Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Is the Trump Administration Rethinking Title VI?

February 4, 2019

Late last year, the Trump Administration's Federal Commission on School Safety (the Commission) wrapped up work on its final report, outlining its proposals to "help prevent tragedies" like last year's mass shooting in Parkland, FL, that prompted the Commission's formation. By and large the report sounded familiar themes—seeking ways to prevent school violence, protect schools and mitigate threats of harm, and better respond to violence when it does occur. Among its nineteen more specific proposals, however, was one that has drawn a more divided reaction—a recommendation urging the Departments of Education (ED) and Justice (DOJ) to withdraw a slate of Obama Administration guidance documents addressing "racial disparities in the administration of school discipline." And both ED and DOJ have since delivered on that proposal, having officially rescinded their earlier school-discipline guidance in late December 2018.

Though focused squarely on school discipline, the Commission's proposal appears to be of a piece with a larger policy agenda currently underway at ED and DOJ, which has already seen the rescission of several significant civil rights guidance documents originating with the previous administration. But the legal analysis informing the Commission's school-discipline proposal may signal a still larger shift in how the Trump Administration plans to enforce a key provision of federal civil rights law: Title VI of the Civil Rights Act of 1964 (Title VI), which forbids programs that receive federal money from discriminating based on race, ethnicity, or national origin. Recent reports suggest that just such a rethinking of Title VI may be in the works.

This Sidebar unpacks the legal considerations that may be informing the Trump Administration's recent actions, explaining why ED and DOJ found the Obama Administration's school-discipline guidance incompatible with Title VI, and what that view might say about how the Trump Administration will seek to enforce Title VI both within and beyond the classroom.

The "Rethinking School Discipline" Guidance

The School Safety Commission—comprised of the department heads of ED, DOJ, Health and Human Services, and Homeland Security—received a broad brief, tasking it with proposing "best practices" to "keep students safe." As a part of that mandate the Commission therefore decided to revisit one "key" policy for ensuring school safety: how teachers "identify and address disorderly conduct at school." The

Congressional Research Service
https://crsreports.congress.gov
LSB10254

policy that caught the Commission's eye was laid out in a series of guidance documents—and particularly a Joint "Dear Colleague Letter" (2014 DCL)—that ED and DOJ issued in January 2014, explaining how the departments would assess whether a school's discipline policy was racially discriminatory, in violation of Titles IV and VI of the Civil Rights Act of 1964. Appreciating the significance of those guidance documents, and why their rescission has already stirred such debate, first requires some understanding of the Civil Rights Act, Title VI in particular.

1. Title VI and Intentional Discrimination (Disparate Treatment)

The substance of Title VI boils down to a single sentence—the entirety of Section 601—providing that no "program or activity" that receives federal financial assistance may discriminate against a "person in the United States" "on the ground of race, color, or national origin." What exactly that prohibition forbids, however, has long been the subject of considerable, often fractious, debate in the courts. At the very least, however, all sides agree that Title VI precludes recipients of federal money from *intentionally* discriminating based on race, often called *different* or *disparate treatment*.

School discipline policies provide an illustration. In that context, intentional discrimination most obviously occurs when a school adopts a policy that expressly singles out students of different races for different levels or types of punishment. As the 2014 DCL points out, however, that sort of facially discriminatory policy is uncommon today. Far more typical are cases where school officials discipline students of different races differently under an otherwise race-neutral policy— where, for example, a principal metes out a harsher punishment for students of one race over another after a playground fight, even though both sides were throwing punches. In such cases, where no evidence speaks directly to intent, the courts must instead sift through more circumstantial indications of bias, relying on a burden-shifting framework to determine whether a discriminatory motive less overtly informed the disciplinary decision.

2. Discriminatory Effects (Disparate Impact) and the 2014 DCL

These cases of "disparate treatment," no matter how they are proved, all hinge on discriminatory *intent*. And on this point the 2014 DCL largely rehearsed well-settled law: a recipient of federal money that treats individuals differently because of their race, color, or national origin will have violated Title VI. Not all cases of discrimination, however, have involved different treatment in this intentional sense. In a series of decisions beginning in the early 1970s, the Supreme Court has found unlawful discrimination under various antidiscrimination statutory provisions even without proof of discriminatory intent—including, originally, under Title VI in *Lau v. Nichols*.

The Court did so by instead looking to the discriminatory *effects* a challenged policy had on different groups—its *disparate impact*, as the theory has come to be called. And under that theory, an entity may be found to have discriminated against a protected group even when it has evenhandedly applied a policy that is otherwise race-neutral, if that policy also happens to impose a disparate and unjustifiable burden on certain races. Thus, in the seminal example, a company was found to have discriminated against African-Americans under Title VII of the Civil Rights Act of 1964 by requiring job applicants to either have a high school diploma or pass an aptitude test, even though the plaintiffs had no evidence the company adopted that policy out of discriminatory intent. What mattered was the policy's effects—in that case, disproportionately disqualifying African-American applicants—and that the policy was not "significantly related" to doing the jobs in question.

As a legal theory, then, disparate impact is not new. Nor is it new even under Title VI, which federal agencies have long interpreted to bar federally assisted programs from disproportionately burdening protected groups, at least without appropriate justification. What appears to have made the 2014 DCL

more novel—and controvertible—was ED's and DOJ's decision to extend that theory to the uniquely sensitive matter of school discipline.

The departments did so by transposing the usual "three-part inquiry" developed under other statutory regimes into the context of school discipline under Titles VI and IV. Thus, the 2014 DCL instructed recipient schools to consider whether their discipline policies "resulted in an adverse impact on students of a particular race as compared with students of other races"—as when, for example, African-American students are disciplined more often or more severely than their white peers for substantially the same conduct. In those cases, the 2014 DCL directed recipients to weigh whether that disciplinary policy was necessary in "meet[ing] an important educational goal," examining "the tightness of the fit between the stated goal and the means employed to achieve it." Besides pointing to some such necessity—the need, for example, to keep classrooms safe and orderly—the school would also need to confirm that it could not have chosen some other "comparably effective" but less racially burdensome policy. If there were some such policy that the school failed to adopt, or if the school adopted its policy for demonstrably discriminatory reasons, under the 2014 DCL that school would have violated Title VI and would consequently risk losing its federal funds.

Squaring Disparate Impact with Title VI

As the 2014 DCL makes clear, discrimination based on disparate impact hinges on a policy's effects, not the intent behind them. That distinction is what distinguishes a theory of disparate treatment discrimination from disparate impact. And that distinction also explains a central point of dispute between the Commission and the 2014 DCL: how ED and DOJ justified the 2014 DCL's disparate impact policy in the first place. That dispute centers on how the Supreme Court has read Title VI's nondiscrimination provision, Section 601. Despite its early suggestion in *Lau* that disparate-impact liability could attach directly under that provision, the Supreme Court has since come to read Section 601 more restrictively, limiting it to intentional discrimination alone. And so to support their 2014 disparate impact policy, ED and DOJ pointed not to Section 601 but, effectively, to their rulemaking authority provided by Section 602. Whether Section 602 actually empowers agencies to issue such disparate impact regulations appears, however, to be an unresolved question. And as explained below, that question has prompted the Trump Administration to rethink not just the 2014 school-discipline guidance but, apparently, disparate impact under Title VI altogether.

1. Defining Discrimination under Title VI

Although Section 601 bans "discrimination" on the basis of race in any federally funded program or activity, it speaks less clearly to the *kinds* of discrimination it thereby prohibits—whether intentional discrimination alone or also disparate impact. The U.S. Supreme Court, for its part, has definitively addressed only the first kind: at the very least, the Court has said, Title VI prohibits policies and practices that *intentionally* discriminate against students because of their race. Whether that is *all* Section 601 forbids, however, long eluded a similarly definitive decision from the Court. But after wrestling with that point in a series of fractured decisions, the Court appeared to put the question to rest with its 2001 ruling in *Alexander v. Sandoval*: it was "beyond dispute," according to that five-Justice majority, that Section 601 reached *only* intentional discrimination, and not discriminatory effects.

In *Sandoval* the Court therefore seemed to close the door to a disparate-impact theory advanced directly under Section 601. But *Sandoval* also left open the possibility that federal agencies could *indirectly* prohibit disparate impact discrimination under Section 602, which empowers funding agencies to issue rules "effectuat[ing]" Section 601. Over the years most federal agencies have done just that, including both ED and DOJ. And according to the 2014 DCL, those regulations gave ED and DOJ all the authority they needed to investigate school discipline policies for their discriminatory effects—and to challenge policies that could not otherwise be justified.

2. Rethinking Disparate Impact under Title VI

On that point, however, the Commission parted ways with the 2014 DCL—finding ED and DOJ's earlier "reading of Title VI ... dubious, at best." The Commission's concern appeared to focus particularly on the interaction between Title VI's two central provisions: the antidiscrimination mandate in Section 601, and the rulemaking authority provided by Section 602. As the *Sandoval* Court read those provisions, Section 601 does not provide authority, all on its own, for an agency to prohibit a policy or practice based solely on its discriminatory effects. And so to back up its disparate impact theory in the 2014 DCL, ED and DOJ had to look elsewhere in Title VI for their authority to issue that guidance. They allegedly found it in a pair of decades-old regulations, both issued under Section 602.

That reliance on Section 602, however, seemed to the Commission to be the guidance's "dubious" misstep. It appeared "strange" to the Commission, as it had to the majority in *Sandoval*, that disparate-impact regulations could further the purpose of Section 601 when, as Justice O'Connor once put it, "[Section] 601 permits the very behavior that the regulations forbid." The Commission thus appeared to question a basic premise of the 2014 DCL: that Section 602 empowered ED and DOJ, as federal funding agencies, to issue rules that go beyond Section 601's prohibition against intentional discrimination. Because Section 601 of Title VI was limited to intentional discrimination, the Commission seems to have reasoned, any rule issued under Section 602 had to be so limited as well. And as the 2014 DCL plainly went further than that by singling out policies for their discriminatory effects, the Commission did not see how the 2014 DCL could "be squared with" the way the Court had read Title VI, most recently in *Sandoval*.

The Future of Disparate Impact under Title VI

This reservation was just one of several that the Commission expressed about the 2014 DCL. But that concern appears to be particularly far-reaching, having less to do with school discipline specifically than with how to read Title VI itself. And with acting Attorney General Whittaker having signed on to the Commission's final report, its analysis of Title VI suggests that DOJ may harbor similar doubts about disparate impact more generally under Section 602—drawing into question rules promulgated by every Cabinet-level department as well as dozens of other agencies. If so, that interpretation could well narrow agency enforcement activity not simply in education, but in the wide range of contexts where federal agencies have in the past recognized and investigated disparate impact claims. Late last year, DOJ and ED took a definite step in this direction, having officially rescinded the 2014 DCL and related school-discipline guidance documents. And recent reports suggest a wider repeal effort may also be underway.

Whatever the Trump Administration's plans on this front, Congress still has significant say over how Title VI works. Given the long and continuing debate about the relation of Title VI's central provisions, Congress could choose to put down its own marker, by definitively clarifying Title VI's scope in either of two ways. On the one hand, Congress could make clear that Section 601 indeed prohibits only intentional discrimination, and that any prohibitions funding agencies may devise under Section 602 may go no further than discrimination of that kind, essentially in line with the Commission's view. On the other hand, Congress could graft an express disparate impact standard onto Section 601, much as it has under Title VII of the Civil Rights Act of 1964, which would unambiguously allow funding agencies to investigate policies and practices under Title VI on the basis of their discriminatory effects. Those legislative additions would join several other proposals in recent years that have sought to clarify the breadth of Title VI's coverage, along with others that have voiced concern about the seemingly uncertain future of disparate impact under Title VI.

Author Information

JD S. Hsin
Legislative Attorney

Disclaimer