

Dropout Nation

Education Next's Myopia on School Discipline

RiShawn Biddle

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If there is one education policy discussion in which sensible thinking from both reformers and traditionalists goes to die, it is that over the overuse of out-of-school suspensions, expulsions and other harsh forms of school discipline.

More than two decades of research from scholars such as Russell Skiba of Indiana University have long ago revealed that far too many kids are suspended and expelled from school; that those practices do little to improve student achievement, enhance school cultures, or make kids safer; and that children from poor and minority households, especially young black, Latino, and poor white men, are more likely to be suspended and expelled than middle class peers. The data also shows that suspensions are far more-likely to be meted out over minor matters such as disruptive behavior and attendance — which teachers and school leaders can deal with through more-effective means — that for violent actions. And finally, that teachers and school leaders often use of suspensions and expulsions to let themselves off the hook for the failure to address the illiteracy that is usually at the heart of child misbehavior.

Yet despite the evidence, some otherwise-sensible conservative reformers (along with institution-oriented reform types and traditionalists) continue to argue against the facts. This time around, the arguing against reality comes courtesy of *Education Next*, the conservative-leaning school reform magazine, with the help of famed legal scholar Richard A. Epstein in a piece focused on the Obama Administration's move earlier this year to issue a series of guidelines to districts and schools geared toward making suspensions and expulsions rare and only used for the most severe cases of child misbehavior in schools. Epstein's arguments falls apart against the overwhelming evidence (and real consequences to children) behind the administration's decision. And by running the piece, *Education Next* exemplifies the problems my fellow conservative reformers dealing seriously with the consequences of racist policies

At the heart of Epstein's argument is that the Obama Administration's school discipline guidelines are "of dubious legal validity and practical soundness." Why? Let's start with the legal arguments. From where Epstein sits, the administration's wrongly bases its decision to issue the guidance on Titles IV and VI of the Civil Rights Act. Because Title IV was originally intended to address school desegregation and coax districts and states to achieve that purpose, Epstein declares that the administration can't issue or enforce

the guidelines. As for Title IV? Epstein argues that the Obama Administration is wrongly applying the disparate impact standard adopted by the U.S. Supreme Court in *Griggs v. Duke Power* to stop “legitimate government action” by districts to discipline kids while in school. And ultimately, from where Epstein sits, the administration is essentially issuing guidance in order to avoid meeting the rules for federal action under the Administrative Procedures Act.

But the legal issues Epstein raise pale compared to his other chief concern: That goal of reducing the overuse of suspensions and expulsions — or reducing “disparate impact” as he calls it — is “weakly justified”. As far as Epstein is concerned, the Department of Education’s Civil Rights data used by the administration to justify the discipline guidelines are particularly useless because it doesn’t supposedly provide “insight into the kinds of behavior that are observed inside particular schools”. This, according to Epstein, makes the administration’s effort especially counterproductive.

Epstein argues that disparate impact is dubious because state-sanctioned racial segregation (including the Jim Crow laws of the American South) no longer exists. [Yes, you can laugh.] Driving this thinking is Epstein’s view that any effort to address the overuse of harsh school discipline is essentially out of order because it is attempting to address what he declares to be “hidden forms of unconscious race bias against minority students”. From where he sits, if policies and actions undertaken by districts aren’t explicitly racially-motivated, then they cannot possibly be racist in effect.

Meanwhile Epstein essentially argues that harsh school discipline has no adverse impact at all on the futures of either the kids subjected to suspensions or even those kids in districts that overuse them. Echoing arguments offered by conservative and libertarian reformers such as Thomas B. Fordham Institute boss (and *EdNext* editor) Michael Petrilli, Joshua Dunn of the University of Colorado-Colorado Springs and Cato Institute’s Andrew Coulson, Epstein argues that suspensions and expulsions actually improve school cultures by ridding schools of troublemakers who make it difficult for kids to learn. Epstein is particularly annoyed that U.S. Secretary of Education Arne Duncan is, in his mind, arguing for a policy that will supposedly subject “good kids” to increased violence in schools. As far as Epstein is concerned, the administration’s school discipline guidance is “dangerous”, both to districts (whose efforts on school discipline should only be addressed by states only) and to children.

Epstein’s arguments would be somewhat seductive if you don’t know anything about either the use of school discipline or about the Obama Administration’s guidance. But when you know better, Epstein’s arguments fall apart. As I noted in January’s **Dropout Nation Podcast** on school discipline, the prescriptions offered up by the administration aren’t exactly ground-breaking, and in fact, are based on recommendations provided by leading researchers in improving school cultures. Some can question how districts should move to implement such guidelines. Others can even argue that the administration’s guidance isn’t specific enough. But the Obama Administration’s recommendations don’t restrict districts from addressing student misbehavior. More importantly, the administration is sensibly addressing a critical

aspect of the nation's education crisis that ends up damaging the futures of our most-vulnerable kids.

Epstein's key legal argument, that the Obama Administration doesn't have any right to issue the guidance under Title IV and Civil Rights Act, doesn't stand scrutiny. For one, Title IV of the Civil Rights Act is actually fairly broad, giving the federal government plenty of leeway to address any denial of opportunities for equal education. This includes addressing complaints from families over any instance where their children are being denied high-quality learning. So the Obama Administration can validly use Title IV to justify issuing guidance, as other administrations (including that of George W. Bush) have done over the past six decades. Same is true for Title VI. Even if one argues that the disparate impact standard used in employment law doesn't apply to education, the fact that the traditional districts receive federal funding gives the Obama Administration leeway.

Epstein also ignores the other legislation that grants the Obama Administration the ability to address overuse of harsh school discipline. There's the No Child Left Behind, which originated as the Elementary and Secondary Act and was crafted as both civil rights legislation as well as a tool for the federal government to spur education reform. When you focus specifically on Title IV of No Child, which gives the federal government leeway to address and fund efforts to deal with school violence, the federal government is given an expansive role in addressing how districts and states use school discipline. Particularly in the case of overuse of suspensions against kids condemned to special ed ghettos, the Individuals with Disabilities Education Act also grants the federal government wide leeway in dealing with how districts deal out discipline to those kids.

Given that Epstein specializes in the role of law in shaping economic activities, it's not shocking that he doesn't give these other laws consideration. But Obama Administration surely does (even if it doesn't mention it). So do the lawyers representing nearly every district and state sure do. This is why districts haven't bothered to challenge the guidance.

But as I noted earlier, Epstein's problems with the Obama Administration's efforts on school discipline go beyond the legal. And on this front, Epstein's arguments are especially off-target.

For one, Epstein fails to admit that the Obama Administration is relying on more than just the Civil Rights Database to justify addressing disparate impacts of harsh school discipline. There's decades of research on the subject, and it shows that minority children, especially young black men, are more-likely to be disciplined than white counterparts, and often, more-likely to be disciplined for minor offenses than white peers. As a team led by University of Pittsburgh researcher John Wallace demonstrated in a 2008 study on school referrals — the first step schools take in disciplining kids — young black men in 10th grade are 30 percent more-likely to be sent to dean's offices for punishment than their white male peers; once referred, they are also 330 percent more-likely to be suspended afterwards than white counterparts. What makes the disparities even more shocking is that there are few differences in rates of suspensions and

expulsions for violent behavior and substance abuse. Just as importantly, young black men are subjected to higher levels of discipline regardless of their economic background; a young black man from a two-parent home is still more likely than most kids to be tossed out of school for a minor offense.

The evidence that suspension and expulsion levels for all kids for the most-serious incidents of violent behavior and substance abuse tend to differ little across race, ethnicity, and gender makes the wide disparities in suspensions for non-violent offenses even more glaring and troubling.

Contrary to what Epstein and conservative reformers want to admit, disparate impact of school discipline (along with the overall overuse of suspensions and expulsions) is a real issue. But the inability of Epstein to admit this isn't shocking because his thinking (and that of conservative reformers at *Education Next*) is based on another flaw: The error of thinking about racialism in binary terms, that is, you can only argue that a policy or practice is racist if it explicitly targets a race or ethnicity, or if the person authoring or administering it is explicitly and consciously racist. But as the essayist Richard Rubin once pointed out in his assessment of the 1955 acquittal of J.W. Milam and Roy Bryant for their murder of Emmitt Till, whether a policy ends up leading to racialism is more-complicated than that. The consequences of policies and practices can be as racist as overt acts by those engaged in explicit racial discrimination. Even if teachers and school leaders aren't explicitly targeting black and Latino children in meting out discipline, the decisions they make can result in educational neglect and malpractice. And this, by the way, can be as true of black teachers and school leaders, many of whom are from middle-class households that diverge greatly from the economically poor households of the kids they serve, as it can be for white counterparts.

This is particularly true when it comes to the overuse of suspensions and expulsions, whose causes and effects mirror another underlying cause of the nation's education crisis: The over-labeling of children, especially young black men (along with young white male counterparts) as special ed cases. As Vanderbilt University Professor Daniel J. Reschly noted in his 2007 testimony to the U.S. Civil Rights Commission that adults in schools have a tendency to confuse the statistical probability that certain ethnic and gender groups may end up being diagnosed with a learning disability with the ethnic composition with ethnic composition within a disability category; essentially they end up labeling certain groups of students as learning disabled because they think they are destined to end up that way. This thinking, along with other biases, explains why so many kids are deemed unworthy of education by many within public education.

As for Epstein's argument that the Obama Administration's guidance will lead to greater violence in schools? That only stands if there is evidence that suspensions and expulsions leads to safer schools. But this isn't so. School violence has been on the decline for the past This isn't surprising. As Linda Raffaele Mendez and Howard Knoff of the University of South Florida noted in a 2003 study, few kids are ever suspended for committing violence or possessing weapons. More often than not, kids are more-likely to be suspended for non-violent offenses such as disruptive behavior, tardiness to class, and truancy. In Maryland, for example, 60 percent of suspensions were meted out for

non-violent offenses such as insubordination and classroom disturbance in 2010-2011, according an analysis conducted by the state department of education.

Meanwhile Epstein's contention that using suspensions and expulsions improves student achievement, especially for supposedly good kids, is also not borne out by data. Two out of every five children suspended in by Maryland's districts and other school operations were suspended again during in 2010-2011. As Johns Hopkins University researcher Robert Balfanz has also demonstrated (including in his 2007 study with colleague Douglas MacIver and Lisa Herzog of the Philadelphia Education Fund) sixth-graders who have been suspended at least once have just a one-in-five chance of graduating six years later. This shouldn't be a surprise. Suspensions are an ineffective way of dealing with the illiteracy and other learning struggles that are often at the heart of most student misbehavior. As researchers such as Raffaele Mendez and Skiba have determined, schools and districts with high levels of suspensions tend to do poorly in improving student achievement. Which makes sense. Districts that are the highest-suspending in the nation also tend to be the most-pervasive clusters of failure mills.

Simply put, Epstein has it all wrong. But again, this isn't shocking because he is writing out of his field of study. Your editor recommends that Epstein spend some time reading **Dropout Nation** as well as the work of researchers in the field of school discipline such as Skiba in order to better-inform any future commentary. But *Education Next* and its editors have no such excuse. After all, it is one of the dominant publications covering and opining on education. More importantly, as the voice of conservative and (occasionally) centrist Democrat reformers in the movement, *Ed Next* has a special obligation to shed proper light on issues that lead to educational malpractice. When decades of data and evidence show that a viewpoint is off-target, then reformers should abandon it.

Yet *Ed Next's* indulgence of that thinking isn't shocking. After all, the magazine hardly has any black reformers — not even an Howard Fuller or an Andre Perry — on the masthead; nor does it run pieces from researchers on school discipline such as Skiba. This results in a lack of diversity in thought on the role of race in education policymaking that leads to pieces such as that by Epstein. The fact that some of *Ed Next's* editors — notably American Enterprise Institute education czar Rick Hess — hardly deal with the impact of education policies on poor and minority children in their research also makes it difficult for the publication to think through matters such as school discipline. Add in the reality that conservative reformers occasionally give comfort to proponents of racist IQ fundamentalism views such as Charles Murray and now-former think tanker Jason Richwine (and even argue for policies such as ability tracking, which are legacies of earlier generations of IQ determinist thinking) means that in some cases, reformers are engaged in mutually contradictory thinking. It is hard to declare that you want brighter futures for all children when you also still embrace practices that has been used almost exclusively to deny some kids the high-quality education needed to do so.

It's a shame that *Education Next* missed an opportunity to offer a piece that actually deals with the reality of overuse of suspensions and expulsions. It must do better.