
CIVIL RIGHTS

The Kudzu of Civil Rights Law: Disparate Impact Spreads Into Educational “Resource Comparability”

By Carissa Mulder*

Note from the Editor:

This article is about a Dear Colleague letter from the Department of Education’s Office of Civil Rights regarding the unequal distribution of school resources. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. But when we do, as here, we will offer links to other perspectives on the issue, including ones opposed to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- *Civil and Human Rights Coalition Applauds Dept. of Education Guidance to Advance Resource Equity for Minority Students*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, (October 1, 2014), <http://www.civilrights.org/press/2014/resource-equity-guidance-1.html>.
 - Sonali Kohli, *Modern-Day Segregation in Public Schools*, THE ATLANTIC, (November 18, 2014), <http://www.theatlantic.com/education/archive/2014/11/modern-day-segregation-in-public-schools/382846/>.
 - Chester E. Finn Jr., *Punishing Achievement in Our Schools*, NATIONAL REVIEW, (November 25, 2014), <http://www.nationalreview.com/article/393407/punishing-achievement-our-schools-chester-e-finn-jr>.
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INTRODUCTION

In June 2015, the Supreme Court issued its decision in *Texas Department of Housing v. Inclusive Communities Project, Inc.*, ruling that disparate impact claims are cognizable under the Fair Housing Act.¹ The Court’s decision in *Texas Department of Housing* gives a limited blessing to the use of disparate impact in housing, where it has spread from its original home in employment law.² It remains to be seen whether this limited approval extends beyond the housing realm. However, even before the Court’s decision, disparate impact was being used to regulate the use of criminal background checks in hiring,³ school discipline,⁴ housing patterns,⁵ and now, availability of school resources.

The Department of Education’s Office of Civil Rights Enforcement (OCR) is particularly enthusiastic about using disparate impact theory to promote de facto racial balancing in education and in October 2014 issued guidance in the form of a “Dear Colleague” letter regarding the distribution of school resources.⁶ The guidance interprets racial disparities in the availability or utilization of resources—such as advanced courses, extracurricular activities, technology, and funding—as invidious racial discrimination, even when those disparities are not the result of racially disparate treatment, but rather of facially neutral policies. For example, if a predominantly white and Asian school district offers Advanced Placement courses and a predominantly black and Latino school district does not, the guidance presumes this is invidious racial discrimination, even

if it is because the first school district has more funds through property taxes or a greater percentage of students performing above grade level who are therefore able to take advantage of the courses. The guidance also presumes it is invidious discrimination if a given school does offer Advanced Placement courses, but a smaller percentage of black or Latino students than white and Asian students enroll in those courses. This guidance is a dubious interpretation of Title VI, encourages school districts to engage in racially disparate treatment, is economically unrealistic, and infringes on decisions best made by local authorities.

I. GUIDANCES AND DEAR COLLEAGUE LETTERS: ARE THEY REALLY NON-BINDING?

As a preliminary matter, it is questionable whether OCR has the authority to notify school districts of sweeping policy changes like this through a Dear Colleague letter rather than by promulgating a rule. This is, alas, a time-honored tradition at the Department of Education (and other agencies) that persists despite criticism of the practice.⁷ It is much easier for OCR to issue a controversial policy change through a guidance document than to expose it to the rigors of notice-and-comment rulemaking required by the Administrative Procedure Act.⁸ The rulemaking process puts the regulated parties on notice of the proposed policy change, as was intended, and allows the regulated parties to mount fierce opposition to the proposed rule if they wish. This can make it very difficult for the agency to achieve its policy goals.⁹ As a result, OCR usually issues guidance documents such as “Dear Colleague” letters, which are written without the formal opportunity for public participation provided by the notice-and-comment process.¹⁰

Although Dear Colleague letters purport to be mere explanations of how OCR will enforce already-existing statutes and rules,¹¹ they often go beyond explanation and into substantive policy-making.¹² Although OCR has the power to revoke federal

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funds if they find a school district to be in violation of Title VI, they rarely do so. School districts fall in line as best they can with the requirements included in the latest Dear Colleague letter because an investigation alone is punishment enough for an alleged violation. A brief glance at recent resolutions of investigations against school districts makes this clear. This is what the Manchester, New Hampshire school district was subjected to during an investigation for an alleged disparate impact violation of Title VI regarding the racial composition of AP and other advanced high school classes:

During the investigation, OCR requested information from the District for the 2010-2011 and 2011-2012 school years. OCR reviewed documentation from the District regarding the policies and procedures relating to enrollment in its courses and programs. OCR also conducted onsite meetings and interviews with administrators, guidance counselors, principals, Building Level Instructional Leaders, classroom teachers, parents and students at the District's three comprehensive high schools, three middle schools, and five of the District's elementary schools, as well as the MST. Additionally, OCR analyzed student enrollment data for the District and for each high school in the District, and compared it to enrollment data OCR was able to obtain for several District programs, including AP course enrollment.¹³

An extensive investigation of this sort is tedious, time-consuming, and expensive.¹⁴ It is no wonder, then, that announcements from OCR often include a variation of, "Prior to the conclusion of OCR's investigation, the District expressed an interest in voluntarily resolving this review."¹⁵ This, along with the threat of losing federal funds, is why OCR is able to achieve its policy objectives through guidance documents. Much of the time, the case will not make it to litigation and OCR will not have to withhold funding. The investigation process is enough to cow the district into submission, and a guidance document tells other districts how to avoid an investigation.

II. DISPARATE IMPACT

a. Title VI and Disparate Impact

The problem with OCR's invocation of disparate impact theory, aside from the weakness of disparate impact theory itself¹⁶ and the questionable use of Dear Colleague letters, is that the text of Title VI does not prohibit disparate impact discrimination, but only disparate treatment. Therefore, the disparate impact approach is suspect after the Supreme Court's decision in *Alexander v. Sandoval*. Although the Court assumed, for purposes of deciding the case, that regulations premised on Title VI were permissible, it called the use of disparate impact into question in footnote 6: "We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably entwined with' § 601 . . . when § 601 permits the very behavior that the regulations forbid."¹⁷

As Justice Scalia noted, § 601 "provides that no person shall, 'on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity'

covered by Title VI."¹⁸ Notably, § 601 only prohibits discrimination "on the ground of" race, color, or national origin, which implies discriminatory treatment. It does not include language such as "discriminatory effects" or "disproportionately affect," which would indicate that Congress intended for Title VI to include a disparate impact component.¹⁹ It is, therefore, an odd result to say that § 602, which only gives federal agencies the authority to act against violations of § 601, permits agencies to find violations of § 601 for behavior that the text of § 601 does not prohibit.²⁰

Even if disparate impact is permitted under Title VI, the October 1 Dear Colleague letter is a use of disparate impact with a particularly expansive reach:

Chronic and widespread racial disparities in access to rigorous courses, academic programs, and extracurricular activities; stable workforces of effective teachers, leaders, and support staff; safe and appropriate buildings and facilities; and modern technology and high-quality instructional materials further hinder the education of students of color today. Below I highlight the negative effects these inequalities can have on student learning and encourage school officials to assess regularly disparities in educational resources in order to identify potential—and where it exists to end—unlawful discrimination, particularly in districts with schools where the racial compositions vary widely.²¹

Elsewhere, OCR states, "Since research is mixed on whether within-school or between-school comparisons are more likely to find disparities in teacher quality, OCR retains discretion to focus on either or both comparisons depending on contextual factors."²² It is difficult to understand how OCR intends to eliminate disparities in teacher quality within schools, as that more or less entails eliminating disparities in teacher quality, period.²³ It also seems unworkable. Unless a school is intentionally putting black and Latino students into classes with less effective teachers, what is to be done? One of the studies OCR cites to support its decision to investigate within-school variations in teacher quality posits that schools are likely unable to identify the best teachers, and even if they can identify the best teachers, they may not choose to hire them or union rules may prevent them from being hired.²⁴ Even if schools can identify the best teachers in the school, determining what the best use of their talents is seems to be a prudential judgment. Should the best math teacher teach AP Calculus so that high-achieving students master the challenging material, which might be very difficult or almost impossible with a lesser teacher? Or is it better for her to teach remedial math in hopes that she can bring low-achieving students up to par? These are decisions best made by principals who are familiar with the strengths and weaknesses of students and teachers at their school, not by a bureaucrat in OCR or a federal judge. This is common sense to almost everyone, including the Supreme Court, except OCR and DOJ.²⁵

In short, everything that remotely touches on education is fair game for OCR to bring a claim of racial discrimination. Bear in mind that OCR is targeting statistical disparities in this area, not disparate treatment. Although the letter does mention

disparate treatment, referred to as “intentional discrimination,” such discrimination is forbidden by the plain text of § 601 and is relatively easy to identify, particularly because it includes facially neutral policies that are pretexts for intentional discrimination.²⁶ Rather, what they are targeting are racial disparities that are the effect of what everyone agrees are facially neutral policies.

b. The Application of Disparate Impact

OCR determines whether disparate impact constitutes racial discrimination by asking a series of questions:

1) Does the school district have a facially neutral policy or practice that produces an adverse impact on students of a particular race, color, or national origin when compared to other students?

2) Can the school district demonstrate that the policy or practice is necessary to meet an important educational goal? In conducting the second step of this inquiry OCR will consider both the importance of the educational goal and the tightness of the fit between the goal and the policy or practice employed to achieve it. If the policy or practice is not necessary to serve an important educational goal, OCR would find that the school district has engaged in discrimination. If the policy or practice is necessary to serve an important educational goal, then OCR would ask:

3) Are there comparably effective alternative policies or practices that would meet the school district’s stated educational goal with less of a discriminatory effect on the disproportionately affected racial group; or, is the identified justification a pretext for discrimination? If the answer to either question is yes, then OCR would find that the school district had engaged in discrimination. If no, then OCR would likely not find sufficient evidence to determine that the school district had engaged in discrimination.²⁷

In other words, if a facially neutral policy or practice produces an adverse impact on students of preferred races—it is, after all, unlikely that OCR will be concerned about a policy that has an adverse impact on whites or Asians—it is probable that the school district will be found to have discriminated on the basis of race. If OCR does not agree about the importance of the educational goal the policy or practice is intended to promote, then the school will fail the second step and will be found to have discriminated. If OCR decides that the policy or practice is not *necessary* to achieve that goal, then the school will be found to have engaged in discrimination. How many practices are absolutely necessary? Much of the time, it is a prudential judgment as to which one of several options is the best. OCR can easily second-guess that decision. And even if the school district survives step two, is there some policy or practice somewhere in the world that might achieve the same goal? Of course most people can dream up some alternative policy that might be better, even if it is more expensive or unworkable in practice. If OCR dreams up such an alternative, yet again, the school will be found to have engaged in discrimination. And if the school manages to satisfy all those requirements, plus

convince OCR that this practice is not a pretext for disparate treatment, “OCR *likely* would not find sufficient evidence to determine that the school district had engaged in discrimination,” but it makes no guarantees.

The hypothetical school district had not engaged in disparate treatment discrimination, or OCR would have proceeded on that basis. Nor was OCR able to show that there was another policy that would achieve the same goal while causing less of a disparate impact, or that the school’s reason for the practice was a pretext. So in the end, OCR is announcing, what really matters is whether we *think* your resource allocation is discriminatory, even if there is no evidence of discrimination other than a statistical disparity. This makes a laughingstock of the rule of law.

c. Some racial disparities are more important than others

OCR cherry-picks comparisons between racial groups to imply that there is something nefarious about racial disparities. For example, they note that black students are less likely than members of other racial groups to attend schools that offer Advanced Placement (AP) courses, and that black and Latino students enroll in calculus at levels below their representation in the population.²⁸ However, it is not until you read the footnotes that you realize that Asian students are the racial or ethnic group most likely to attend a school with AP courses.²⁹ In fact, a greater percentage of Latino students than white students attend a school that offers AP courses.³⁰

As is common in all topics involving both education and race, Asians are almost entirely ignored in this document. The letter uses the term “students of color” rather than “minority students,” and “students of color” refers to “black, Latino, Asian, Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and students of two or more races.”³¹ Yet the document focuses almost exclusively on the resources and academic participation of black and Latino students as compared to white students. This is likely because focusing on black and Latino students as compared to white students allows OCR to present a simplistic contrast between adequate resources and academic participation for and by white students, and inadequate resources and academic participation for and by black and Latino students. Introducing Asian students into the picture blurs the contrast. The result of looking at black, white, Latino, and Asian students, instead of just the first three groups, reveals a state of affairs congruent with that at other education levels.³²

An additional flaw in the Guidance, and in disparate impact theory generally, is its failure to recognize the fact that any policy or practice will benefit some groups more than others. Funding for an AP Spanish class will disproportionately benefit Hispanic students from bilingual families. Students whose families only speak English will be at a comparative disadvantage in the AP Spanish class. Funding for a soccer team will disproportionately benefit those who are athletic. Every decision about allocating funds benefits someone and does not benefit someone else. Every funding decision disparately impacts someone. If we divert funds away from the AP-offering schools attended by 94 percent of Asians to the non-AP-offering schools attended by 80 percent of blacks, there will be a disparate impact on Asians.³³

OCR realizes this, which is why it only considers disparate

impact discriminatory if it has a negative effect on preferred groups: “For example, students in special education may be served by more teachers and support staff than other students, and therefore districts may spend more on those students, but that does not mean those students are receiving a disproportionate share of resources.”³⁴ Similarly, “Funding disparities that benefit students of a particular race, color, or national origin may also permissibly occur when districts are attempting to remedy past discrimination.”³⁵ Given that Title VI has been used to target intentional discrimination since its enactment in 1964, there is presumably little disparate treatment discrimination left to address. This means that most of this supposed historical discrimination would be disparate impact discrimination. OCR therefore encourages school districts to engage in blatantly racially motivated disparate treatment discrimination in order to rectify a disparate impact caused by a facially neutral policy.

III. DISPARATE IMPACT ENCOURAGES ENTITIES TO ENGAGE IN DISPARATE TREATMENT

As mentioned above, the Guidance encourages funding disparities that attempt to remedy purported past discrimination. These disparities do not result from a facially neutral policy that disproportionately affects particular racial groups, but from intentionally providing more resources to a particular school or district *because* the students are a preferred race. We are back to the dilemma Justice Scalia highlighted in *Ricci*: in an attempt to avoid disparate impact discrimination, entities often veer over into engaging into disparate treatment discrimination.³⁶

This is an even more egregious example than in *Ricci*, however, as OCR contemplates that the school district will not be engaging in disparate treatment not only to avoid a charge of disparate impact, but to remedy supposed historical discrimination. This is impermissible. As Justice Powell wrote in *Bakke*, “helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”³⁷ The intended beneficiaries of the Davis Medical School racial quotas likely had experienced disparate treatment on the basis of their race. *Bakke* was decided in 1978, only fourteen years after the passage of the 1964 Civil Rights Act, which included Title VI. Yet even then, Justice Powell said, you cannot require innocent third parties to pay for others’ sins. How much less can you require a second generation Chinese-American student to lose his AP Physics class because the high school across town is poor and disproportionately comprised of second-generation Mexican-American students?

IV. THE TROUBLE WITH RESOURCE ALLOCATION AS DISCRIMINATION

An additional flaw in the Guidance is that OCR tries to steal a base by treating disparate resource allocation, standing alone, as invidious discrimination. The cases it cites to support its claim that differential resource allocation by itself constitutes discrimination all relate to integration of school districts that had practiced de jure segregation.³⁸ In those cases, differential allocation of resources was one factor in determining whether

school districts that had practiced legally-mandated racial segregation had dismantled their dual systems.³⁹ Examining the differential allocation of resources served as a way of smoking out racially disparate treatment and efforts to perpetuate segregation, particularly in determining compliance with a desegregation decree.⁴⁰

Many school districts over which OCR is claiming authority based on resource allocation discrimination never practiced de jure segregation. Those that did were required to integrate their schools, often at the cost of great social disruption, forty years ago. No K-12 student today has ever been subject to de jure educational segregation. As the Supreme Court approvingly summarized the District Court’s findings in a case that sought to lift a desegregation injunction, “The District Court found that present residential segregation was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation.”⁴¹ And in a later case, “Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”⁴² OCR’s guidance is not limited to school districts that once practiced de jure segregation, but covers all school districts in the country. It does not allege that there is widespread intentional discrimination in allocation of resources between and within schools, but alleges that students of preferred races are more likely to be poor than students of non-preferred races. The poorer students are more likely to attend schools that have fewer resources, either because they live in a poorer area that has less property tax revenue or because it costs more to educate the poorer students. This is not invidious racial discrimination of the kind at issue in *Green*, *Freeman*, and *Dowell*. This is just a consequence of living in a poor area.⁴³

V. FINANCES, LOCAL CONTROL, AND SOCIAL ENGINEERING

OCR’s vision for implementing this guidance is not modest. OCR acknowledges that disparities in resources are not due to different treatment on the basis of race, but rather because schools are usually funded through property taxes.⁴⁴ This is not racial discrimination that any ordinary person would recognize. It is simply economic reality: wealthier areas will be able to afford nicer gyms and iPads for fourth-graders. Describing economic reality as racial discrimination is consistent with the Obama Administration’s abuse of disparate impact in other areas. HUD’s recent “Affirmatively Furthering Fair Housing” rule dubs geographic clustering of racial groups “segregation” because members of ethnic minorities are less likely to be able to afford housing in more genteel areas.⁴⁵ The fact that members of certain ethnic groups are more likely to be poor than are members of other ethnic groups, and therefore have less access to housing and schools in wealthy neighborhoods, which is what these two administrative dictates boil down to, is not racial discrimination. It is discrimination on the basis of your pocketbook. By that standard, the largely white population of poverty-stricken Appalachia has an axe to grind against Asians and Latinos, as the residents of Appalachia live in an ethnically homogenous area of concentrated poverty and almost certainly have scant access to AP courses.⁴⁶

More importantly, the Supreme Court has already addressed this issue in regard to an Equal Protection claim in *San Antonio Independent School District v. Rodriguez*.⁴⁷ This is relevant to an analysis of Title VI because the Court interprets Title VI and the Equal Protection Clause in a very similar way.⁴⁸ Furthermore, the case was decided almost a decade after Title VI was enacted, and the Court did not even mention Title VI in its decision despite the fact that the poorer school district was 90 percent Mexican-American and 6 percent black, and the wealthier school district was about 81 percent white, 18 percent Mexican-American, and less than 1 percent black.⁴⁹ Significantly, although *Griggs v. Duke Power*, which incorporated disparate impact into Title VII, had been decided two years earlier, the Court makes no reference to disparate impact in *Rodriguez*, and says that it is impossible to identify a suspect class.⁵⁰ Instead of analyzing whether there is a suspect class defined by race—especially since the two representative school districts discussed in the litigation were majority-Hispanic and majority-white, respectively—the Court looked at whether there was a suspect class comprised of “poor people,” and determined there was not.

The Court framed the issue thus: “the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth.”⁵¹ This is the essence of the Resource Comparability Dear Colleague letter when it is stripped of the racial folderol that expresses concern for poor children of one race and not another. And, the Supreme Court found, there is no right to have the most expensive education on offer as long as education is being provided:

[N]either appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a relatively poorer quality education than children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees’ argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the education process, can any system assure equal quality of education except in the most relative sense.⁵²

OCR refuses to acknowledge that finances are limited and that tradeoffs must be made in the area of education as everywhere else. “Intradistrict and interdistrict funding disparities often mirror differences in the racial and socioeconomic demographics of schools, particularly when adjusted to take into account regional wage variations and extra costs associated with educating low-income children, English language learn-

ers, and children with disabilities.”⁵³ If it costs more to educate the students at a particular school, that school will not have the same financial resources to provide a new football field or a music class as a school where it costs less to educate students in the basics. That is not racial discrimination, but economic reality. It is difficult to escape the conviction, though, that OCR is less concerned with excellence than egalitarianism, even if that means depriving middle-class children of the opportunity to excel.

The only way that OCR can achieve its goal is by forcing states and localities to remake their school funding systems. The reference to intradistrict and interdistrict funding disparities makes this plain. The Supreme Court has frowned upon this as well, reasoning that taxation and education policy are both subjects to which great deference is owed to state legislatures. The Court wrote:

We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State’s judgment in conferring on local subdivisions the power to tax local property to supply revenues for local interest. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. . . . No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods or services, has yet been devised which is free of all discriminatory impact. In such a complex area in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.⁵⁴

VI. THE GUIDANCE FAILS TO CONSIDER INDIVIDUAL CIRCUMSTANCES AND INDIVIDUAL CHOICE

The Guidance rests on a flawed premise: that lack of resources is primarily responsible for the achievement gap between blacks and Hispanics and whites. (No word on what is responsible for the achievement gap between Asians and whites.) If we throw more money at the problem, it will be solved. There are no differences between poor students in predominantly minority schools and middle- and upper-class students in predominantly white schools that cannot be solved by offering more extracurricular activities, more laptops, and more AP courses. OCR is so committed to this premise that at points the Guidance descends into absurdity.

“English language learners represented five percent of high school students, but only two percent of the students enrolled in an AP course.”⁵⁵ It is difficult to understand how the Department of Education can expect students who are still learning to speak English to participate in AP classes in great numbers. An inability to speak the language of the school system would seem to be an important predictor of educational difficulties. How can you expect someone who is not even proficient in English to take an AP English Literature course? If they are still trying to learn English, why would they take an AP French course? And, perhaps most importantly, if they are still trying to learn English, that is probably going to absorb much of the time and effort that they could have put into

studying other subjects.

Latinos are more likely to attend a school that offers AP courses than are white students.⁵⁶ And yet, the Guidance notes “students of color are less likely than their white peers to enroll in [advanced courses and gifted and talented programs] within schools that have those offerings.”⁵⁷ So Latinos are more likely to have the opportunity to enroll in an AP class than are white students, but they apparently are less likely to take advantage of the opportunity when it is presented. Perhaps teachers need to push black and Latino students harder to enroll in advanced classes. But if, in the end, black and Latino students are for whatever reason disproportionately uninterested in enrolling in advanced courses, or are disproportionately likely to be at an academic level where they are unable to handle the coursework, no amount of pushing will erase the racial disparity.⁵⁸

Similarly, OCR sees invidious discrimination in inexperienced teachers being disproportionately likely to teach in schools that primarily serve black and Latino students. If we can only identify the effective and experienced teachers, OCR says, we can assign them to teach black and Latino students. But what if teachers do not want to teach at those schools for any number of non-racially discriminatory reasons? OCR itself trumpets that black and Latino students are more likely to be subject to disciplinary action.⁵⁹ Additionally, “Low socioeconomic status, whether measured at the individual or school level, has been associated with an increased risk of school discipline.”⁶⁰ What if that reflects disproportionate involvement in disruptive behavior, and teachers prefer to teach in a school with better-behaved students?⁶¹ Or it could be as simple as teachers preferring to live near their homes in middle-class areas.⁶² Regardless, OCR ignores the fact that teachers too have the ability to choose where they want to work. If the district tries to force them to teach at a school that is a particularly unpleasant assignment, they may simply quit. And since they are effective teachers, they can probably find teaching jobs in another district or a private school.

In short, OCR fails to recognize that human beings are individuals who have agency. The people whose lives are affected by the Guidance are not little square units who come in different colors but are otherwise identical. They come from particular families within particular cultures and have the ability to make choices, even if that choice is just foot-dragging.

VII. FORCING LESS-PREPARED STUDENTS INTO ADVANCED COURSES MAY HINDER, NOT HELP, THEIR EDUCATIONAL PROGRESS

The Guidance notes that black and Latino students are underrepresented in gifted and talented programs compared to their representation in student bodies.⁶³ The Guidance also notes that English language learners are far less likely to be enrolled in gifted and talented programs than are non-English language learners.⁶⁴ If the racial breakdown of students enrolled in gifted and talented classes is to exactly match their representation in the student body, schools have two options: prevent some white and Asian students from enrolling in those classes, or enroll more black and Latino students in those classes.

The latter option may seem attractive. Is there a downside to enrolling more black and Latino students in advanced classes?

The answer is, “of course not,” as long as they are equally academically prepared. If they are *not* as academically prepared as the median student in the gifted and talented class, research at the post-secondary education level suggests that being placed in an advanced class may result in these students learning less than they would have learned in a regular class. This theory is known as “mismatch,” and has been extensively discussed in Richard Sander and Stuart Taylor, Jr.’s book of the same name. In the post-secondary environment, it is likely that placing students in classes where their academic preparation is weaker than the class’s median student has, in the end, led to fewer black and Latino scientists and lawyers.⁶⁵ The negative effects of placing students in classes for which they are at a relative disadvantage academically seem to be the same across racial lines, but due to affirmative action policies it is usually black and Latino students who are the “beneficiaries” of these efforts.⁶⁶

It is likely that placing elementary and high school students in advanced classes for which they are academically under-prepared would have a similar effect. It is unlikely that these students would be able to make up the ground necessary to succeed in the class—after all, their classmates will be learning at the same time they are. It is profoundly discouraging to know that you lag behind your classmates no matter how hard you work, which could easily cause students to question their overall academic ability and educational aspirations. Bureaucrats’ desire to have the “right” racial mix in advanced classes is no reason to subject students to such a discouraging experience. Students who have the academic preparation and interest to succeed in an advanced class should be encouraged to enroll in that class, regardless of their race. Similarly, students whose academic preparation is better suited to another class should be encouraged to enroll in that class, regardless of their race.

CONCLUSION

When the Supreme Court imported disparate impact into Title VII in *Griggs v. Duke Power*, it was a well-meaning, if misguided, attempt to eliminate unnecessary job qualifications that disproportionately disadvantaged blacks. Forty years later, disparate impact has spread far beyond the confines of employment law and is being used as a tool by would-be social engineers. The Resource Allocation Guidance will increase the federal government’s micromanagement of elementary and secondary education and reduce local control of schools. It will encourage school districts to favor certain schools over others when making funding decisions based on the racial composition of the schools. It will do little to improve the academic opportunities of black and Hispanic students, but it may harm the academic opportunities of white and Asian students.

There are doubtless some students in underprivileged schools who would benefit from and are interested in participating in AP courses and other advanced coursework. Accommodating those students does not require remaking the entire American school system under the auspices of a mandate from Washington. Allowing high-scoring students to transfer to public schools that offer advanced courses is one comparatively simple solution. Allowing charter schools to operate, or even providing vouchers for private schools, are alternatives. All these options are less disruptive than transforming property

tax systems and faculty assignments. However, those options quite possibly will not reduce racial disparities, but will provide an opportunity for youngsters of all races who have the drive and talent to pursue a challenging education. That ought to, but will not, be good enough for the social engineers at OCR.

Endnotes

- 1 Tex. Dep't of Housing v. Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015).
- 2 *Id.* at 2522-2524 (describing limitations on disparate impact liability).
- 3 See U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY (Dec. 2013), available at http://www.eusccr.com/EEOC_final_2013.pdf.
- 4 See U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, AND U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; see also U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT (Apr. 2012), available at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.
- 5 See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 CFR Parts 5, 91, 92, 570, 574, 576, and 904); see also Abigail Thernstrom, Peter Kirsanow, and Todd Gaziano, "Comment re Docket No. FR-5173-P-01, 'Affirmatively Furthering Fair Housing,'" (Sept. 17, 2013), available at <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/04/HUD-Comment-Affirmatively-Furthering-Fair-Housing.pdf>.
- 6 U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE LETTER: RESOURCE COMPARABILITY [hereinafter RESOURCE COMPARABILITY] (Oct. 1, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.
- 7 Robert A. Anthony, Interpretive Rules, *Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1354 (1992).
- 8 Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 339 (2014) ("agencies can change their legal stances relatively easily—indeed, that is one reason why they use guidance in lieu of more formalized rulemaking").
- 9 See R. Shep Melnick, *The Odd Evolution of the Civil Rights State*, 37 HARV. J.L.P.P. 113, 122-23 (2014).
- 10 See Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 301-02 (2014).
- 11 RESOURCE COMPARABILITY at n. 3 ("This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Department evaluates whether covered entities are complying with their legal obligations.").
- 12 Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007). See also Jesse Krohn, *Sexual Harassment, Sexual Assault, and Students with Special Needs: Crafting an Effective Response for Schools*, 17 U. PENN. J. L. SOC. CH. 29, 36 (2014) ("When schools are given clear, reliable guidelines for how they should behave – and clear, reliable guidelines for how they will be punished if they do not – they comply, to the benefit of students. . . . OCR released a 'Dear Colleague' letter mandating policy changes in the way schools address sexual harassment and sexual assault.").
- 13 Letter from Thomas J. Hibino, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. Debra J. Livingston, Superintendent of Manchester School District, Re: Case No. 01-11-5003 Manchester School District, at 2 (April 9, 2014) (on file with author).

- 14 For example, a recently settled Title IX investigation of a California school district was opened in November 2011 and resolved in October 2014. See Letter from Arthur Zeidman, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. John A. Garcia, Superintendent, Downey Unified School District, Re: Case No. 09-12-1095, at 1 (Oct. 14, 2014) (on file with author).
- 15 Letter from Thomas J. Hibino, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. Debra J. Livingston, Superintendent of Manchester School District, Re: Case No. 01-11-5003 Manchester School District, at 1 (April 9, 2014); see, e.g., Letter from Arthur Zeidman, Regional Director, U.S. Dep't of Educ., Office of Civil Rights, to Dr. John A. Garcia, Superintendent, Downey Unified School District, Re: Case No. 09-12-1095, at 1 (Oct. 14, 2014) (on file with author); Letter from Taylor D. August, Director, Dallas Office, U.S. Dep't of Educ., Office of Civil Rights, to Dr. Gearl Loden, Superintendent, Tupelo Public School District, Re: OCR Docket 06-11-5002, at 1 (Sept. 25, 2014) (on file with author).
- 16 Tex. Dep't of Housing v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2527 (2015) (Thomas, J., dissenting) ("We should drop the pretense that *Griggs'* interpretation of Title VII was legitimate.").
- 17 Alexander v. Sandoval, 532 U.S. 275, n. 6 (2001).
- 18 *Id.* at 278.
- 19 Sandoval at n.6. This argument is of course controversial; see *id.* at 306 (Stevens, J., dissenting).
- 20 RESOURCE COMPARABILITY at 2.
- 21 *Id.* at n. 15.
- 22 *Id.* at 12-13. OCR writes that states and districts are developing teacher evaluation systems that will be able to provide information about teacher effectiveness. This seems overly optimistic. Even if the most effective teachers are identified, it is difficult to understand how districts will override the role of individual choice in teacher placement.
- 23 Cory Koedel and Julian R. Betts, *Re-examining the Role of Teacher Quality in the Educational Production Function* (April 2007), http://economics.missouri.edu/working-papers/2007/wp0708_koedel.pdf, 17-18. The lack of between-school variation in teacher value-added is likely to be largely the result of the inability of schools to identify and hire the best teachers. In Section VIII, we show that the observable teacher qualifications most often linked to recruitment, retention and salaries are almost entirely unable to predict teacher value-added. Furthermore, Ballou (1996) shows that even when schools are able to hire seemingly superior teachers, they often choose not to. Finally, schools at SDUSD are further limited in their ability to select the most effective teachers by the labor contract between SDUSD and the teachers' union. This contract requires that schools with an open position choose from the five teachers with the most district seniority who apply for the position and meet the state qualifications, restricting each school's pool of potential applicants.
- 24 Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").
- 25 RESOURCE COMPARABILITY at 6-8.
- 26 *Id.* at 8.
- 27 *Id.* at 3.
- 28 *Id.* at n. 10. Philip Handwerk, et al., Access to Success: Patterns of Advanced Placement Participation in U.S. High Schools, (July 2008), <http://www.ets.org/Media/Research/pdf/PIC-ACCESS.pdf> (finding six percent of Asian students, 12 percent of Latino students, and 14 percent of white students attend high schools without any Advanced Placement courses).
- 29 *Id.*

30 *Id.* at 2.

31 Richard Sander and Stuart Taylor, Jr., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS* (2012) 34. Nationwide, the academic index of whites taking the SAT is about 140 points higher than the academic index for blacks (corresponding to a 300-point black-white gap on the current SAT I test, and a 0.4 GPA gap in high school grades), and it has hovered in that range for the past twenty years. Hispanics, in contrast, have an average academic index that is about 70 points lower than that of whites. The gap for American Indians is very similar to the black-white gap, and the academic index of Asians is about thirty points higher than that of whites. J.P. Wright, et al., *Prior problem behavior accounts for the racial gap in school suspensions*, 42 J. OF CRIM. JUSTICE 257 (2014) (“Recent studies, for example, reveal that black youth, in comparison with their white counterparts, are often less prepared for school entry”), available at <http://www.sciencedirect.com/science/article/pii/S0047235214000105>. See also Katherine A. Magnuson and Jane Waldfogel, *Early Childhood Care and Education: Effects on Racial and Ethnic Gaps in School Readiness*, 15 THE FUTURE OF CHILDREN 169, 183 (2005) (“the average Hispanic-white reading gap at school entry is about 0.50 of a standard deviation”), available at http://futureofchildren.org/futureofchildren/publications/docs/15_01_09.pdf; Monte Morin, *Study examines achievement gap between Asian American, white students*, L.A. TIMES, May 5, 2014 (“Even if they come from poorer, less educated families, Asian Americans significantly outperform white students by fifth grade”), <http://www.latimes.com/science/sciencenow/la-sci-sn-why-do-asian-american-students-perform-better-than-whites-20140505-story.html>.

32 RESOURCE COMPARABILITY at n. 10.

33 *Id.* at 10.

34 *Id.*

35 Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (“[R]esolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”).

36 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

37 *Id.* at n. 40.

38 Bd. of Educ. of Okla. Pub. Schools v. Dowell, 498 U.S. 237, 250 (1991), quoting Green v. County Sch. Bd., 391 U.S. 237, 435 (1968) (“In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but “to every facet of school operations—faculty, staff, transportation, extracurricular activities, and facilities.”).

39 Green v. County Bd. of New Kent County, 391 U.S. 430, 435 (1968). The pattern of separate ‘white’ and ‘Negro’ schools in New Kent County school system established under compulsion of state law is precisely the pattern of segregation to which Brown I and Brown II were particularly addressed, and which Brown I declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system’s schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part ‘white’ and part ‘Negro.’

40 Dowell at 243.

41 Freeman v. Pitts, 503 U.S. 467, 495 (1992).

42 See Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1421-22 (2014).

43 RESOURCE COMPARABILITY at 5.

44 Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 CFR Parts 5, 91, 92, 570, 574, 576, and 904).

45 Kelvin Pollard and Linda A. Jacobsen, *The Appalachian Region: A Data Overview from the 2007-2011 American Community Survey*, Appalachian Regional Commission, at 14, 41 (Feb. 2013), http://www.arc.gov/assets/research_reports/PRBDataOverviewReport2007-2011.pdf. The Appalachian region is significantly less diverse racially and ethnically diverse than the United States as a whole, and most parts of the region have remained far below the national average in their minority populations. In two-thirds of Appalachian counties, minorities (defined as anyone who identifies with a racial or ethnic group other than “white alone, not Hispanic”) made up less than 10 percent of the population during the 2007-2011 period. . . . In 23 Appalachian counties, per capita income was less than \$15,000. . . . Indeed, per capita income in the 2007-2011 period was just \$18,720 in rural Appalachian counties as a whole, and just \$18,197 in central Appalachia.

46 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

47 Guardians Ass’n v. Civil Service Comm’n of City of New York, 463 U.S. 582, 589-90 (1983).

48 San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 12-13 (1973).

49 *Id.* at 25.

50 *Id.* at 19.

51 *Id.* at 23-24.

52 RESOURCE COMPARABILITY at 5.

53 Rodriguez at 40-41.

54 RESOURCE COMPARABILITY at 3.

55 *Id.* at n. 10.

56 *Id.* at 3.

57 John H. McWhorter, *Explaining the Black Education Gap*, THE WILSON QUARTERLY (Summer 2000), available at <http://archive.wilsonquarterly.com/essays/explaining-black-education-gap>. Victimologist arguments are put to a fuller test in another affluent community halfway across the country, the Cleveland suburb of Shaker Heights. The community’s excellent public schools spent about \$10,000 a year per student in 1998, compared with a national average of \$6,842. The town is affluent and racially integrated; half of the student population is black. Students track themselves into advanced courses. There are after-school, weekend, and summer programs to help children whose grades are slipping, and a program in which older black students help younger ones. As early as kindergarten, students needing help with language arts skills are specially tutored. There are special sessions on taking standardized tests. A counselor works with students who have low grades but appear to have high potential. Shaker Heights is beautifully tailored to helping black students, and one would be hard pressed to call the black families sailing through these wide streets in their Saturns and Toyotas “struggling blue collar.” Yet in four recent graduating classes, blacks constituted just seven percent of the top fifth of their class—and 90 percent of the bottom fifth. Of the students who failed at least one portion of the ninth-grade proficiency test, 82 percent were black.

58 U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, AND U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>. The Civil Rights Data Collection, conducted by OCR, has demonstrated that students of certain racial or ethnic groups tend to be disciplined more than their peers. For example, 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% of students in the CRDC, they make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. Further, over 50% of students who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.

59 J.P. Wright, et al., *Prior problem behavior accounts for the racial gap in school suspensions*, 42 J. OF CRIM. JUSTICE 257, at 258 (2014), available at <http://www.sciencedirect.com/science/article/pii/S0047235214000105>.

60 *Id.* at 263.

61 The school district in *Freeman v. Pitts*, 503 U.S. 467, 482 (1992), faced a similar problem in achieving racial balance in its faculty. The District Court found the crux of the problem to be that DCSS has relied on the replacement process to attain a racial balance in teachers and other staff and has avoided using mandatory reassignment. DCSS gave as its reason for not using mandatory reassignment that the competition among local school districts is stiff, and that it is difficult to attract and keep qualified teachers if they are required to work far from their homes. In fact, because teachers prefer to work close to their homes, DCSS has a voluntary transfer program in which teachers who have taught at the same school for a period of three years may ask for a transfer. Because most teachers ask to be transferred to schools near their homes, this program makes compliance with the objective of racial balance in faculty and staff more difficult.

62 RESOURCE COMPARABILITY at 3-4.

63 *Id.*

64 Sander and Taylor, *supra* note 31, at 52-53; 74-75.

65 *Id.* at 47 (“[W]hen Elliott and Strenta looked closely at the data, they realized that the distinguishing characteristic of students who fell away from science was not their race but rather the weakness of their academic preparation.”); *id.* at 48-49; *id.* at 74-75 (“[O]ne of my students wondered whether older white students (whom law schools often gave admissions to in pursuit of a different kind of diversity) might also encounter mismatch problems. The BPS allowed us to identify the age of students and confirm that, indeed, a larger percentage of older white students were attending schools with credentials a good deal lower than their classmates. Yes, they had disproportionate trouble on the bar. And yes, when we controlled for mismatch, the difference in performance disappeared. Poor outcomes were not a function of age, race, or any other group characteristic—it was about large preferences.”).

