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Enforcing Disciplinary Leniency: How the Office for Civil Rights Dictated School Discipline Policy and How It Could Again

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Key Points

- Although the 2014 "Dear Colleague" letter on school discipline was routinely described by journalists as "nonbinding guidance" without "force of law," it actually applied substantial coercive power to school districts.
- The Department of Education's Office for Civil Rights (OCR) used "disparate impact" as a pretext for invasive investigations that would only end when school districts agreed to adopt lenient discipline policies.
- With the confirmation of Catherine E. Lhamon as assistant secretary of OCR, it's all but certain that the Biden administration will take a similar or even more aggressive approach on school discipline.
- Governors and state legislators can and should take steps to defend the administrative autonomy of school districts regarding school discipline.

In July 2021, the US Senate's Health, Education, Labor, and Pensions Committee held confirmation hearings for Catherine E. Lhamon, President Joe Biden's nominee for assistant secretary for civil rights at the US Department of Education (ED). Lhamon served in the same role during the Obama administration from 2013 to 2017. During her hearing, Lhamon faced criticism for the controversial way in which she managed the Office for Civil Rights (OCR), especially for her use of informal "guidance" that often created new, legally binding standards intended to achieve specific policy shifts in schools.

This report assesses Rethink School Discipline, Lhamon's discipline guidance package that included, among other documents, a "Dear Colleague" letter (DCL) on the "*Nondiscriminatory Administration of School Discipline*."[1] (Emphasis added.) OCR and the Civil Rights Division at the Department of Justice (DOJ) jointly issued the DCL on January 8, 2014. During her most recent confirmation hearing, Lhamon expressed her intent to reinstate this guidance package, telling Sen. Tina Smith (D-MN) that "it's crucial to reinstate guidance on the topic and I think it's crucial to be clear with school communities about what the civil rights obligations are and *how best to do the work in their classrooms*."[2] (Emphasis added.)

Given that its reissuance appears to be a fait accompli, policymakers and the public must understand

what this policy actually did. Unfortunately, media accounts of the discipline guidance were fundamentally misleading. Claims by the *Washington Post*, the *New York Times*, the *Atlantic*, and other major media outlets that the discipline guidance was "nonbinding" or "did not impose any new mandates on districts" were false and entirely unsupported by the facts.[3]

The discipline guidance set forth a specific analysis for the evaluation of discipline complaints under Title VI of the Civil Rights Act of 1964. Internal guidance subsequently issued to OCR staff significantly narrowed and limited the scope of review and the evidence relied on to force schools to change their policies and practices. Under OCR's scheme, data were the main determinant of a school's compliance. OCR singularly relied on data, which created a de facto compliance requirement. OCR's enforcement of the discipline guidance, in practice, established a legal standard: *Any* discrepancy in discipline data violates Title VI. This standard had the full force and effect of law, not because it had been properly promulgated, but because it was compulsory. Schools were forced to comply or risk losing federal funds.

As I have served as both OCR's principal deputy assistant secretary (from 2018 to 2020) and its acting assistant secretary (from 2020 to 2021), I know firsthand that expansive policies like the discipline guidance harmed students and transformed OCR from a law enforcement agency to an advocacy organization that focused more on pressuring educational institutions to adopt particular policies than enforcing vital civil rights protections.

Lhamon's recent confirmation shows that the Biden administration will embrace this flawed discipline policy. Department leadership will likely seek to expand it or even codify it in OCR's regulation.[4] With the pending readoption of this policy, policymakers, educators, and parents must fully understand the impact of the discipline guidance—and prepare to resist and oppose federal initiatives that distort requirements of federal civil rights laws, harm students, and interfere with a school's ability to manage the educational environment. Unlike previous efforts to advance politically motivated policies in the name of civil rights enforcement, school leaders know what to expect and should prepare *now* to combat the federal government's impending overreach.

Legal Background

OCR and DOJ issued the 2014 discipline guidance with the stated intent of helping school districts "administer student discipline without discriminating on the basis of race."[5] Specifically, the departments explained that "unlawful discrimination based on race" in the administration of discipline can occur in two different ways: (1) when a student is treated differently based on race, color, or national origin and (2) when a "neutral" policy is "administered in an evenhanded manner" that nonetheless has a disparate impact or a "disproportionate and unjustified effect on students of a particular race."[6] (Emphasis omitted.) In short, a school could be found in violation of Title VI, which prohibits discrimination based on race, color, or national origin, for different treatment of students based on race—or for the equal and fair application of a neutral policy.

The discipline guidance included, among other things, a "Disparate Impact Flowchart" that outlined the disparate impact, or burden-shifting analysis, OCR used in investigating discipline cases under Title VI.[7] If OCR determined, based on data, that a "discipline policy resulted in an adverse impact of students of a particular race as compared with students of other races," it then assessed whether the "discipline policy [is] necessary to meet an important educational goal."[8] If the policy did not achieve an important educational goal, OCR would determine that the school engaged in race discrimination in violation of Title VI.

If the policy did meet an important educational goal, OCR then determined whether there were "comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact" on the identified racial group—or whether the policy was "a pretext for discrimination."[9] If the answer to either question was yes, OCR determined that the school violated Title VI.

OCR's pronouncement that it would comprehensively apply a disparate-impact analysis to Title VI school discipline cases alarmed school leaders and ignited considerable debate among policy and legal

experts.[10] The Obama administration's use of disparate impact in school discipline cases began long before the issuance of the 2014 discipline guidance. As early as October 7, 2010, reports emerged "that addressing racial disparities in school discipline [was] a high priority" for OCR.[11] By 2010, OCR had already launched five major compliance reviews to investigate potentially discriminatory discipline practices—using both different treatment and disparate-impact theories.[12]

The use of the disparate-impact analysis was widely viewed as a "more aggressive approach" to civil rights, "a reinvigorated approach to enforcing civil rights statutes" that enforced equity in "educational outcomes."[13] Supporters lauded the use of disparate impact as a means to broaden "the scope of the OCR investigations" and hold schools accountable for "differences in outcomes among students of color or other students that result from neutral policies or procedures."[14] Advocates viewed this approach to civil rights enforcement as one of the "alternative solutions" to combating systemic racism, mainly because it could achieve more social change than traditional civil rights enforcement could.[15] Proponents were not wrong, which is why the use of disparate impact has varied across presidential administrations.

In my experience, OCR has historically used a disparate-impact analysis in Title VI cases, albeit inconsistently. On one hand, the Obama administration represented the discipline guidance as a "major shift in practice," more aligned with OCR's historical approach to civil rights enforcement.[16] On the other hand, critics claimed that the application of the discipline guidance constituted an unprecedented change in federal policy.[17] Neither claim is completely accurate.

OCR's use of a disparate-impact analysis in Title VI cases is less clear and more complicated. Opponents of the discipline guidance point to a 1981 memorandum by then–Assistant Secretary Clarence Thomas that essentially rejected the application of disparate impact in Title VI discipline cases.[18] Yet, a 1991 Government Accountability Office (GAO) report that examined OCR case resolutions between 1983 and 1990 noted that OCR applied both a disparate treatment and a disparate-impact analysis in Title VI school assignment and grouping cases. In examining OCR's enforcement of these Title VI cases, GAO stated that OCR's "regional offices (1) inconsistently used disparate impact analysis; and (2) sometimes required proof of disparate treatment, instead of disparate impact, to find violations of title VI regulations."[19]

As a part of the study, OCR informed GAO that most often, "both analytic approaches will be used and that if disparate treatment is not found, OCR next determines if school district practices have a disparate impact."[20] GAO, however, identified significant inconsistencies in regional offices' application of both analyses.[21] Additionally, following the Supreme Court's decision in *Alexander v. Sandoval*, the George W. Bush administration declined to interpret the case as "impliedly striking down Title VI's disparate impact regulations," at least regarding obligations to serve individuals "with Limited English Proficiency."[22] The bottom line is that OCR's historical application of a disparate-impact analysis is nuanced.

Critics have raised legitimate concerns regarding OCR's authority to promulgate regulations or even interpret existing regulations to allow for the application of a disparate-impact analysis under Title VI, although I do not intend to address those substantive legal objections here.[23] There is no doubt that OCR's use of disparate impact under Title VI will, at some point, be litigated—or clarified through the adoption of regulations. The fact remains that historically, OCR *has* interpreted its regulations to apply a disparate-impact analysis in Title VI complaints, including in discipline cases; its use has varied, as has the form and application of a traditional burden-shifting analysis.

Despite OCR's complicated historical use of disparate-impact analysis, the 2014 discipline guidance still represented a noteworthy shift in OCR's investigative approach. In almost all cases, the agency required staff to open a systemic district-wide investigation—even when OCR received an individual complaint. OCR leadership prohibited its attorneys from entertaining a resolution agreement in individual cases—even when a school provided relief to the individual student involved in the complaint and prohibited early complaint resolution in all discipline cases.[24] More importantly, the guidance was intended to put schools on notice that they could be held in violation of Title VI for fairly applying a neutral discipline policy—and it did.

The discipline guidance remained in effect until the end of 2018, at least formally. Throughout 2017 and 2018, Title VI discipline cases received heightened scrutiny. During that time, the Trump administration reversed two Obama-era mandates relating to how offices investigated cases, including Title VI discipline cases. Among other changes, OCR leadership no longer required regional offices to turn every discipline case into a systemic investigation. Additionally, OCR headquarters no longer required offices to request and review three years of data in *all* discipline cases.[25] Under the Trump administration, these decisions were left up to the staff in the regional offices.[26]

> There is little evidence that OCR ever evaluated whether a district's policies were necessary or whether "less discriminatory," alternative policies could have been used to achieve the same goals.

In 2018, the Federal Commission on School Safety, formed by President Trump following the horrific Parkland, Florida, school shooting, issued a report of policy recommendations and best practices to improve school safety.[27] On December 21, 2018, based on the commission's recommendations, the ED and DOJ rescinded the discipline guidance—including supplemental guidance documents that were issued as a part of the broader school discipline package.[28] That same day, OCR separately issued a "Questions & Answers" guidance document on the enforcement of Title VI's prohibition on racial discrimination and school discipline.[29] Notably, the Q&A stated that OCR "bears the burden of proving a violation" occurred—and specifically acknowledged that the "mere existence of disparities" is not sufficient evidence of a civil rights violation.[30]

Effects of the Discipline Guidance

In the years preceding and certainly following the issuance of the 2014 discipline guidance, OCR prioritized and aggressively opened hundreds of Title VI discipline cases, affecting "approximately 10 million children" across the United States.[31] From August 1, 2013, to December 1, 2017, OCR opened 465 Title VI discipline cases in elementary and secondary schools.[32] OCR's approach required staff to open and systemically investigate almost all cases in which staff confirmed statistical disparities in discipline data.[33]

Once OCR opened an investigation, it issued burdensome and overly broad data requests that took months for schools to fulfill and even longer for OCR to analyze.[34] As an example, the list of "Essential Data/Information" OCR included in *every* "Statement of the Case" included 15 different categories of data points or information. In one dataset alone, OCR gathered lists of all schools, alternative schools, school facilities and any other facilities operated by the district, three years of enrollment data, graduation rate data by race, dropout rate data by race, and GATE or Advanced Course, Advanced Placement, honors, and International Baccalaureate enrollment data by race.[35]

During my tenure as acting assistant secretary of OCR, I did not personally review each of the hundreds of school discipline cases in full detail. But I did review some at length and made a full attempt to understand through discussions with staff what OCR had done and was doing with these cases. The following represents my best assessment of how OCR acted under the 2014 DCL.

While conducting investigations and evaluating evidence, OCR more often than not did not seem to apply the disparate-impact analysis outlined in the discipline guidance; that is, OCR's inquiry rarely advanced past a review of statistical data. There is little evidence that OCR ever evaluated whether a district's policies were necessary or whether "less discriminatory," alternative policies could have been used to achieve the same goals. This is evident from OCR's internal guidance to staff on how to investigate Title VI discipline complaints.[36] From the 23-page document, there is hardly any mention of the disparate-impact burden-shifting analysis described in the discipline guidance.[37]

In fact, the chart explaining the agency's "Approach for Investigating Discipline Cases" includes not

one reference to the disparate-impact analysis that gives schools the opportunity to offer an explanation on discipline policies. Rather, the chart focuses exclusively on data—and how staff should obtain, analyze, and use data throughout an investigation.[38] This is consistent with my discussions with OCR staff; in the vast majority of cases, the agency focused on data discrepancies and required schools enter into agreements and take corrective action solely because of disparities in student discipline data.

Furthermore, the investigative methods used in these cases caused significant frustration among OCR staff. The investigations were overly broad and unreasonably burdensome and required staff to collect and analyze more data than necessary to determine if a violation occurred. The investigations were fishing expeditions. Feedback from staff indicates that OCR's attorneys were required to "keep digging" to find evidence of a Title VI violation—and simply wear down the school to the point that the district requested a resolution agreement before the investigation's conclusion.

This approach included pressuring schools into submission by prolonging the investigation and simply exhausting school district staff.[39] It was not uncommon for a school district to simply agree to enter a resolution agreement with OCR for no other reason than to bring an end to a multiyear investigation.[40] The internal investigative guidance to OCR staff certainly confirms the approach described to me by OCR's leading civil servants.[41] In those rare cases in which a school district recognized that OCR had no evidence other than statistical disparities and opted to proceed with the investigation, OCR kept the case open—but did not actively work to resolve it. Those cases sat somewhat dormant, without any significant activity.

Data-Driven Enforcement. OCR's enforcement of the discipline guidance represented a major shift in how OCR historically processed cases and the evidence on which it relied to find a violation under Title VI. While opponents of the discipline guidance argued that disparate impact was inappropriate under Title VI, the problem was much worse. Critics were wrong to assume that the discipline guidance was fully implemented as written. In actuality, it seems there is little evidence that OCR applied the disparate-impact analysis outlined in the discipline guidance. In fact, rather than applying that analysis, which more closely aligned with OCR's historical interpretation and application of the law, it seems the agency exclusively relied on data to investigate cases and issue violations.[42]

Based on the plain text of the discipline guidance and the internal investigative guidance provided to staff, it is unlikely that OCR ever accepted a school district's policy as "necessary to meet an important educational goal"—with regard to either the educational necessity of the policy or the "tightness" between the proffered goal and the manner in which it was achieved.[43]

From my conversations with OCR staff and occasional review of cases while in office, I found little evidence that OCR routinely considered—or accepted—a district's justification. OCR seemed to abandon the burden-shifting test altogether.[44] OCR's internal guidance supports this conclusion.[45]

In a traditional disparate-impact analysis, a school would have the opportunity to offer an explanation—and the school would receive "deference" as to the necessity and application of its policies.[46] Additionally, and perhaps more importantly, the plain text of the discipline guidance foreclosed any realistic application of a disparate-impact analysis.[47] The guidance states—outright—that exclusionary discipline policies can't be justified; it identifies "conflict resolution, restorative practices, counseling, and structured systems of positive interventions" as alternative policies that have less adverse impact on racial groups.[48] There would have been no way for a school to overcome these presumptions. The discipline guidance included clear warnings that school district justifications would be rejected.[49]

At the end of the day, schools faced losing federal funds over any discrepancy in discipline data—because data alone drove OCR's enforcement of the discipline guidance, *and* OCR already identified its preferred "less discriminatory" practices. No educational goal—whether preserving school safety, improving learning outcomes, or maintaining a conducive learning environment—would have been considered or viewed as sufficient to overcome data disproportionalities.

Civil Rights Enforcement Hijacked. OCR's approach to implementing the discipline guidance constituted a significant deviation from its historical approach to law enforcement. With the adoption of the discipline guidance, OCR headquarters set a national policy that data would drive compliance determinations.[50] The purpose was to advance specific policy goals and objectives. OCR meant to end exclusionary discipline practices and require schools to implement restorative justice policies. The internal guidance to investigators proves this occurred.[51] The Obama administration opted to achieve this by abandoning any legitimate legal analyses under Title VI to promote these policies through the biased enforcement of civil rights laws.

OCR used the discipline guidance to shift the culture in schools across this country. The intended impact was *not* to identify or remedy ongoing racial discrimination. It was to force change and apply Title VI to ensure equal outcomes. The discipline guidance was used as a hammer to pressure schools into adopting restorative justice policies favored by the Obama administration. Experts have analyzed the impact of OCR's enforcement of the discipline guidance—and I observed evidence firsthand: The discipline guidance was a national enforcement tool to secure resolution agreements that advanced policies and social change,[52] and the threat of losing federal funds effectively coerced schools into adopting these policies.[53]

Impact on OCR. The deviation from historical practices and investigatory methods required OCR staff to rely less on evidence and focus more on achieving a specific, desired outcome in Title VI discipline cases. Historically, OCR has relied on collecting and evaluating evidence—and has let the evidence lead the investigation and the ultimate compliance determination. But with OCR's implementation of the discipline guidance and the exclusive focus on data to achieve a particular result, staff were required to approach these investigations with a particular goal in mind. This practice institutionalized, within OCR, what essentially constituted a "results-oriented" investigatory process.

This type of practice is problematic for any law enforcement agency and significantly affected OCR. OCR is statutorily authorized to investigate and resolve complaints to ensure compliance with federal civil rights laws. To achieve this, the agency must remain a neutral and objective arbiter, an agency that objectively determines whether a school district has violated the law. Families and school districts alike must know and understand Title VI's legal requirements. Otherwise, the "legal standard" shifts like the wind. Families have no way of knowing which "rights" may apply in any given year, and schools have no way of knowing what standard will be required to achieve and maintain compliance.

There is no doubt that OCR's overly broad enforcement of the discipline guidance affected OCR's ability to effectively resolve cases.

These tactics politicize the enforcement of federal civil rights laws. The implementation of policies like the discipline guidance transform law enforcement agencies into organizations primarily focused on advancing an ideological agenda. Throughout the Trump administration, we focused on reorienting OCR to be a civil rights enforcement agency, dedicated to full and faithful execution of the law.[54]

Most significantly, there is no doubt that OCR's overly broad enforcement of the discipline guidance affected OCR's ability to effectively resolve cases.[55] The result? Students and families waited years without resolution or redress because OCR's application of the discipline guidance mandated an extensive and exhaustive review of data, policies, and local educational decisions made by educators and local school district leaders.

Impact on School Climate and Students. As a part of the Federal Commission on School Safety's work to examine school violence and develop recommendations for making schools safer, the DOJ and ED held a summit on school discipline in April 2018. As a part of this summit, parents, teachers, stakeholders, and other experts provided testimony on the impact of the discipline guidance.

Teachers and administrators spoke of the chilling effect of the guidance, which rendered

educators unable to respond to poor behavior in the classroom. Administrators provided examples of ignoring bad behavior and even covering up certain incidents to avoid any perception of wrongdoing or racial discrimination.

Some participants argued that "alternative discipline policies" promoted by the Obama administration contributed to "incidents of school violence, including the rape of an elementary school student with a disability, the stabbing of one student by another student, and numerous assaults of teachers by students."[56]

> OCR's reliance on data required schools to focus only on "making the numbers look good" instead of treating students equally or making individualized decisions to meet students' needs.

The testimony provided was not conclusive, but the feedback from teachers, parents, and stakeholders was powerful. At a minimum, the testimony suggested that the discipline guidance contributed to making schools less safe—and tied the hands of school officials who became incapable of protecting students and staff or addressing poor classroom behavior. In the worst-case scenario, OCR's policies created environments that permitted significant acts of violence in schools and placed students and teachers in harm's way.

The testimony and information submitted to the Federal Commission on School Safety should not and cannot be ignored. The information provided to the commission revealed the significant safety risks associated with the implementation of the 2014 discipline guidance. The Biden administration must take such threats to student and teacher safety more seriously. Surely, given the consequential evidence, there must be a high bar for reinstating the guidance. OCR must specifically address how it will *ensure* that students, teachers, and school staff remain safe before readoption of the guidance. With recent reports of post-COVID surges in school violence, demanding that ED meet this high threshold is even more important.[57]

Conclusion

The discipline guidance was based on the fundamental premise that any data discrepancy constitutes discrimination and violates Title VI. The guidance perpetuated the viewpoint that anything that is not equal is inherently discriminatory—or even racist. The discipline guidance required schools to consider one factor in all discipline decisions: the color of the student's skin.

So, under the discipline guidance, a school had no option but to consider race in all decisions and to consider it exclusively. OCR's reliance on data required schools to focus only on "making the numbers look good" instead of treating students equally or making individualized decisions to meet students' needs.[58]

The only way a school could eliminate all disparities in discipline data is to either stop disciplining students altogether *or* base all discipline decisions on race—and ignore the individual factors that may contribute to a student's behavior. With the enforcement of the discipline guidance, schools had to not only consider race in the assignment of discipline decisions but also apply different penalties to students based on race to maintain "good numbers." That is called different treatment, and it required schools to systemically violate Title VI. None of these options is good for students—and not one will create a safe or nurturing educational environment.

The discipline guidance promoted the belief that discrimination, or any discrepancy in student discipline data, can only be remedied through additional discrimination or treating students differently to avoid disparities in discipline data. The guidance also perpetuated the assumption and belief that any discrepancy in data is based on discriminatory practices. That's not true, and OCR should not have assumed it was.[59] Under the discipline guidance, neutrality and color-blind policies were inherently suspect, and any discrepancies in outcomes were assumed to be the result of institutionalized racism embedded within the school system. These are foundational principles associated with critical race theory, and the 2014 discipline

policy is one of several Obama-era policies rooted in the practice.[60]

Like so many policies advanced by the Obama administration, the discipline guidance was a misguided and exaggerated response to a real problem. Discrepancies in discipline data should be examined and addressed. Schools should strategically and intentionally implement policies and practices that ensure students are treated equally throughout the discipline process; race must play no factor in *any* discipline decision, and schools must ensure equality under the law. When discrepancies in discipline data do exist, schools should conduct thorough examinations of policies and practices and educate teachers on the requirements of Title VI. School board members, together with school leaders and staff, should take necessary steps to address any policies that may be contributing to disparities, including examining exclusionary practices.

Schools have an obligation to critically examine discipline practices to ensure alignment with Title VI and to implement policies that ensure that no student is discriminated against based on race, sex, or disability status. As a part of this important work, schools should implement programs that address and improve school climate. But requiring schools to adopt policies that mandate the consideration of race in all discipline decisions only perpetuates racial discrimination. It conditions school leaders and educators alike to see only the skin color of students. Such policies do not improve student outcomes; they do not make schools safe or improve school climate.

Racial inequality must be addressed and discriminatory practices must be stopped. And there are productive and permissible ways for the ED to support schools in their efforts that benefit students, parents, and teachers. The discipline guidance was another Obama-era policy that sought to solve an incredibly complex issue with a singular, overly simplistic, *race-based* solution.

Students are more than the color of their skin. Reinstitution of the discipline guidance will again result in the establishment of racial quotas, and skin color will determine school-level decisions. Most concerning, we will again find that the discipline guidance does not address the problems it was intended to correct. In 2013, the ED boasted that schools reported, through the Civil Rights Data Collection, a "nearly 20 percent drop in the number of K–12 students who received at least one out-of-school suspension[s]." It was touted as a significant achievement.[61] But educational outcomes for minority students did not significantly improve during that time—nor have they since.[62] The 2019 National Assessment of Educational Progress (NAEP) test scores show that only 14 percent of Black eighth graders scored at or above proficient in mathematics, and only 15 percent scored proficient or above in reading.[63] It is more likely that schools simply began reporting less exclusionary discipline incidents to ensure compliance; they likely "fixed" the numbers, just as OCR mandated. Our students, families, educators, and schools deserve better.

Recommendations

State leaders and local school district are best positioned to provide oversight and monitor OCR's enforcement of federal civil rights laws—and they should take steps now to put systems and mechanisms in place to be ready to report, monitor, and litigate.

Report. A state department of education may form an advisory committee made up of district representatives or school attorneys across the state to report on and advise schools on responding to civil rights investigations conducted by OCR.

A state may opt to develop an internal communications system for schools in the state to report on trends in OCR investigations. This will assist schools in responding to OCR complaints and keep state leadership informed of enforcement changes implemented by the Biden administration.

A state legislature may commission an interim study to evaluate the impact of the Biden administration's policy changes and determine how schools are affected by OCR's civil rights investigations.

Monitor and Litigate. A governor may appoint a state-level ombudsman to engage with schools that are being investigated by OCR. The ombudsman can monitor, on behalf of the governor or attorney general, OCR's enforcement of federal civil rights laws in the state and take appropriate

steps to protect schools from overreach by the federal government.

A state board of education may form a subcommittee to monitor and track OCR investigations in the state and the implementation of policies by OCR. The subcommittee may issue public reports to keep school staff, education leaders, and stakeholders updated on OCR developments.

The appropriate entity within a state may establish a working group to monitor OCR's enforcement of federal civil rights laws. The working group can make recommendations to the state legislature, the attorney general, or the governor on enforcement matters that may be ripe for legal action.

About the Author

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Notes

1. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," January 8, 2014, 1, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

2. US Senate Committee on Health, Education, Labor, and Pensions, "Nominations of Catherine Lhamon to Be Assistant Secretary for Civil Rights at the Department of Education, Elizabeth Brown to Be General Counsel of the Department of Education, and Roberto Rodriguez to Be Assistant Secretary for Planning, Evaluation, and Policy Development of the Department of Education," July 13, 2021, https://www.help.senate.gov/hearings/nominations-of-catherine-lhamon-to-be-assistant-secretary-for-civil-rights-at-the-department-of-education-elizabeth-brown-to-be-general-counsel-of-the-department-of-education-and-roberto-rodriguez-to-be-assistant-secretary-for-planning-evaluation-and-policy-development-of-the-department-of-education. Catherine Lhamon stated at her last confirmation hearing that she would "work with school communities" to "make sure that we don't see . . . disparities persist and we don't see discrimination." Interestingly, she pointed out that "those are different things"—referring to "disparities" and "discrimination"—despite holding schools in violation of federal law, which prohibits discrimination, solely for having disparities in discipline data.

3. Danielle Weiner-Bronner, "Obama Administration Asks Schools to Drop Zero-Tolerance Approach," *Atlantic*, January 8, 2014, https://www.theatlantic.com/national/archive/2014/01/ending-zero-policy-discipline/356812/; Erica L. Green, "Trump Officials Plan to Rescind Obama-Era School Discipline Policies," *New York Times*, December 17, 2018, https://www.nytimes.com/2018/12/17/us/politics/trump-school-discipline.html; Laura Meckler, "Civil Rights Committee Calls for Schools to Combat Racial Disparities in Discrimination in Discipline," *Washington Post*, July 23, 2019, https://www.washingtonpost.com/local/education/civil-rights-commission-calls-for-schools-to-combat-racial-disparities-in-discipline/2019/07/22/7cdbedf6-acbc-11e9-bc5c-e73b603e7f38_story.html; and Andrew Ujifusa, "Betsy DeVos Revokes Obama Discipline Guidance Designed to Protect Students of Color," *Education Week*, December 21, 2018, https://www.edweek.org/policy-politics/betsy-devos-revokes-obama-discipline-guidance-designed-to-protect-students-of-color/2018/12.

4. See US Department of Education, Office for Civil Rights, "Request for Information Regarding the Nondiscriminatory Administration of School Discipline," *Federal Register* 86, no. 108 (June 8, 2021): 30449–53, https://www.federalregister.gov/documents/2021/06/08/2021-11990/request-for-information-regarding-the-nondiscriminatory-administration-of-school-discipline. The recent request for information sought public comment in a wide array of areas involving school discipline policies. See also Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, "Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions," https://www.reginfo.gov/public/do/eAgendaMain; and Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, "Discrimination Based on Shared Ancestry or Ethnicity in Response to EO 13899 on Combating Anti-Semitism and EO 13985 on Advancing Racial Equity and Support for Underserved Communities," https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1870-AA15. "The Department plans to issue a proposed rule to amend its regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., in response to Executive Orders (EO) 13899 on Combating Anti-Semitism and 13985 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."

5. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 1.

6. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 7.

7. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 13. See also *Elston v. Talladega County Board of Education*, 997 F.2d 1394 (11th Cir. 1993).

8. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 8.

9. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 11, 13.

10. There are no questions or concerns about the Office for Civil Rights' (OCR) enforcement of Title VI in cases in which the agency has evidence that a school is treating students differently, based on race, in the administration of discipline. Such practices violate Title VI, and schools should be held accountable and made to take remedial steps to address the noncompliance.

11. Mary Ann Zehr, "Obama Administration Targets 'Disparate Impact' of Discipline," *Education Week*, October 7, 2010, https://www.edweek.org/leadership/obama-administration-targets-disparate-impact-of-discipline/2010/10.

12. Zehr, "Obama Administration Targets 'Disparate Impact' of Discipline."

13. See Rosa K. Hirji and Benétta M. Standly, "The OCR as a Tool in Dismantling the School-to-Prison Pipeline," American Bar Association, May 23, 2011, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2011/ocr-as-tool-dismantling-school-to-prison-pipeline/.

14. Hirji and Standly, "The OCR as a Tool in Dismantling the School-to-Prison Pipeline."

15. Hirji and Standly, "The OCR as a Tool in Dismantling the School-to-Prison Pipeline."

16. Hirji and Standly, "The OCR as a Tool in Dismantling the School-to-Prison Pipeline." See also Zehr, "Obama Administration Targets 'Disparate Impact' of Discipline."

17. Michael J. Petrilli, "A Supposed Discipline Fix Threatens School Cultures," *Education Next*, March 7, 2018, https://www.educationnext.org/supposed-discipline-fix-threatens-school-cultures-forum-petrilli/.

18. See Clarence Thomas, "Memorandum to U.S. Secretary of Education: Civil Rights Aspects of Discipline in the Public Schools," September 18, 1981. "Where there is evenhandedness in the application of discipline criteria, there can be no finding of a Title VI violation, even when black students or other minorities are disciplined at a disproportionately high rate. Conversely, the discriminatory disciplining of a single minority student can be a violation of Title VI if that student is treated more harshly than a white student or if students with similar discipline records who committed a similar or greater offense. As a general rule, however, statistics play a minor role in determining whether or not a violation of Title VI has occurred." See also Gail L. Heriot and Alison Somin, "The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teacher, Wrong on the Law," *Texas Review of Law & Politics* 22, no. 3 (June 2018), http://www.trolp.org/blog/2018/6/21/the-department-of-educations-obamaera-initiative-on-racial-disparities-in-school-discipline-wrong-for-students-and-teachers-wrong-on-the-law.

19. US Government Accountability Office, "Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights," April 25, 1991, 30. This is likely given the small number of cases that make it to OCR headquarters for review.

20. US Government Accountability Office, "Within-School Discrimination," 32. See also US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline," February 12, 2014, https://media4.manhattan-institute.org/sites/default/files/OCR-disciplineguide-2014.pdf. The internal guidance mandates the application of both disparate treatment and disparate impact application to Title VI discipline investigations.

21. US Government Accountability Office, "Within-School Discrimination," 30.

22. See Ralph F. Boyd Jr., "Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency)," October 26, 2001, https://www.justice.gov/crt/federal-coordination-and-compliance-section-201.

23. Heriot and Somin, "The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline." See also Hans von Spakovsky and Jonathan Butcher, "Misusing 'Disparate Impact' to Discriminate Against Students in School Discipline," Heritage Foundation, September 29, 2020, https://www.heritage.org/sites/default/files/2020-09/LM271_0.pdf.

24. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline." The internal guidance mandates the application of both disparate treatment and disparate impact application to Title VI discipline investigations.

25. US Government Accountability Office, *K–12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, March 2018, https://files.eric.ed.gov/fulltext/ED590845.pdf. Footnote 56 on page 31 reads: "In June 2017, OCR changed the investigative approach it had been using since 2014. The new instructions to the OCR field offices regarding the scope of complaints removed the requirement to use a systemic approach and assess multiple years of data when investigating complaints of discrimination in discipline based on race. Instead, investigators are now allowed to determine the appropriate scope on a case-by-

case basis. Several OCR investigators we spoke with in regional offices said that caseloads were a substantial challenge, and a few noted that this policy change could help them process cases more efficiently."

26. US Department of Education, Office for Civil Rights, "OCR Instructions to the Field Re Scope of Complaints," June 8, 2017.

27. US Department of Education, Federal Commission on School Safety, "Final Report of the Federal Commission on School Safety," December 18, 2018, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

28. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "'Dear Colleague' Letter," December 21, 2018, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

29. US Department of Education, Office for Civil Rights, "Questions & Answers on Racial Discrimination and School Discipline," December 21, 2018, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf.

30. US Department of Education, Office for Civil Rights, "Questions & Answers on Racial Discrimination and School Discipline."

31. See Max Eden, *Enforcing Classroom Disorder: Trump Has Not Called Off Obama's War on School Discipline*, Manhattan Institute, August 13, 2018, https://www.manhattan-institute.org/html/enforcing-classroom-disorder-trump-has-not-called-obamas-war-school-discipline-11407.html.

32. US Department of Education, Office for Civil Rights, Freedom of Information Act (FOIA) response, August 5, 2021.

33. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline." OCR staff reviewed data even in complaints that would typically be dismissed (i.e., untimely complaints, complaints that lacked consent to proceed, and complaints that had been withdrawn). In those cases, if staff identified data disparities, the complaint was dismissed—but staff were required to nominate the case for a potential compliance review.

34. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline." See page 7 for at least 16 different data points involving extensive, multiyear, multi-school requests.

35. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline," 7.

36. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline."

37. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline."

38. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline."

39. See Heriot and Somin, "The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline."

40. See Eden, *Enforcing Classroom Disorder*.

41. See US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints."

42. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints." OCR's historical application of disparate impact theory overwhelmingly included a burden-shifting analysis. In no previous application of disparate impact were violations determined based on data alone.

43. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 13. See also US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints." (Specifically, see "Approach for Investigating Discipline Cases" and the exclusive reliance on data.)

44. See also Max Eden, "'Disparate Impact' for School Discipline? Never Has Been, Never Should Be.," Manhattan Institute, January 17, 2018, https://www.manhattan-institute.org/html/disparate-impact-school-discipline-never-has-been-never-should-be-10897.html.

45. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints."

46. See Eden, *Enforcing Classroom Disorder*.

47. See Eden, *Enforcing Classroom Disorder*.

48. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 1. See also Eden, "Disparate Impact for School Discipline?"

49. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline," 1. See also Eden, "Disparate Impact for School Discipline?"

50. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints."

51. US Department of Education, Office for Civil Rights, "OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints."

52. See Eden, *Enforcing Classroom Disorder;* Max Eden, *Safe and Orderly Schools: Updated Guidance on School Discipline*, Manhattan Institute, March 2019, https://files.eric.ed.gov/fulltext/ED594263.pdf; and Max Eden, *School Discipline Reform and*

Disorder: Evidence from New York City Public Schools, 2012–16, Manhattan Institute, March 14, 2017, https://www.manhattan-institute.org/html/school-discipline-reform-and-disorder-evidence-nyc-schools-10103.html.

53. See Eden, *Enforcing Classroom Disorder*. See also Heriot and Somin, "The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline."

54. US Department of Education, Office for Civil Rights, "Annual Report to the Secretary, the President, and the Congress," January 2021, https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf.

55. US Department of Education, Office for Civil Rights, "Annual Report to the Secretary, the President, and the Congress."

56. US Department of Education, Federal Commission on School Safety, "Final Report of the Federal Commission on School Safety."

57. See Stephen Sawchuk, "Violence in Schools Seems to Be Increasing. Why?" *Education Week*, November 1, 2021, https://www.edweek.org/leadership/violence-seems-to-be-increasing-in-schools-why/2021/11.

58. US Department of Education, "Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities," *Federal Register* 81, no. 243 (December 19, 2016): 92376–464, https://www.federalregister.gov/documents/2016/12/19/2016-30190/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children.

59. *City of Richmond v. J. A. Croson Company*, 488 US 469 (1989); *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 332 (4th Cir. 2001); and *Coalition to Save our Children v. State Board of Education*, 90 F.3d 752, 775 (3rd Cir. 1996).

60. Mark Keierleber, "A School Discipline Double-Take: How Catherine Lhamon Could Turn Back the Clock with a Renewed Focus on Persistent Racial Disparities—and Ignite New Feuds," 74, June 16, 2021, http://laschoolreport.com/a-school-discipline-double-take-how-catherine-lhamon-could-turn-back-the-clock-with-a-renewed-focus-on-persistent-racial-disparities-and-ignite-new-feuds/. See also, for example, Richard Delgado and Jean Stefancic, *Critical Race Theory (Third Edition): An Introduction* (New York: New York University Press, 2017). On page 4: "Realizing that new theories and strategies were needed to combat the subtler forms of racism that were gaining ground." On page 27: "But if racism is embedded in our thoughts and processes and social structures as deeply as many crits believe, then 'ordinary business' of society—the routines, practices, and institutions that we rely on to do the world's work—will keep minorities in subordinate positions." On page 29: "Think of how the system applauds affording everyone equality of opportunities but resists programs that assure equality of results."

61. See Evie Blad, "Disparities Continue to Plague US Schools, Federal Data Show," *Education Week*, June 7, 2016, https://www.edweek.org/leadership/disparities-continue-to-plague-u-s-schools-federal-data-show/2016/06. See also Evie Blad, "Trump Stance on Civil Rights Is 'Distressing and Dangerous,' Obama Official Says," *Education Week*, July 20, 2017, https://www.edweek.org/policy-politics/trump-stance-on-civil-rights-is-distressing-and-dangerous-obama-official-says/2017/07.

62. The implementation of the discipline guidance may have produced better suspension and expulsion data, but it did not significantly affect student performance. See National Center for Education Statistics, Institute of Education Sciences, *Trends in High School Dropout and Completion Rates in the United States: 2014*, February 22, 2018, https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2018117. This report showed that the adjusted cohort graduation rate for Black students in the 2013–14 school year was 73 percent, and for Hispanic students, it was 70 percent. See also National Center for Education Statistics, "Trends in High School Dropout and Completion Rates in the United States: 2018," December 12, 2018, https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2019117. This report showed that the adjusted cohort graduation rate for Black students in the 2015–16 school year was 76 percent, and for Hispanic students, it was 79 percent.

63. See Nation's Report Card, "Mathematics: National Achievement-Level Results—Grade 8," https://www.nationsreportcard.gov/mathematics/nation/achievement/?grade=8; and Nation's Report Card, "Reading: National Achievement-Level Results—Grade 8," https://www.nationsreportcard.gov/reading/nation/achievement/?grade=8.

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