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Obama Administration Undermines School Safety, Pressures Schools to Adopt Racial Quotas in Student Discipline

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Crime rates are not the same across different racial categories, and student misconduct rates aren't, either. The Supreme Court ruled many years ago that such racial disparities don't prove racism or unconstitutional discrimination. But in guidance released last week by the Education and Justice Departments, the Obama administration signaled that it will hold school districts liable for such racial disparities under federal Title VI regulations. In the long run, the only practical way for school districts to comply with this guidance is to tacitly adopt unconstitutional racial quotas in school discipline. This will result in increased school violence, discrimination in discipline against white and Asian students, an increased racial achievement gap that harms black students, and more white flight from inner-city schools. Eventually, private and public colleges will be affected, not just school districts, since Title VI bans racial discrimination not just in the public schools, but in higher education as well.

The administration made clear that it views racial disparities in student discipline rates, which exist in virtually all school systems, as generally being the product of racism by school officials, not "more frequent or more serious misbehavior by students of color." Moreover, it also made clear that even if the school district proves itself innocent of racism, it will still be held liable for "racially disparate impact" – non-racist conduct that unintentionally has a discriminatory *effect* on a racial *group*, even though it treats *individuals* of all races alike – unless the school district shows that its discipline not only furthers an important educational purpose, but *also* does not lead to more suspensions of minorities than other (more ideologically-fashionable) methods of discipline that the government views as equally effective.

Administration officials like Attorney General Eric Holder do not like harsh discipline of minority students, such as out-of-school suspensions or referrals to law enforcement, for things like "schoolyard fights" or "threats" to teachers that have not yet culminated in a physical attack. But such suspensions are often necessary for learning and school safety: "in 2012 Senate testimony," Cato Institute education researcher "Andrew Coulson pointed out that. . . compared with the alternatives, the use of out-of-school suspensions appears to improve the learning environment for other (non-disciplined) students by protecting them from disruption." Liberal academics believe that schools should focus on trying to gently rehabilitate offenders

through "reparative" or "restorative" methods, instead of using strict punishments like suspensions aimed at deterring such offenses from being committed in the first place. But that excessive focus on rehabilitation is myopic: while "research shows that out of school suspensions do no good for the suspended student academically," "they do appear to benefit the rest of the school, presumably by making it easier for teachers to teach the non-disruptive children."

As a practical matter, the Obama administration's guidance defines virtually all of the nation's school districts as being in violation of Title VI. And it does so based partly on a disparate-impact theory of discrimination that the Supreme Court has questioned in the educational context, ruling that the Title VI statute itself does not ban race-neutral "disparate impact," only intentional discrimination, and that students also cannot sue in federal court over disparate-impact, even if an agency adopts a Title VI regulation that bans "disparate impact," because such a regulation seeks to fundamentally transform rather than implement Title VI's ban on racial discrimination.

Fear of "disparate-impact" liability in recent years has driven frightened school officials to adopt rigid, inflexible "zero-tolerance" policies, since draconian "discipline policies tend to yield smaller racial differences in discipline rates than more lenient ones," notes a lawyer and statistical expert. Ironically, those zero-tolerance policies were criticized by the administration in announcing its new school-discipline guidance. But that guidance doubles down on the very "disparate impact" mandates that spawned that zero-tolerance excesses in the first place. As the Cato Institute's Walter Olson notes, "zero-tolerance policies were adopted in the first place in part as a defense for administrators against disparate-impact charges. In other words, the new supposed remedy (disparate-impact scrutiny) helped cause the disease to which it is being promoted as the cure."

The Supreme Court ruled in *United States v. Armstrong* (1996) that there is no legal "presumption that people of *all* races commit *all* types of crimes" at the same rate, since that is "contradicted by" real world data. For example, blacks, who are only 13% of America's population, commit nearly half of all murders — four times the general rate. Indeed, relying on that false presumption can lead to constitutional violations: A federal appeals court ruled in *People Who Care v. Rockford Board of Education* (1997) that schools cannot use racial caps or proportions in discipline, striking down a rule that forbade a "school district to refer a higher percentage of minority students than of white students for discipline" as a veiled racial quota.

Yet, incredibly, the Education Departments treats that false presumption as fact, and insists that there is no evidence of "more frequent" misbehavior by some groups (pg. 4), and that "research suggests that the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color."

But as Heather Mac Donald of the Manhattan Institute has noted, black teenagers are 25 times as likely to get arrested in Chicago as whites, and the black homicide rate for teenagers is 10 times higher nationally than for whites. As she noted in *City Journal*:

Nationally, "the homicide rate among males between the ages of 14 and 17 is nearly ten times higher for blacks than for whites and Hispanics combined." In the Chicago schools, which used to be headed by Obama's own current Education Secretary, "25 times more black Chicago students than white ones were arrested at school," between September 2011 and February 2012.

This intransigent disregard for reality shows that the Education Department has an ingrained bias against school systems that have statistical disparities for reasons having nothing to do with racism and everything to do with sensible imposition of discipline on students who commit violence and make it hard for other students to learn. School districts investigated for discrimination by the Education Department simply will not receive due process but rather will be presumed guilty.

Worse, the Education Department insists that a school can be deemed guilty (under the disparate-impact concept) solely due to its "neutral," "evenhanded" application of discipline rules just because more minority students in fact commit such offenses, even when the school in fact proves that such misbehavior is in fact more frequent among certain groups. It is not necessary to show that a black student was treated any differently than a white student for the school system to be deemed guilty in the Education Department's eyes (see pp. 12, 71):

Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspension, expulsion, or citation (*e.g.*, ticketing or other fines or summonses) upon any student who commits a specified offense . . . .

The administration of student discipline can result in unlawful discrimination based on race in two ways: . . . 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.

For example, the Education Department wrote that even if a school district punished more black than white students for unauthorized "use of electronic devices," but only because black students actually "are engaging in the use of electronic devices at a higher rate than students of other races" (pg. 18), the school district is still liable for discrimination under a disparate-impact theory if the punishment itself (evenly applied to both white and black offenders) was "excessive" relative to what the school district's own guidelines indicated was proper. Similarly, it wrote that a school could be liable for punishing students for an offense like tardiness if more students of one race than another were tardy, and the school district could have reduced the disproportionate impact on that race by remedying school district policies that made it harder for them to get to class on time (pg. 19).

Where racial imbalances result — even from student conduct, not school officials' racism — the Education Department wrote that it will find the school liable if it believes that there are any "comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact." The Education Department is likely to claim that such alternatives exist even if they seem non-existent or utterly impractical to school officials, since the bureaucrats in its Office for Civil Rights, many of whom have seldom been in a classroom (as I can attest from having worked there), believe they know better that

teachers how to run a classroom. Elsewhere, the Education Department's guidance lectures the nation's school officials about the latest fads in "classroom management, conflict resolution and approaches to de-escalate classroom disruptions," reflecting its belief that it knows better than teachers and principals do how to run a school and discipline students.

Never mind that the Education Department's authority to even enforce disparate-impact rules is legally questionable. It imposes its ban on "disparate impact" even though the Supreme Court ruled in *Alexander v. Sandoval* (2001) that such "disparate impact" doesn't violate Title VI at all. (The Supreme Court ruled in the *Sandoval* case that people cannot sue institutions over "disparate impact" under Title VI. The Obama administration takes the position that while Title VI statute itself doesn't reach disparate impact, Title VI *regulations* can and do. The *Sandoval* decision said that people cannot cite those regulations to sue over "disparate impact" under Title VI. Federal appeals courts have also said that people cannot even invoke those disparate-impact regulations to sue under other laws, such as Section 1983, that more broadly allow people to sue over rights created by federal law, further clouding the legality of these disparate-impact regulations.

These guidelines reflect the mindset of left-wing civil-rights activists who have little understanding of how classrooms operate in the real world (and how disorderly and unsafe classrooms spawned by restrictions on discipline can destroy students' ability to learn, prevent teachers from teaching, and drive teachers out of teaching). They show little empathy for teachers and principals, and little concern for how difficult it will be for schools to comply with their impractical rules and red tape. (When I worked in the Washington headquarters of the Office for Civil Rights, one of the senior lawyers there boasted that every investigation for compliance with the bilingual education regulations she enforced, always found the school district to have violated Title VI. The important decision was which school district to investigate; once the investigation was launched, a finding of non-compliance with Title VI was a foregone conclusion. The regulations she boasted about interpreted Title VI quite differently — and more onerously — than federal courts did.)

Reducing discipline for threats, fighting, and classroom disruptions will harm, not help, African-American, by increasing the racial achievement gap. As University of Rochester professor Joshua Kinsler found, "in public schools with discipline problems, it hurts those innocent African American children academically to keep disruptive students in the classroom. According to Kinsler's findings, significantly cutting out-of-school suspensions in those schools *widens* the black-white academic achievement gap."

Black students will suffer if school officials are prevented from adequately disciplining other black students, such as those who commit acts of violence, since violence is usually committed against other members of the perpetrator's own race. Giving black students special treatment in discipline is an example of the "soft bigotry of low expectations" that undermines educational achievement among African-Americans. Moreover, a loud and disorderly classroom environment, in addition to preventing learning, also prevents students from absorbing the lessons in politeness and courtesy that employers expect when they hire new employees. Employers require their employees to follow rules and get along with co-workers, not exhibit "defiance" towards superiors, traits instilled through school discipline. Regulations

that interfere with this deprive students of "equal access" to an essential educational "benefit," namely, moral instruction and instruction in how to get along with others. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999) (civil rights laws forbid denying students access to an educational "benefit" based on their sex or race).

Racial disparities in suspension rates do not show discrimination. For example, the Supreme Court said that it is "completely unrealistic" to argue that minorities should be represented in each field or activity "in lockstep proportion to their representation in the local population." (*See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).)

Demanding that schools eliminate all racial disparities among groups will harm students by effectively forcing school officials to treat some accused students worse based on their race — exactly what the Title VI statute forbids. A disparate-impact regulation cannot override the very statute it purports to implement. (Title VI bans differential treatment based on race — even when the victim is white.)

Writing in *City Journal* in Summer 2006, former educator Edmund Janko explained how informal pressure from bureaucrats to suspend students in numbers proportional to their race (what the Obama administration is now demanding) led him to engage in unfair racial discrimination against some white students:

More than 25 years ago, when I was dean of boys at a high school in northern Queens, we received a letter from a federal agency pointing out that we had suspended black students far out of proportion to their numbers in our student population. Though it carried no explicit or even implicit threats, the letter was enough to set the alarm bells ringing in all the first-floor administrative offices. . .

There never was a smoking-gun memo . . . but somehow we knew we had to get our numbers "right"—that is, we needed to suspend fewer minorities or haul more white folks into the dean's office for our ultimate punishment.What this meant in practice was an unarticulated modification of our disciplinary standards. For example, obscenities directed at a teacher would mean, in cases involving minority students, a rebuke from the dean and a notation on the record or a letter home rather than a suspension. For cases in which white students had committed infractions, it meant zero tolerance. Unofficially, we began to enforce dual systems of justice. Inevitably, where the numbers ruled, some kids would wind up punished more severely than others for the same offense.

As Professor Joshua Dunn notes, Asian students may be particularly harmed by racial quotas in school discipline — even more than whites — since they are currently disciplined at lower rates than members of other races due to their committing fewer violations of disciplinary rules:

These guidelines will also encourage schools to unjustly punish students in races that have lower rates of punishment than their percentage of the student body. If we accept the guideline's assumption that disruptive behavior should be evenly distributed across racial groups, Asian students are woefully underpunished. Under these guidelines a school would be well-advised to increase their punishments of Asian students whether or not they committed any infractions.

Creating *de facto* racial quotas in school discipline will also increase violence and disorder in the schools. At a widely-read education blog, a teacher describes the violence and disorder that occurred when her school adopted racial quotas in school discipline:

I was the homeroom teacher in an incident in a school that tried to implement just this criteria for discipline. One kid (scrawny 7th grader) had the {bleep} beaten out of him by a 6-foot, fully-muscled 7th grader – two different races. The little kid was suspended before his copious blood had been cleaned up off the floor. The big kid never did have ANY punishment – that particular ethnic group had been disciplined too many times.

Need I mention that it was a tough month, as word quickly spread that violence against the "under-disciplined" ethnic group was treated as a freebie?

By making urban schools even more violent, racial quotas in discipline are likely to increase *de facto* segregation in such schools, by driving out white, Asian, and black middle-class students, leaving behind a racially-isolated core of poor black students who cannot afford to either move to a better neighborhood or go to a private school. As Professor Dunn observes, "the consequences for schools and particularly for minority students will be nothing short of disastrous if actually implemented. The only conclusion that can be drawn from these guidelines is that the Obama administration does not care about actual student behavior and only wants to focus on disembodied percentages regardless of their destructive educational consequences."

That the Obama administration's guidance creates powerful incentives for just such quotas was confirmed by legal experts quoted in publications like the *Washington Times*:

"You have to make certain that your school discipline cases match those percentages. If you don't, you'll have the feds on your doorstep," said Joshua Dunn, a political science professor at the University of Colorado and director of the university's Center for Legal Studies. "If they actually do enforce these guidelines, there will be unintended consequences. This creates some rather destructive incentives. I don't think there's any way around that."

Disclosure: I was once an attorney in the Education Department's Office for Civil Rights, which is responsible for the guidance discussed above.