
CIVIL RIGHTS

SCHOOL DISCIPLINE AND DISPARATE IMPACT

By John R. Martin*

Note from the Editor:

This paper analyzes the U.S. Department of Education's proposed use of disparate impact theory in examining school discipline in schools across the country. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about discipline and disparate impact. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- Arne Duncan, Secretary, U.S. Dep't of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010): <http://www2.ed.gov/news/speeches/2010/03/03082010.html>
- Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities (Sept. 27, 2010): http://www.justice.gov/crt/speeches/perez_eosconf_speech.php
- Roger Clegg, *The Dangers of Disparate-Impact Policy*, WASH. TIMES, Oct. 20, 2010: <http://www.washingtontimes.com/news/2010/oct/20/the-dangers-of-disparate-impact-policy/>
- Press Release, New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor (Mar. 6, 2012): <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache>
- U.S. Commission on Civil Rights, School Discipline and Disparate Impact Briefing Report (March 2012): http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf

At the historic Edmund Pettus Bridge in Selma, Alabama, U.S. Secretary of Education Arne Duncan announced an initiative to examine disparities in achievement, academic opportunity, and discipline to determine whether schools across the country are discriminating against racial and ethnic minorities.¹ The Department of Education would use both data collection and investigations of individual school districts—called compliance reviews—as part of this initiative. The Department would seek to root out both direct discrimination and indirect discrimination, i.e., facially neutral policies and practices that have a disparate impact. This was a change in policy by the Obama Administration. The Department during the Bush Administration had not used “disparate impact analysis in its examination of complaints or compliance reviews.”² When the Department finds what it deems to be discrimination, Secretary Duncan noted, “it can ultimately withhold federal funds in extreme cases to schools and districts that refuse to remedy discrimination.”³ The Department planned to begin thirty-eight compliance reviews

by the end of the fiscal year, including reviews of discipline issues in five states.⁴

Secretary Duncan seemed to assume that disparities are caused by discrimination, whether intentional or unintentional. Martin Luther King, Jr. “would have been dismayed to learn of schools that seem to suspend and discipline only young African-American boys,” he said. There are “deep” and “pronounced” “disparities in discipline,” and there is “still” a “need to challenge policies which subsidize or needlessly result in grossly disparate impacts for children of color.”⁵ Similarly, Attorney General Eric Holder said in a speech that it is “quite simply, unacceptable” that “students of color” are “disproportionately likely to be suspended or expelled,” asserting that the disparities were at a minimum due to unintentional discrimination by schools.⁶

I. Title VI

Title VI of the Civil Rights Act of 1964 at Section 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 receiving Federal financial assistance.”⁷ Section 602 authorizes federal agencies that provide financial assistance to programs and activities to “effectuate the provisions of [Title VI] . . . by issuing rules, regulations or orders of general applicability”⁸ Although Title VI’s text does not include a disparate-impact provision, an effects test, a results test, or the like, the Department of Education promulgated a regulation pursuant to Section 602 prohibiting recipients from “utiliz[ing]

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criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin, or have the *effect* of defeating or substantially impairing accomplishments of the objectives of the program as respect individuals of a particular race, color, or national origin,” thus reserving the authority to use disparate-impact theory.⁹

As noted above, however, there is no mention of use of disparate-impact theory in the language of the statute. No one disagrees that direct or intentional discrimination, such as disciplining a black student more harshly than a similarly situated white student, is discrimination “on the ground of race.” But it is a different situation when a neutrally administered, facially neutral policy results in higher rates of discipline for one race over another. The racial disparity in this scenario occurs because students of one race have committed infractions of a neutral rule at a higher rate in the school or school district.

Congress has included explicit disparate-impact, results, or effects provisions in other civil rights statutes. The absence of any such provision offers evidence that Congress did not intend for discrimination under Title VI to encompass disparate impact. For example, the 1991 amendments to Title VII explicitly authorized a “disparate impact” cause of action and codified the burden of proof necessary to establish an “unlawful employment practice based on disparate impact.”¹⁰ Section 2 of the Voting Rights Act (VRA) prohibits electoral changes “which *result[]* in a denial or abridgement” of the right to vote.¹¹ One circumstance that may be considered in determining whether political processes deny or abridge the right to vote is the “extent to which members of a protected class have been elected to office in the State or political subdivision.”¹² Thus, Congress included a results test in which the process is judged, at least in part, by its outcome, even if the process was not created with discriminatory intent. The Americans with Disabilities Act (ADA) prohibits the following:

using qualification standards, employment tests or other selection criteria *that screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity.¹³

Thus, as the above examples show, Congress knows how to prohibit actions or policies based on their effects. The VRA and the ADA do not use the term “disparate impact,” but they turn on the outcome of the actions at issue. In Title VI, on the other hand, Congress only prohibited actions taken “on the ground of” race, color, or national origin.

Alexander v. Sandoval

The Supreme Court has never ruled on whether Title VI authorizes agencies such as the Department of Education to promulgate disparate-impact regulations. Its opinion in *Alexander v. Sandoval*, however, indicates that the Court would rule them invalid if the question were squarely presented.¹⁴ The Court in a 5-4 decision held that there is no private right of action to enforce disparate-impact regulations under Title VI.

In *Sandoval*, a driver’s license applicant challenged Alabama’s policy of only giving driver’s license exams in English as violating disparate-impact regulations promulgated under Title VI. A Department of Justice regulation similar to the one issued by the Department of Education prohibited funding recipients from “utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin”¹⁵ *Sandoval* assumed, without deciding, that disparate-impact regulations were authorized by Section 602, but held that there was no private cause of action to enforce them.¹⁶

Justice Scalia wrote for the majority that for purposes of this case, three aspects of Title VI “must be taken as a given.”¹⁷ First, Section 601 created a private cause of action for individuals to sue and obtain both injunctive relief and damages.¹⁸ Second, it is “beyond dispute . . . that § 601 prohibits only intentional discrimination.”¹⁹ And third, the Court would assume without deciding that Section 602 “may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”²⁰

Because Section 601 prohibits only intentional discrimination and permits facially neutral policies that have a disparate effect, a regulation issued pursuant to it cannot prohibit facially neutral policies.²¹ A private right of action to enforce the disparate-impact regulation therefore “must come, if at all, from the independent force of § 602.”²²

The Court, however, found no congressional intent in Section 602 to create any rights other than those conferred in Section 601:

Section 602 authorizes federal agencies “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.” . . . Whereas §601 decrees that “[n]o person . . . shall . . . be subjected to discrimination,” . . . the text of § 602 provides that “[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601].” . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to “effectuat[ing]” rights already created by § 601.²³

Section 602 thus does not create a new private right of action to sue under a disparate-impact theory. Nor can regulations promulgated under it. A regulation cannot create a new right that Congress omitted in the statute. Agencies “may play the sorcerer’s apprentice but not the sorcerer himself.”²⁴

The majority in *Sandoval* suggested that it would invalidate a regulation purporting to effectuate a statute that prohibits only intentional discrimination and permits facially neutral policies that have a disparate impact, when the regulation prohibits those very same policies: “We cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ § 601, . . . when § 601 permits the very behavior that the regulations forbid.”²⁵ Justices Kennedy and Thomas joined Justice Scalia’s majority opinion in *Sandoval*, which strongly signaled that such regulations went beyond the statute and were invalid, and the addition of Chief Justice Roberts and Justice

Alito to the Court strengthens the likelihood that the majority would strike down such regulations now.²⁶

II. The Department of Education

When the Department learns that a school or school district has a policy, practice, or procedure that has an adverse impact on minority students, it essentially shifts the burden of proof to the district to justify the racial disparity. Ricardo Soto, Principal Deputy Assistant Secretary at the Office for Civil Rights, explained in his statement to the U.S. Commission on Civil Rights:

Unlike cases involving different treatment, cases involving disparate-impact theory do not require that a school had the intent to discriminate. Rather, under the disparate-impact theory, the pertinent inquiry is whether the evidence establishes that a facially neutral discipline policy, practice, or procedure causes a significant disproportionate racial impact and lacks a substantial, legitimate educational justification. Even if there is a substantial, legitimate educational justification, a violation may still be established under disparate impact if the evidence establishes that there are equally effective alternative policies, practices, or procedures that would achieve the school's educational goals while having a less significant, adverse racial impact.²⁷

Thus, once a disparity is discovered, the district must show "a substantial, legitimate educational justification" for the policy, practice, or procedure, *and* that there are no "equally effective alternative[s]" that would have a "less significant, adverse racial impact."

This is analogous to the disparate-impact regime codified in the 1991 amendments to Title VII of the Civil Rights Act of 1964. Under Title VII, an employment practice based on disparate impact is unlawful only if, after the plaintiff shows a disparate impact, the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."²⁸ If the defendant meets this burden, the plaintiff may "still succeed by showing that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."²⁹

However, unlike Title VII, the text of Title VI has no disparate-impact provision or effects test, as discussed above. The Department of Education's approach shifts the burden to school districts to prove a negative, that they are not discriminating, which is not set out in the text of the statute.

III. Is There Evidence of Discrimination?

If disparities exist among racial and ethnic groups in school discipline, there are three possible explanations: (1) teachers and school officials are discriminating on the basis of race or national origin; (2) students of different races and national origins misbehave in school at different rates; or (3) a combination of the two. Secretary Duncan and Attorney General Holder seem to believe the first explanation. The underlying premise is that white students, for example, will commit infractions at the same rate as black students. But

disparities among racial and ethnic groups exist in many areas, as social scientists so often report. The data in areas analogous or related to school discipline caution that one should not assume proportionality in rates of misbehavior and discipline among racial and ethnic groups.

For example, there are disparities between whites and blacks in crime rates. A disproportionate number of blacks are in prison in the United States, not because of discrimination by police, prosecutors, or courts, but because blacks commit crimes at a higher rate than whites, as even liberal social scientists concede. Professor Amy L. Wax of the University of Pennsylvania Law School has written:

Contrary to frequently voiced accusations and despite voluminous literature intent upon demonstrating discrimination at every turn, there is almost no reliable evidence of racial bias in the criminal justice system's handling of ordinary violent and non-violent offenses. Rather, the facts overwhelmingly show that blacks go to prison more often because blacks commit more crimes. As a noted criminal law scholar sympathetic to black concerns stated in an exhaustive summary of the literature, "[v]irtually every sophisticated review of social science evidence on criminal justice decision making has concluded, overall, that the apparent influence of the offender's race on official decisions concerning individual defendants is slight." With respect to arrests, "few or no reliable, systematic data are available that demonstrate systematic discrimination." Rather, "arrests can by and large be taken as reasonable reflections of the involvement in serious crime of members of different racial groups." Likewise, . . . blacks are not singled out for stricter or more frequent prosecution. Nor do they receive longer sentences once criminal history and other sentencing factors are taken into account. In short, for ordinary violent and property crimes, "the answer to the question, 'Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison,' is no."³⁰

There are also disparities in the rates of out-of-wedlock births and single-parent families. Disparities in family structure could be a contributing factor to disparities in school discipline. The estimated out-of-wedlock birth rates in the United States in 2010 were 17% for Asian or Pacific Islander, 29% for non-Hispanic whites, 53.3% for Hispanics, 65.6% for American Indians or Alaska Natives, and 72.5% for non-Hispanic blacks.³¹ The rates of children estimated to be living in single-parent families in 2009 were 16% for Asian and Pacific Islanders, 24% for non-Hispanic whites, 40% for Hispanics, 53% for American Indians, and 67% for blacks.³² Growing up in single-parent families puts children at greater risk of dropping out of school and becoming a teen parent.³³ Family composition is a predictive factor in cognitive performance.³⁴ Data from Wisconsin also suggests that "the probability of incarceration for juveniles in families headed by never-married single mothers [is much] higher than for juveniles in the two-parent family."³⁵

Studies have also found disparities in test scores. To take just one example: For the high school class of 2009, out of

2400 possible points on the SAT test, 1623 was the average score for Asian students, 1581 for white students, 1448 for American Indian or Alaska Native students, 1362 for Mexican and Mexican American students, 1345 for Puerto Rican students, and 1276 for black students.³⁶ Given the differences in crime rates, family structure, and test scores, one would not be surprised to find disparities in school infractions and discipline.

Researchers have not been able to find clear evidence of discrimination by school officials. The Department of Education recently published new data surveying 72,000 students, approximately 85% of the nation's enrollment. Asian students received proportionally much less discipline than white students. They were 6% of enrollment but only received 2% of in-school suspensions, 3% of first-time out-of-school suspensions, 1% of multiple out-of-school suspensions, and 2% of expulsions. White students were 51% of enrollment and received 39% of in-school suspensions, 36% of first-time out-of-school suspensions, 29% of multiple out-of-school suspensions, and 33% of expulsions. Black students were 18% of enrollment and received 35% of in-school suspensions, 35% of first-time out-of-school suspensions, 46% of multiple out-of-school suspensions, and 39% of expulsions. If school officials discriminated against black students in favor of white students, then they also discriminated against white students in favor of Asian students. Of course, racial disparities in discipline do not prove discrimination because there may be disparities in behavior.

Meanwhile, discipline rates for Hispanic students were almost exactly proportional to their overall enrollment. They were 24% of enrollment, 23% of in-school suspensions, 25% of first-time out-of-school suspensions, 22% of multiple out-of-school suspensions, and 24% of expulsions.³⁷ Under even disparate-impact theory, there was no evidence of discrimination against Hispanics.

One study found differences in punishment for students sent by teachers to the principal's office. Black and Hispanic students were more likely to receive suspensions or expulsions relative to white students for similar offenses.³⁸ But the study's authors admitted they did not take into account which students committed prior infractions, "a variable that might well be expected to have a significant effect on administrative decisions regarding disciplinary consequences."³⁹ The authors' own data showed that black students were 2.19 times as likely to be referred for misbehavior as white students in elementary school and 3.79 times as likely as white students in middle school,⁴⁰ making it much more likely that the black students were repeat offenders in any particular encounter. Since repeat offenders may rightly receive more punishment, the study cannot tell us whether administrators unfairly punished anyone.

A Texas study found that "African-American and Hispanic students were more likely than white students to experience repeated involvement with the school disciplinary system for multiple school code of conduct violations."⁴¹ But the paper noted that the "reader should not discount the possibility of overrepresentation of African-Americans among students who are repeatedly disciplined flows from the previous finding that

African-American students are disproportionately involved in the discipline system in the first place."⁴²

Another paper attempted to isolate discrimination by controlling for the "student's overall behavior problems, characteristics of the classroom (i.e., overall level of disruption), and the teacher's ethnicity."⁴³ The black students had a higher-than-expected rate of office disciplinary referrals when controlling for these factors, but another finding in the study calls into doubt whether the higher rate was due to discrimination: black male students in classrooms with black teachers were more likely to receive office disciplinary referrals than the other students.⁴⁴ The authors concluded that the "findings do not suggest that a cultural or ethnic match between students and their teachers reduces the risk of [office disciplinary referrals] among Black students."⁴⁵ This finding indicates that there may be problems with the theory that teachers were discriminating against black students.

Some researchers have noted differences in the types of offenses committed by white and black students resulting in office referrals, with whites more likely to commit objective offenses and blacks more likely to commit subjective ones. White students were "significantly more likely than black students to be referred to the office for smoking, leaving without permission, vandalism, and obscene language." Meanwhile, black students were "more likely to be referred for disrespect, excessive noise, threat, and loitering."⁴⁶ The subjective offenses have elsewhere been termed "defiance."⁴⁷ All of these offenses could be serious, but threatening behavior—even if subjective—would be more serious than skipping class. Moreover, threats and other forms of defiance might well be more disruptive in a classroom setting than obscene language. Of course, none of these behaviors will be helpful for the student later in life, and any good teacher would try to stop them all. These different kinds of offenses illustrate the on-the-ground judgment calls teachers and administrators have to make every day, decisions that may not be easily amenable to quantifiable disparate-impact analysis.

IV. Disparate Impact as Policy

According to Assistant Secretary of Education for Civil Rights Russlynn Ali, "Disparate impact is woven through all civil rights enforcement in [the Obama] administration."⁴⁸ Using disparate-impact theory in civil rights enforcement has of course been subject to criticism from some sectors over the decades. Any selection criteria in employment, housing, admissions, or elsewhere will almost invariably have a disparate impact on some group, no matter how valid or necessary the criteria. Disparate-impact theory assumes the natural order of things is proportionate representation in all walks of life. Proportionate outcomes, however achieved, are the only sure way to avoid charges of discrimination under the theory. But ensuring outcomes—by putting a hand on the scale, awarding bonus points to certain groups, etc.—results in direct discrimination against one group in favor of another. One is now treating similarly situated people differently on the basis of race, ethnicity, or gender. As Roger Clegg has written:

[W]hat is really rotten at the core of disparate-impact theory is this: Under the guise of combating the problem

of “unintended discrimination,” the theory demands deliberate discrimination. It requires selection devices to be chosen with an eye on the racial, ethnic, and gender bottom line that such devices will create. Such a practice would be condemned as discriminatory under any other circumstances—and rightly so. If a bigoted Los Angeles employer determined that he had been hiring “too many” Asians and Jews by giving a particular test, and therefore deliberately discards the test for one that he knows will result in fewer of them being hired, all would agree that this violates the law. And yet it is precisely this calculation that disparate-impact theory applauds.⁴⁹

The Supreme Court had a similar view in *Wards Cove Packing Co. v. Atonio*. If mere racial disparities in hiring, regardless of the underlying pool of qualified job applicants, means there is a prima facie case of discrimination, then the “only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.”⁵⁰

Using disparate-impact theory to analyze school discipline arguably presents similar issues. The surest way for a school to avoid coming to the attention of the Department of Education or the Department of Justice is to have racially proportionate disciplinary numbers. In a school where minority students are disciplined at higher rates than white students, a simple way to decrease the imbalance is to discipline minority students less. But by deliberately doing so the school is intentionally discriminating. Further, such a policy would harm the other students in the school if it leads to more classroom disruptions, particularly so for students in schools that have more discipline problems. Richard Arum and Melissa Velez found that minority students “are exposed to school environments with high levels of disorder, violence and concerns over safety” and therefore “face the disparate impact of inadequate and ineffective discipline in U.S. schools.” “Significantly,” they go on to say, “in schools with higher levels of disciplinary administration, we . . . have found that the gap between African-American and white student test performance does not exist.”⁵¹

Testimony before the U.S. Commission on Civil Rights demonstrated that teachers and administrators are very concerned about disparities in discipline. A teacher from the suburban Washington, D.C. area testified that her district monitors the disciplinary rates in her classes for African-American and Hispanic students relative to the other students. The district’s expectation is that there will not be disparities, and she is held to account if there are.⁵²

Two school districts told the Commission they have changed their discipline policies in order to reduce racial disparities in discipline. The Winston-Salem/Forsyth County Schools in North Carolina revised their discipline policies to “address the disproportionate discipline of African-American students in the district.”⁵³ The Tucson Unified School District outlined the “shift” in its discipline policies with the goal “to ensure . . . the reduction of disciplinary incidents” for African-American students. Expected outcomes for African-American students are “[r]educed discipline referrals to the office” and

“[r]educed suspensions and expulsions.”⁵⁴ As laid out above, these discipline policy revisions present the risk of deliberate discrimination.

Of the seventeen school districts that responded to the Commission, nine reported using the Positive Behavior Intervention Support (PBIS) program, a “systems approach to preventing and responding to classroom and school discipline problems.” One goal of the PBIS program is to “eliminate[e] the disproportional number and racial predictability of the student groups that occupy the highest and lowest achievement categories.”⁵⁵ The Obama Administration has also urged the adoption of alternative disciplinary policies to reduce disparities.⁵⁶ Of course, there is nothing wrong with schools implementing programs to improve student behavior, which may eventually result in less disparity in discipline among different groups. The danger is that schools will weaken disciplinary measures in order to equalize the rates, which will only increase disruptive behavior.

The Obama Administration has criticized both zero-tolerance policies and school administrators’ discretion in meting out discipline, often in the same speech, because both have led to racial disparities.⁵⁷ Certainly mechanistic, zero-tolerance policies often lead to absurd results, but zero-tolerance and discretion are the only two policy options school districts have.⁵⁸ One is left with the impression that the nation’s schools will continue to be criticized unless and until they achieve racial balance in discipline.

V. Conclusion

Disparate-impact regulations go beyond the text of Title VI’s prohibition of discrimination “on the ground of race, color or national origin,” and the Supreme Court has suggested that it will strike down such regulations if the question is presented. As in other areas of civil rights law, disparate-impact theory creates an incentive to achieve racially proportionate outcomes so as to avoid legal liability, or, in the case of public schools, to avoid the loss of federal funds. Findings regarding whether schools across the nation are discriminating in discipline on the basis of race are mixed at best. The most difficult and crucial job for many schools is maintaining order and discipline so that students are able to learn without disruptions in the classroom. The Department’s use of disparate-impact theory may lead to a reduction in good order and discipline in many schools if school boards and principals believe they must weaken their policies to achieve a racial balance.

Endnotes

1 Arne Duncan, Secretary, U.S. Dep’t of Educ., Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), available at <http://www2.ed.gov/news/speeches/2010/03/03082010.html>.

2 Arne Duncan, Secretary, U.S. Dep’t of Educ., Press Conference Call on Civil Rights Enforcement, Transcript at 5 (Assistant Secretary for Civil Rights Russlynn Ali speaking) (Mar. 8, 2010), available at www2.ed.gov/news/av/audio/2010/03/03082010.doc; see also Mary Ann Zehr, School Discipline Inequities Become a Federal Priority, EDUC. WK., Oct. 30, 2010 (“Kenneth L. Marcus, . . . who headed the Education Department’s civil rights office in 2003 and 2004 . . . , said he . . . recalls that most education cases were brought

by the agency under the ‘different treatment’ rather than ‘disparate impact’ course of action.”).

3 Arne Duncan, *supra* note 1; *see also* 42 U.S.C. § 2000d-1 (agency may terminate funding to recipient that discriminates on the basis of race, color, or national origin).

4 Sam Dillon, *Officials Step Up Enforcement of Rights Laws in Education*, N.Y. TIMES, Mar. 8, 2010; Arne Duncan, Press Conference Call on Civil Rights Enforcement, *supra* note 2, at 10 (Assistant Secretary for Civil Rights Russlynn Ali speaking).

5 Arne Duncan, *supra* note 1. A few months after Secretary Duncan’s speech, Assistant Attorney General for Civil Rights Thomas Perez went further, claiming that “students of color are receiving different and harsher disciplinary punishments than whites for the same or similar infractions.” Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities (Sept. 27, 2010), *available at* http://www.justice.gov/crt/speeches/perez_eosconf_speech.php.

6 Attorney General Holder Speaks at 100 Black Men of Atlanta Inaugural Members Leadership Summit (Feb. 25, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120225.html>. The Department of Education published data from a national survey of more than 72,000 students showing that while black students made up 18% of the sample, they were 35% of the students suspended once and 39% of the students expelled. Press Release, New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor (Mar. 6, 2012), *available at* <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache>.

7 42 U.S.C. § 2000d.

8 *Id.* § 2000d-1.

9 34 C.F.R. § 100.3(b)(2) (emphasis added).

10 42 U.S.C. § 2000e-2(k)(1)(A).

11 *Id.* § 1973.

12 *Id.* § 1973(b).

13 *Id.* § 12112 (emphasis added).

14 532 U.S. 275 (2001).

15 28 C.F.R. § 42.104(b)(2) (emphasis added).

16 *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

17 *Id.* at 279.

18 *Id.* at 279-80.

19 *Id.* at 280 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Guardians Ass’n v. Civil Serv. Comm’n of New York City*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287 (1985)). The dissent disagreed that Section 601 prohibits only intentional discrimination. *See, e.g., Sandoval*, 532 U.S. at 281 n.1.

20 *Sandoval*, 532 U.S. at 281.

21 *Id.* at 285 (“It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.”).

22 *Id.* at 286.

23 *Id.* at 288-89 (citations omitted).

24 *Id.* at 291 (“Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”).

25 *Id.* at 286 (citing *Guardians Ass’n v. Civil Serv. Comm’n of New York City*, 463 U.S. 582, 613 (1983) (O’Connor, J., concurring in judgment) (“If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply ‘further’ the purpose of Title VI; they go well *beyond* that purpose.”) (emphasis in original).

26 *See generally* John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (Oct. 2002) (arguing the *Sandoval* opinion strongly suggests a majority of the Court views disparate impact regulations as an invalid exercise of administrative power under section 602). The dissenting Justices would hold that agencies have a much broader administrative power under Title VI. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, averred that for “three decades” the Court has “treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited.” *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting).

27 Statement of Ricardo Soto, Principal Deputy Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ., Before the U.S. Commission on Civil Rights’ Briefing on School Discipline and Disparate Impact (Feb. 11, 2011), *in* U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT BRIEFING REPORT 55 (March 2012) [hereinafter SCHOOL DISCIPLINE REPORT], *available at* http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

28 42 U.S.C. § 2000e-2(k)(1)(A).

29 *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C)).

30 AMY L. WAX, RACE, WRONGS, AND REMEDIES 91(2009) (quoting MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 50, 71, 79 (1996)).

31 BRADY E. HAMILTON ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CENTER FOR HEALTH STATISTICS, NAT’L VITAL STATISTICS REPORTS, VOL. 60, NO. 2, BIRTHS: PRELIMINARY DATA FOR 2010, Table 1 (Nov. 2011).

32 THE ANNIE E. CASEY FOUND., KIDS COUNT DATA CTR., DATA ACROSS STATES: CHILDREN IN SINGLE-PARENT FAMILIES BY RACE (PERCENT)—2009.

33 *See* MARK MATHER, POPULATION REFERENCE BUREAU, U.S. CHILDREN IN SINGLE-MOTHER FAMILIES (May 2010).

34 Richard Arum & Melissa Velez, *Class and Racial Differences in U.S. School Disciplinary Environments*, at 4, *chapter in* IMPROVING LEARNING ENVIRONMENTS IN SCHOOLS: LESSONS FROM ABROAD (Forthcoming: Palo Alto, Stanford University Press).

35 PATRICK FAGAN, HERITAGE FOUND., CONGRESS’S ROLE IN IMPROVING JUVENILE DELINQUENCY DATA (Mar. 10, 2000).

36 Mary Beth Marklein, *SAT Scores Show Disparities by Race, Gender, Family Income*, USA TODAY, Aug. 26, 2009.

37 U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION 2 (Mar. 2012), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>.

38 *See* Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, SCH. PSYCHOL. REV., Vol. 40, No. 1, at 85, 95 (2011) [hereinafter Skiba et al., *Race is Not Neutral*].

39 *Id.* at 103.

40 *Id.* at 93.

41 TONY FABELO ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., PUB. POL’Y RESEARCH INST., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 42 (2011).

42 *Id.* at 42 n.80. This study included a multivariate analysis in an attempt to compare students of different races who were otherwise from similar backgrounds, including socioeconomic background. But it did not isolate whether the students came from a single parent household. Instead, acknowledging the importance of family structure, the analysis included as a variable the percentage of families in the student’s county headed by a single parent. *Id.* at 94. This variable does not remotely capture the family structure of an individual student. The analysis thus classified many students as coming from similar backgrounds when they differed with regard to their family situation.

43 Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, J. EDUC. PSYCHOL., Vol. 102, No. 2, at 508, 510 (2010).

44 *Id.* at 511, 514.

45 *Id.* at 515.

46 Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, URB. REV., Vol. 34, No. 4, at 317, 332 (Dec. 2002).

47 Skiba et al., *Race Is Not Neutral*, *supra* note 38, at 101. In contrast, a 2010 study of elementary students did not find that black students were more likely than white students to receive an office disciplinary referral for defiance. See Bradshaw, *supra* note 43, at 513.

48 Zehr, *supra* note 2.

49 Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG., NAT'L LEGAL CENTER FOR THE PUB. INT., Vol. 5, No. 12, at 11-12 (Dec. 2001).

50 *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989), *modified by* Civil Rights Act of 1991, Pub. L. No. 102-166; *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (“[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.”); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (“[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”) (Scalia, J., concurring).

51 Arum & Velez, *supra* note 34, at 35-36.

52 Statement of Jaime Frank *in* SCHOOL DISCIPLINE REPORT, *supra* note 27, at 28-29.

53 Letter from Donald L. Martin, Jr., Superintendent, Winston-Salem/Forsyth County Schools, to Lenore Ostrowsky, Office of the Staff Director, U.S. Commission on Civil Rights (Dec. 10, 2010).

54 Letter from Augustine Romero, Director of Academic and Student Equity, and Jimmy Hart, Director of Academic Equity for African American Studies, Tucson Unified School District to Martin Dannenfeler, Staff Director, U.S. Commission on Civil Rights (Dec. 13, 2010).

55 Letter from Romain Dallemand, Superintendent, Rochester (MN) Public Schools, to Martin Dannenfeler (Nov. 30, 2010).

56 Press Release, Secretary Duncan, Attorney General Holder Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices (July 21, 2011), *available at* <http://www.ed.gov/news/press-releases/secretary-duncan-attorney-general-holder-announce-effort-respond-school-prison-p>.

57 *See, e.g.*, Attorney General Holder Speaks at 100 Black Men of Atlanta Inaugural Members Leadership Summit, *supra* note 6; Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities, *supra* note 5.

58 Ironically, “many schools enacted zero tolerance policies at least in part due to federal pressure.” Statement and Rebuttal of Commissioner Gail Heriot *in* SCHOOL DISCIPLINE REPORT, *supra* note 27, at 104 n.16 (citing Gun Free Zones Act of 1996, P.L. 104-208, and Department of Education policy declaring that schools would face serious consequences for not stopping sexual harassment between students).

