



Simple Justice

A Criminal Defense Blog

Schools Have Rules: Disparate Impact Edition

By Scott H. Greenfield

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When left to their own discretion, school administrators were the target of reproach for applying rules inconsistently. Much like the push for federal sentencing guidelines, the theoretical expectation is that there be a foolish consistency in the punishment of students and defendants based upon easily quantifiable metrics. Bureaucracy loves easily quantifiable metrics, as it enables clerks to check boxes rather than think.

Thus was born the zero tolerance approach of schools toward whatever bogeyman was destroying America's youth. Lest this sound unduly flip, the rationale which found some justification when addressing heroin was applied with [equal force for ibuprophen](#). No drugs means no drugs. That's how zero tolerance rolls.

The federal government has just figured out that this could be a problem. From the [New York Times](#):

As school districts have placed more police officers on campuses, criminal charges against children [have drastically increased](#), a trend that has alarmed civil rights groups and others concerned about the safety and educational welfare of public-school students.

"A routine school disciplinary infraction should land a student in the principal's office, not in a police precinct," Mr. Holder said in a statement.

How cool is it when the Attorney General of the United States makes an assertion worthy of the news that mirrors what the rest of us have been saying for years? It's like he "discovered" a truth that's been hidden from discerning government view, but for the millions of people who have been saying the same thing for years. So, he's a bit slower than the rest of us. At least he got there eventually.

"The widespread use of suspensions and expulsions has tremendous costs," Mr. Duncan wrote in a letter to school officials. "Students who are suspended or expelled from school may be

unsupervised during daytime hours and cannot benefit from great teaching, positive peer interactions and adult mentorship offered in class and in school.”

This is undeniable. But this also isn't news. Rather, this is the outcome of the last initiative of the bureaucracy designed to save the students from its last demon. The flip side of this assertion is that students who cause problems in the classroom prevent other students from benefitting from all that great teaching, etc. On the one hand, it's an example of rhetoric-fail. On the other hand, it's an example of how simplistic solutions trade one set of problems for another.

There is no question that zero tolerance has been a fiasco. There is similarly no question that Holder is correct, if a bit late to the party, that ordinary infractions should be dealt with as a school discipline problem rather than a law enforcement problem, and that suspension and expulsion are punishments that should be reserved for only those situations that demand them.

But it takes a lot to get the federal pendulum to swing, and once it starts, it seems to invariably go too far. As [Walter Olson notes](#), it's not just that the federal educational bureaucracy has awoken to the insanity of its last favored approach, but that it's now discovered that employment discrimination concepts can be applied to schools.

Unfortunately, there's much more. The letter represents the culmination of a years-long drive toward imposing tighter Washington oversight on school discipline policies that result in “disparate impact” among racial or other groups. Policies that result in the suspension of differentially more minority kids, or special-ed kids, will now be suspect — even if the rate of underlying behavior is not in fact uniform among every group.

By disparate impact, the feds have discovered that more minority kids are hurt by the blind application of rules than non-minority, and this changes the equation from bad rules to discriminatory application of rules. The [New York Times](#) editorial provides the leap of faith:

Most school officials try to apply disciplinary policies fairly and in compliance with federal laws that forbid racial discrimination. Even so, a large and troubling body of data — some if it gathered by the federal government — shows that black and Hispanic students are disproportionately and unjustifiably subjected to suspension, expulsion or even arrest for nonviolent offenses that should be dealt with in the principal's office.

That minority students are disproportionately subject to punishment is a matter of statistics. Whether that's “unjustifiably” the outcome is a matter of disparate impact theory: since there can be no differences based on race or ethnicity, there can be no disparate impact that is not the product of discrimination.

And there may be discriminatory application of punishment in schools. Or, it may be a product of economics, where students in poor schools, or inner city schools, or schools with a higher non-English speaking student body, or schools whose students don't have a stable home life, or any other number of factors give rise to behavioral differences and hence punishment disparities.

Accounting for all those possibilities is hard, and would both require a really long checklist and give clerks headaches because they will be required to look beyond superficial metrics and have to figure out why things happened in individual instances in order to determine whether there is discrimination or just proper, proportionate discipline. But blanket rules are easy to apply.

As with defendants in criminal prosecutions, each case is different. Each case stands or falls on its own, based upon its own unique circumstances. This isn't to say that school administrators don't apply rules and discipline inconsistently and inappropriately, and even discriminatorily, but that the only way to figure it out is to do the heavy lifting of analyzing each case to determine whether it's proper or not.

Yet, the Times editorial concludes with this non-sequitur:

Attorney General Eric H. Holder Jr. was on the mark last week when he said, "A routine school disciplinary infraction should land a student in the principal's office, not in a police precinct." By making suspension and arrest a last resort, school districts can avoid federal civil rights sanctions and move away from destructive policies that seriously harm the most vulnerable students.

So avoiding federal civil rights sanctions will be the new zero tolerance, where punishment is meted out by race to make sure that the numbers align with racial divisions, without regard to what the students did and what the appropriate punishment should be? What could possibly go wrong?