disciplinary policies impossible to implement. It also required schools to endanger the safety of their students and the quality of the learning environment by forcing them to allow individuals who have been convicted of violent crimes and thus "involved in the justice system" to re-enter schools. As the Federal Commission on School Safety said in its report:

> Surveys of teachers confirm that the Guidance's chilling effect on school discipline—and, in particular, on the use of exclusionary discipline—has forced teachers to reduce discipline to non-exclusionary methods, even where such methods are inadequate or inappropriate to the student misconduct, with significant consequences for student and teacher safety.[32]

The Civil Rights Act. The imposition of a disparate impact standard on schools is also beyond the requirements of the Civil Rights Act. In fact, the imposition of what amounts to a racial quota system for disciplinary actions based on the ratio of different races and ethnic groups in the general student population is unlawful.

In 2001, in *Alexander v. Sandoval*, a private litigant sued the State of Alabama claiming that the state's policy of only administering the state driver's license examination in English violated "disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964."[33] The Supreme Court was careful to note that it was not reviewing whether that regulation "was authorized by § 602," but only whether a private party could sue to "enforce the regulation."[34]

The Supreme Court ruled that a private litigant could not enforce the regulation.[35] However, in the majority opinion, written by Justice Antonin Scalia, the Court said that it was "beyond dispute—and no party disagrees—that section 601 prohibits only intentional discrimination."[36] The Court cited a string of prior decisions confirming this view of section 601, including *Regents of the University of California v. Bakke*,[37] *Guardians Association. v. Civil Service Commission of New York City*,[38] and *Alexander v. Choate*.[39]

Scalia also noted that some justices—none of whom are still on the Court—expressed the view in the *Guardians* case "that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601" although "no opinion of this Court has held that" view of the law. Those "statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination."[40] Furthermore, the Court said it could not "help observing, however, how

strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601...when § 601 permits the very behavior that the regulations forbid."[41]

While the Supreme Court has not yet directly struck down disparate impact regulations issued under section 602, it seems clear from these prior decisions, including *Alexander v. Sandoval*, that the Court would, in all likelihood, throw out any regulations that use disparate impact analysis to punish schools for their discipline policies. If there is no intentional discrimination, there is no violation of Title VI.

In the *Bakke* decision, the Court also said that the purpose of Title VI was to prevent federal funds being used for programs that discriminate on the basis of race. It cited the comments of Senator Abraham Ribicoff (D–CN) that "there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction."[42] The Court found unconstitutional a special admissions program at the University of California Medical School that reserved a certain number of seats for "disadvantaged minority students," saying that whether the program was "described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," which violates the Equal Protection Clause of the Fourteenth Amendment.[43]

The end result of the disparate impact rule that was forced on schools over their discipline policies leads directly to schools imposing prohibited racial quotas. As the Wisconsin Institute for Law and Liberty pointed out in a letter protesting the Obama Administration's guidance, the "Department of Education's emphasis on the collection and monitoring of racial statistics and its demand that something be done if the numbers come out the wrong way is tantamount to setting impermissible race quotas for disciplinary outcomes."[44]

Obviously, the only way to avoid a cutoff of federal funds under the disparate-impact standard imposed by the Obama Administration was to ensure that the number of students of different races and ethnic backgrounds being disciplined exactly matched the proportion of students of the same race and ethnicity in the general student population, regardless of the facts and circumstances of their actual, individual behaviors.

That could only be accomplished by applying different standards to students—differential treatment—for the same misbehavior based on the students' race and ethnicity. This amounts to nothing less than a racial quota system that punishes some student and benefits others—depending on race.

Other Examples of Disparate Impact Theory in Federal Law and Regulations

Lawmakers should also consider the Individuals with Disabilities Education Act (IDEA), the federal law governing education spending and services for children with special needs.[45] The IDEA provides that states must have "policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities."[46] Again, the federal government is responsible for protecting civil rights and investigating and sanctioning individuals for discrimination as applicable, but as explained in this *Backgrounder*, disparate-impact theory is rife with problems.

In the waning days of President Obama's Administration, federal officials issued a rule that further embedded disparate impact into IDEA implementation by requiring state policymakers to "identify districts with 'significant disproportionality' in special education—that is, when districts identify, place in more restrictive settings, or discipline children from any racial or ethnic group at markedly higher rates than their peers."[47] The rule was to take effect in 2018.

Under the Trump Administration, Education Secretary Betsy DeVos suspended implementation of the rule so the regulation would receive more review, saying, "We are concerned the 2016 significant disproportionality regulations could result in *de facto* quotas, which in turn could result in a denial of services based on a child's ethnic or racial status/group."[48] The Council of Parent Attorneys and Advocates sued the agency over the delay, and a federal district court ruled in favor of the group in March 2019, claiming DeVos' decision was "arbitrary and capricious," and putting the regulation back in force.[49]

Disparate-impact theory, then, has seeped into more than one part of federal code, and lawmakers should be prepared to address the problem in its different manifestations in federal law.

Policy Recommendations

At both the state and federal levels, policymakers must give parents and educators the ability to respond to incidents of student misconduct without regulations rooted in social justice theories.

- **Educators should be allowed to decide how to discipline a student based on the circumstances of the incident.** In some cases,

the circumstances may warrant suspension or expulsion. Policymakers must reject proposals such as the recently expanded provision in California law that prohibits expulsion even when a child "willfully [defies] the valid authority of those school personnel engaged in the performance of their duties."[50] Today, California educators cannot even suspend a K–8 student for "disrupting school activities"—limiting the alternatives available to educators as they try to protect the majority of students who are not disruptive.

- **Federal law should not incentivize the use of racial quotas.** Though the 2014 "Dear Colleague" letter on school discipline is gone for now, any future administration could potentially bring it back. Students, parents, and educators need clear directives in federal law and administrative guidance that explicitly reject the use of disparate impact in discipline policies and guarantee that no students will be treated differently based on their race and ethnicity.

- **Congress should review the IDEA and its regulations to remove all provisions based on disparate impact analysis.** In addition to clarifying the Civil Rights Act, lawmakers should review the Individuals with Disabilities Education Act, which is a dense, confusing federal law, as are the accompanying regulations dealing with the assignment of minority students to special-needs services.[51] Now that federal officials have correctly rescinded the 2014 letter, lawmakers should review the IDEA and its regulations to remove all provisions based on disparate impact analysis that have also resulted in schools keeping quotas measuring the treatment and assignment of minority students, instead of examining the individual circumstances of each specific student.

Conclusion

Applying a disparate-impact standard to school disciplinary policies is both unlawful and unwise. It makes no sense to claim that a neutral policy applied equally to all students regardless of race that is intended to create and maintain a safe, enriching learning environment is "discriminatory" if it does not meet certain racial quotas. Different students misbehave differently due to a wide variety of different circumstances involving conditions in their homes, neighborhoods, and communities.

Such a racially disparate discipline policy endangers students and teachers—and encourages even more disruptive misbehavior. The policy resulted in prohibited racial quotas and led to students being treated differently based on their race. The Trump Administration acted wisely when it withdrew this unlawful and unfair Obama Administration policy.

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44. Wisconsin Institute for Law & Liberty, Inc., "Letter to Betsy DeVos, Secretary of Education, U.S. Department of Education," June 12, 2018, http://www.will-law.org/wp-content/uploads/2018/06/2018-06-12-devos-dear-colleague-letter-final.pdf (accesed September 28, 2020).
45. 20 U.S. Code § 1400 (2004).
46. Ibid.
47. News release, "Fact Sheet: Equity in IDEA," U.S. Department of Education, December 12, 2016, https://www.ed.gov/news/press-releases/fact-sheet-equity-idea (accessed August 25, 2020).
48. See ibid., and *Federal Register*, Vol. 83, No. 31306 (July 3, 2018), pp. 31306–31318, https://www.federalregister.gov/documents/2018/07/03/2018-14374/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children (accessed August 25, 2020).
49. *Council of Parent Attorneys and Advocates v. DeVos*, 365 F.Supp. 3d 28 (D.D.C. 2019), appeal voluntarily dismissed, 2019 WL 4566614 (D.C. Cir. 2019), and Erica L. Green, "DeVos Illegally Delayed Special Education Rule, Judge Says," *New York Times*, March 8, 2019, https://www.nytimes.com/2019/03/08/us/politics/betsy-devos-special-education.html (accessed August 25, 2020).
50. California Education Code, § 48901.1, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB419 (accessed August 25, 2020).
51. Individuals with Disabilities Education Act, 20 U.S. Code § 1412 (2004).