Addressing Racial Discrimination in Student Discipline

By Candace J. Gomez

The U.S. Department of Education and the U.S. Department of Justice (“the Departments”) recently issued guidance in the form of a “Dear Colleague” letter to public elementary and secondary schools regarding schools’ legal obligations to administer student discipline on a nondiscriminatory basis. http://www2.ed.gov/about/offices/list/ocr/colleague-201401-title-vi.pdf. This guidance does not add requirements to applicable law, but provides information and examples concerning how the Departments evaluate whether schools are complying with their legal obligations.

In short, the Departments have found that “racial discrimination in school discipline is a real problem.” Id. at page 4. Data examined by the Departments has shown that students of certain racial or ethnic groups tend to be disciplined more than their peers. The research suggests that the substantial racial disparities are not explained by more frequent or more serious misbehavior by students of color. It may instead indicate that certain groups of students have been subjected to different treatment or that a school policy or practice may have had an adverse discriminatory impact on them.

Legal framework

Title IV of the Civil Rights Act of 1964 and Title VI of the Civil Rights Act of 1964 (“the Statutes”) prohibit discrimination based upon race, color, or national origin by recipients of federal financial assistance. The statutes, accordingly, protect students from discrimination and, when a school responds to student misconduct, the statutes require that the school’s response be undertaken in a racially nondiscriminatory manner.

School district accountability for actions by third parties

The Departments advised that the statutes cover school officials (including school resource officers) and each individual over whom those officials exercise some control, whether through contract or other arrangement. According to the Departments, schools cannot divine themselves of responsibility for nondiscriminatory administration of student discipline by relying on other parties. The Departments may therefore hold schools accountable for discriminatory actions taken by parties including school resource officers, school district police officers, contract or private security companies, security guards or other contractors. It is unclear whether the Departments would hold school districts responsible for actions by municipal law enforcement personnel.

Student discipline can result in unlawful racial discrimination in two ways

The administration of student discipline can result in unlawful discrimination based on race in two ways: (1) a student is subjected to different treatment based on his/her race; or (2) a policy is neutral on its face, meaning that the policy itself does not mention race and is administered in an evenhanded manner, but has a disparate impact (i.e., a disproportionate and unjustified effect) on students of a particular race.

Different treatment

Typical examples of different treatment are when: similarly situated students of different races are disciplined differently for the same offense; schools exercise selective enforcement of a facially neutral policy against students of a particular race; or when teachers or administrators act based on racially discriminatory motives.

The Departments will look at both direct evidence (including remarks, testimony, or admissions by school officials revealing racially discriminatory motives) and, absent direct evidence of discrimination, circumstantial evidence, to determine whether discrimination has occurred. Circumstantial evidence is evidence that allows the Departments to infer discriminatory intent from the facts of the investigation, or from the totality of the circumstances.

Schools should be prepared to answer the following questions during an investigation by the Departments:

“Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the discriminatory process?” http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf at page 8. If not, then the Departments would not find sufficient evidence to determine that the school has engaged in discrimination.

If the answer is yes, then the Departments would ask:

“How did the school articulate a legitimate, nondiscriminatory reason for the different treatment?” Id. At page 9. If not, then the Departments could find that the school has discriminated on the basis of race. If the answer is yes, then the Departments would ask:

“If the reason articulated a pretext for discrimination?” Id. If the answer is yes, then the Departments would likely find that the school had engaged in discrimination.

If the answer is no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.

Disparate impact

Schools should be aware that, although they may evenhandedly implement facially neutral policies and practices, policies and practices that have an unjustified effect of discriminating against students on the basis of race would be deemed to have an unlawful disparate impact.

In determining whether a facially neutral policy has an unlawful disparate impact on the basis of race, the Departments will engage in the following three-part inquiry:

“Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?” Id. at page 11. If not, then the Departments would not find sufficient evidence of disparate impact. If the answer is yes, then the Departments would ask:

“If the discipline policy necessary to meet an important educational goal?” Id.

If not, then the Departments would find that the school had engaged in discrimination. If the answer is yes, then the Departments would ask:

“Are there 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 disproportionately affected racial group, or is the school’s proffered justification a pretext for discrimination?” Id.

If the answer is yes to either question, then the Departments would likely find that the school had engaged in discrimination. If the answer is no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.

Some suggested steps for schools to avoid findings of discrimination

In addition to investigating complaints that have been filed, the Departments’ guidance suggests that they will become more proactive in initiating nationwide comprehensive investigations of school districts based on student discipline. As a result, schools should take the appropriate measures to prepare for an investigation and review. The following are some proactive steps that schools should consider:

• Review and revise student codes of conduct, parent handbooks and teacher manuals to ensure that they are clear and nondiscriminatory.

• Examine school discipline data analyzed by subgroup, offense and other relevant factors to look for trends that may indicate discriminatory treatment.

• Develop and implement uniform standards for the content of student discipline files.

• Maintain data on teacher and principal referrals and discipline to assess whether particular teachers or principals are referring for discipline disproportionately large numbers of students by race.

• Develop and implement a comprehensive school and/or district-wide approach to classroom management and student behavior grounded in evidence-based educational practices.

• Provide all school personnel with ongoing professional development and training in evidence-based techniques on classroom management, conflict resolution, and de-escalation approaches that decrease classroom disruptions and use removals from class or school as a last resort.

• Provide cultural awareness training to all school personnel, including training on working with a racially and ethnically diverse student population and on the harms of employing or failing to counter racial and ethnic stereotypes.

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