THE DAILY CALLER

How Eric Holder's Disparate Impact Crusade Leads To Quotas

By Hans Bader

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In a May 17 speech commemorating *Brown v. Board of Education*, Attorney General Holder claimed that "in too many of our school districts," "segregation has reoccurred." That includes, he erroneously said, "zero-tolerance school discipline practices that, while well-intentioned and aimed at promoting school safety, affect black males at a rate three times higher than their white peers."

But higher black suspension rates reflect higher rates of misbehavior among blacks, not zero-tolerance policies. Indeed, zero-tolerance policies suspend a slightly larger number of white students relative to black students than milder forms of discipline. Ironically, as Walter Olson notes, "zero-tolerance policies were adopted in the first place in part as a defense for administrators against disparate-impact charges" alleging racial disparities in discipline. Thus, pressuring schools to eliminate all racial disparities – as the Obama administration is doing – could actually reinforce harsh zero-tolerance policies!

Misconduct rates are not the same for different races. A 2014 study in the *Journal of Criminal Justice* by criminologists like John Paul Wright found that racial disparities in student discipline result from more frequent misbehavior by blacks, not racism. The study, entitled "Prior Problem Behavior Accounts for the Racial Gap in School Suspensions," concluded that higher black suspension rates are "completely accounted for" by students' own behavior. Since racial disparities are caused by student conduct, getting rid of zero-tolerance will not end them.

Indeed, as expert James P. Scanlan notes, harsh "discipline policies tend to yield smaller racial differences in discipline rates than more lenient ones." The "Department of Education's own report shows that relative racial" differences in discipline rates "are larger in districts with zero tolerance policies than those without such policies," such as Los Angeles and Denver.

The Education Department claims it has the right to demand that schools eliminate colorblind disciplinary rules just because they have a "disparate impact" — i.e., if a higher percentage of blacks than whites are suspended, and the school cannot prove to bureaucrats' satisfaction that the disciplinary rule is essential to maintain order. The Education Department's January 2014 guidance to the nation's schools insists that a school can be guilty under Title VI of the

Civil Rights Act (for disparate impact) solely due to "neutral," "evenhanded" application of discipline rules, just because more minority students violate such rules (see pp. 11-12).

But the Education Department has no right to enforce such "disparate impact" rules. The Supreme Court ruled in *Alexander v. Sandoval* (2001) that disparate impact doesn't violate Title VI, only "intentional" discrimination does. The Education Department claims that while the Title VI statute itself doesn't reach disparate impact, *regulations* under it can and do (an idea that the Supreme Court decision described as "strange" in footnote 6 of its opinion).

The Education Department states that even if the only reason a school punishes more black students for unauthorized "use of electronic devices" is because blacks actually "are engaging in the use of electronic devices at a higher rate than students of other races," it can still be liable for disparate impact. This distorts the disparate impact concept. Even when courts *do* allow liability for disparate impact, the disparity must result from something in the disciplinary *process*, not the mere fact that more blacks misbehaved. As the 2001 *Robinson* decision allowing lawsuits over disparate impact in workplace discipline emphasized, a mere "bottom line racial imbalance in the work force" is "insufficient."

The Education Department also claimed such disparities were the product of racism by schools, not just "disparate impact." That contradicts the Supreme Court's ruling in *U.S. v. Armstrong*. It rejected the "presumption that people of *all* races commit *all* types of crimes" at the same rate, which is "contradicted by" reality. Blacks, who are only 13 percent of the population, commit nearly half of all murders.

The Education Department claimed there is no evidence of "more frequent" misbehavior by minority students. But the homicide rate is 10 times higher for black teenagers than for whites.

The only way to equalize suspension rates for all races would be to adopt racial quotas that curb discipline for black offenders. But an appeals court ruled in *People Who Care v. Rockford Board of Education (1997)* that schools cannot use racial quotas 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." Ignoring that ruling, the Obama administration has pressured school districts such as Oakland and Palm Beach County into imposing veiled racial quotas.

Quotas would harm, not help, African-Americans, who are often victims of black-on-black violence. As 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," and "cutting out-of-school suspensions in those schools *widens* the black-white academic achievement gap."