August 18, 2026

Guidance on Pupil Discipline and Compliance with Title VI[1]

American students deserve the opportunity to learn in classrooms that are orderly and in schools that are safe and free of race discrimination. Effective teaching and learning are not possible without those fundamental prerequisites. And all schools receiving federal funding, from preschool through graduate school, have an obligation under Title VI of the Civil Rights Act of 1964 (Title VI) to treat students equally regardless of the students' race, color, or national origin—including when they administer discipline. Based on these core principles, parents, students, and educators should be able to trust that schools will fulfill two fundamental duties:

(1) establish a disciplinary system that creates a safe and well-ordered learning environment; and

(2) ensure that students are not treated differently based on race, color, or national origin in matters of discipline or otherwise.

On April 23, 2025, President Donald Trump issued Executive Order 14,280, *Reinstating Common Sense School Discipline Policies*, which directs the U.S. Department of Education (Department) to "issue new guidance to local educational agencies (LEAs) and state educational agencies (SEAs) regarding school discipline and their obligations not to engage in racial discrimination under Title VI in all contexts, including school discipline."[2] As the order noted, past administrations have wrongly interpreted Title VI to impose "disparate-impact" liability, which "effectively required schools to discriminate on the basis of race by

[1] Throughout this letter, "school" or "recipient" is used generally to refer to preschool, elementary, secondary, and postsecondary educational institutions and state educational agencies (SEAs) that receive federal financial assistance from the Department. The contents of this guidance lack the force and effect of law and do not bind the public or create new legal standards. This document is designed to provide clarity to the public regarding existing legal requirements under Title VI. If you are interested in commenting on this guidance, please email your comment to OCR@ed.gov or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202. For further information about the Department's guidance processes, please visit the Department's webpage on significant guidance at https://www.ed.gov/about/ed-offices/ogc/significant-guidance-at-the-department-of-education.

[2] Executive Order 14,280, 90 Fed. Reg. 17,533, 17,534 (Apr. 28, 2025). The Department also adopts this guidance independently of Executive Order 14,280.

imposing discipline based on racial characteristics, rather than on objective behavior alone."[3] These erroneous interpretations not only led schools to discriminate based on race but also caused "teachers and students [to] suffer[] increased levels of classroom disorder and school violence."[4]

The same day he issued Executive Order 14,280, President Trump issued Executive Order 14,281, *Restoring Equality of Opportunity and Meritocracy*, which explained the problems with disparate-impact liability:

> A bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes. It promises that people are treated as individuals, not components of a particular race or group. It encourages meritocracy and a colorblind society, not race- or sex-based favoritism. Adherence to this principle is essential to creating opportunity, encouraging achievement, and sustaining the American Dream.
>
> But a pernicious movement endangers this foundational principle, seeking to transform America's promise of equal opportunity into a divisive pursuit of results preordained by irrelevant immutable characteristics, regardless of individual strengths, effort, or achievement. A key tool of this movement is disparate-impact liability, which holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed. Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability. It not only undermines our national values, but also runs contrary to equal protection under the law and, therefore, violates our Constitution….
>
> Disparate-impact liability imperils the effectiveness of civil rights laws by mandating, rather than proscribing, discrimination. As the Supreme Court put it, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[5]
>
> Disparate-impact liability is wholly inconsistent with the Constitution and threatens the commitment to merit and equality of opportunity that forms the foundation of the American Dream. Under my Administration, citizens will be treated equally before the law and as individuals, not consigned to a certain fate based on their immutable characteristics.[6]

Regrettably, prior administrations have imposed disparate-impact liability in the context of school discipline throughout the United States. The imposition was never sound as a matter of law or justice, and, as this guidance explains, schools must cease consideration of race throughout their disciplinary policies and practices, absent truly extraordinary circumstances that satisfy strict scrutiny.

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[3] *Id.* at 17,533.

[4] *Id.*

[5] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality).

[6] Executive Order 14,281, 90 Fed. Reg. 17,537, 17,537 (Apr. 28, 2025). The Department also adopts this guidance independently of Executive Order 14,281.

The Department has already taken steps to restore Title VI to its original public meaning. On July 24, 2026, the Department issued a final rule, modifying its regulations to eliminate disparate-impact liability. *Rescinding Portions of the Department of Education Title VI Regulations To Align With the Statutory Text and Conform to Executive Order 14281*, 91 Fed. Reg. 46,733 (July 24, 2026).

The following guidance further clarifies the legal framework that recipients should use to fulfill their constitutional and statutory obligations. This guidance makes clear that neither Title VI nor the Constitution requires the use of race in student discipline and that the use or consideration of race in student discipline violates Title VI and the Constitution absent truly extraordinary circumstances that satisfy strict scrutiny.[7] In student discipline and education more broadly, students must "be treated equally before the law and as individuals, not consigned to a certain fate based on their immutable characteristics."[8]

The Department's guidance outlines the legal background of Title VI and explains Constitutional requirements that impact a school's implementation of discipline policies. This guidance highlights the history of the Department's administrative enforcement of Title VI and explains how Title VI enforcement has evolved over the years. Finally, this guidance details the legal requirements that govern the consideration of race in disciplinary actions.

I. Legal Background

The Constitution and Title VI of the Civil Rights Act of 1964 prohibit intentional race discrimination, not unintentional disparate impact.[9] The Constitution generally prohibits race discrimination by the government.[10] Title VI generally prohibits race discrimination in any program or activity receiving federal funding.[11] The Supreme Court has interpreted Title VI's prohibition on race discrimination to include race

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[7] When this guidance refers to violations of the Constitution, it is referring to the policies, practices, or actions of government actors. *See generally Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 804 (2019). When this guidance refers to violations of Title VI, it is referring to the policies, practices, or actions of recipients of federal funding. *See* 42 U.S.C. § 2000d.

[8] Executive Order 14,281, 90 Fed. Reg. at 17,537.

[9] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (Constitution prohibits only acts with "a racially discriminatory purpose"); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (Title VI reaches "only instances of intentional discrimination").

[10] *See* U.S. Const. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws"); U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law"); *see also, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (cleaned up)); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (similar); *Louisiana v. Callais*, 146 S. Ct. 1131, 1152 (2026) ("[T]he general rule [is] that the Constitution almost never permits the Federal Government or a State to discriminate on the basis of race.").

[11] *See* 42 U.S.C. § 2000d ("No person in the United States 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.").

discrimination that violates the Constitution's equal-protection guarantee when committed by an institution that receives federal funds.[12]

Constitution. The Constitution's equal-protection guarantee generally forbids race discrimination by the government, including in education. The Constitution provides that the government must not "deny to any person … the equal protection of the laws."[13] It "guarantees equal laws, not equal results."[14] The "core purpose" of the Constitution's equal-protection guarantee is "doing away with all governmentally imposed discrimination based on race."[15] For good reason: "'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[16] Racial preferences "demean[] the dignity and worth of a person," by judging an individual based on "ancestry," rather than on "merit," "essential qualities," and individual circumstances.[17] Thus, under "our colorblind Constitution,"[18] "racial discrimination is invidious in all contexts."[19]

Under the Constitution's equal-protection guarantee, race discrimination occurs in numerous ways, including when the government adopts a policy that facially classifies based on race, adopts a facially neutral policy with racially discriminatory intent or purpose, intentionally uses race, or intentionally treats individuals differently based on race.[20] The Supreme Court has repeatedly made clear that the Constitution prohibits intentional discrimination—not unintentional disparate impact.[21]

When the government discriminates based on race, that discrimination is unconstitutional unless the government meets strict scrutiny.[22] Unsurprisingly, satisfying strict scrutiny is an extremely heavy burden. To surmount strict scrutiny, the racial classification must further a "compelling … interest[]" and the

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[12] *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 198 n.2 (2023).

[13] U.S. Const. amend. XIV, § 1.

[14] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

[15] *SFFA*, 600 U.S. at 206 (cleaned up).

[16] *Id.* at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

[17] *Id.* at 220 (internal quotation marks omitted).

[18] *Allen v. Milligan*, 146 S. Ct. 1377, 1380 (2026).

[19] *See SFFA*, 600 U.S. at 214 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)).

[20] *See, e.g.*, *Callais*, 146 S. Ct. at 1147 ("*any* use of race in government decisionmaking generally [constitutes race discrimination and] triggers strict scrutiny").

[21] *See, e.g.*, *Washington*, 426 U.S. at 239 (Constitution prohibits acts with "a racially discriminatory purpose," not unintentional disparate impact); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

[22] *Fisher v. Univ. of Texas*, 570 U.S. 297, 307 (2013); *see also, e.g.*, *SFFA*, 600 U.S. at 206–07; *Callais*, 146 S. Ct. at 1146 ("In [equal-protection] cases, if race played a role in a decision made by a government actor, strict scrutiny applied."); *Constitutionality of Race-Based Department of Education Programs*, 2025 WL 4055305, 49 Op. O.L.C. ___, slip op. at 5 (Dec. 2, 2025) (noting that "the strict scrutiny standard of review applies *whenever* the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking").

use of race must be "'narrowly tailored'—meaning 'necessary'—to achieve that interest."[23] That is an "unforgiving" standard and is "'the most demanding test known to constitutional law.'"[24] As "a practical matter," strict scrutiny is "fatal in fact absent truly extraordinary circumstances."[25]

These equal-protection principles apply the same way in education. As the Supreme Court stated in *Brown v. Board of Education* and repeated nearly seven decades later in *Students for Fair Admissions v. Harvard*, "the right to a public education 'must be made available to all on equal terms.'"[26] The Constitution forbids the government from "us[ing] race as a factor in affording educational opportunities among its citizens," regardless of whether the government is distributing a burden or a benefit.[27] And because a school's disciplinary system is a component of education, student discipline must likewise be administered in accordance with the Constitution's equal-protection guarantee. Simply put, "racial discrimination is invidious in all contexts"—including student discipline.[28]

Title VI. Title VI generally forbids race discrimination in any program or activity receiving federal funding, including education. It states that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI, including education.[29] Title VI also authorizes federal agencies "to effectuate the provisions of [Title VI] … by issuing rules, regulations, or orders of general applicability."[30]

The Supreme Court has long held that discrimination that violates the Constitution's equal-protection guarantee "committed by an institution that accepts federal funds also constitutes a violation of Title VI."[31] The Supreme Court has also made clear that it is "beyond dispute" that Title VI prohibits intentional discrimination and does not prohibit unintentional disparate impact.[32]

II. Shifting Administrative Positions & the Consequences of Adopting Disparate-Impact Liability for Title VI

Administrations have inconsistently described and enforced Title VI, especially with respect to student discipline. At times, the Department has made clear that Title VI does not prohibit unintentional disparate impact but allows evenhanded application of neutral discipline policies that result in a disparate impact on a certain group. Other times, the Department has claimed that Title VI prohibits unintentional disparate impact and has effectively coerced schools to discriminate on the basis of race to avoid disparate outcomes even when such outcomes were a result of an evenhanded application of a neutral discipline

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[23] *SFFA*, 600 U.S. at 206–07.

[24] *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 484 (2025).

[25] *Id.* at 485.

[26] *SFFA*, 600 U.S. at 204 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

[27] *Id.* (cleaned up).

[28] *See id.* at 214 (quoting *Edmonson*, 500 U.S. at 619).

[29] 42 U.S.C. § 2000d *et seq.*

[30] *Id.* § 2000d-1. Though this guidance generally discusses race discrimination, the guidance equally applies to discrimination based on color and national origin.

[31] *Gratz v. Bollinger*, 539 U.S. 244, 276 & n.23 (2003); *accord, e.g.*, *SFFA*, 600 U.S. at 198 n.2.

[32] *Sandoval*, 532 U.S. at 280 (emphasis added); 91 Fed. Reg. at 46,734–38.

policy.[33] When the Department has adopted disparate-impact liability for Title VI, its policies and actions have caused significant harm, including to the rule of law, students, teachers, the learning environment, and schools more broadly.

Early on, certain key officials of the Department made clear that Title VI did not prohibit unintentional disparate impact. For example, in 1981, then-Assistant Secretary for Civil Rights Clarence Thomas explained in a memorandum that mere disparate impact in discipline did not violate Title VI:

> 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 students with similar disciplinary records who committed a similar or greater offense.[34]

But the Department unfortunately did not always maintain that view. For example, on January 8, 2014, the Department issued a Dear Colleague Letter, stating that a facially neutral discipline policy, even if "administered in an evenhanded manner" and even when "not adopted with the intent to discriminate," can nevertheless "result in unlawful discrimination" under Title VI if it has a "*disparate impact*, *i.e.*, a disproportionate and unjustified *effect* on students of a particular race."[35] This governmental push to impose disparate-impact analysis inevitably injected consideration of race into school discipline. Schools ignored or covered up—rather than disciplined—student misconduct to avoid any purported racial disparity in discipline numbers that might catch the eye of the federal government. As a result, students who should have been suspended, expelled, or otherwise held accountable for dangerous or disruptive behavior remained in the classroom, making schools less safe and disrupting the learning environment.

In 2018, the Department in the first Trump administration took a better approach. It rescinded the 2014 Dear Colleague Letter, emphasized that the 2014 letter's use of "disparate impact" was flawed both legally and as a matter of policy, and allowed for local solutions to address the safety and orderliness problems in the educational environment.[36] Unsurprisingly, the Department's rejection of disparate-impact liability reversed the government pressure to discriminate based on race and coincided with schools becoming safer and better environments for learning.

The whipsawing unnecessarily continued. In 2021, the Biden administration took steps to restore the 2014 guidance, which eventually led the Biden administration to issue a Dear Colleague Letter in 2023 that returned to disparate-impact liability.[37] That letter, which is in the process of being formally rescinded,

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[33] *See e.g.*, *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 535–538 (7th Cir. 1997).

[34] *See* Clarence Thomas, *Memorandum to the U.S. Secretary of Education: Civil Rights Aspects of Discipline in the Public Schools* (Sept. 18, 1981).

[35] *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, U.S. Dep't of Educ., 7 (Jan. 8, 2014), https://www.ed.gov/laws-and-policy/civil-rights-laws/race-color-and-national-origin-discrimination/dear-colleague-letter-nondiscriminatory-administration-of-school-discipline-rescinded (2014 Dear Colleague Letter, 2014 letter, or 2014 guidance).

[36] *Dear Colleague Letter*, U.S. Dep't of Educ. (Dec. 21, 2018), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201812.pdf (2018 Dear Colleague Letter, 2018 letter, or 2018 guidance).

[37] *See Request for Information Regarding the Nondiscriminatory Administration of School Discipline*, 86 Fed.

contained, among other things, a thinly veiled warning that school districts could be investigated and punished for racial discrimination under Title VI if the percentage of disciplinary incidents involving students from certain racial or ethnic demographics exceeded the racial or ethnic groups' percentage of the overall student body. This guidance predictably increased violence and other disruptions at school.

Under the Department's July 24, 2026, final rule modifying its regulations to eliminate disparate-impact liability, *Rescinding Portions of the Department of Education Title VI Regulations To Align With the Statutory Text and Conform to Executive Order 14281*, 91 Fed. Reg. 46,733 (July 24, 2026), the back-and-forth of administrative regulation and subregulatory guidance under different administrations ends. Future administrations must adhere to the original public meaning of Title VI and the Constitution and reject disparate-impact liability for Title VI, which will result in the benefits seen during the first Trump administration and will avoid the significant harms caused by other administrations' adoption of disparate-impact liability.

A. Practical Consequences of Erroneous Understandings of Title VI: 2014–2018

On January 8, 2014, the Department issued a Dear Colleague Letter, stating that a facially neutral discipline policy, even if "administered in an evenhanded manner" and even when "not adopted with the intent to discriminate," can nevertheless "result in unlawful discrimination" under Title VI if it has a "*disparate impact*, *i.e.*, a disproportionate and unjustified *effect* on students of a particular race."[38] Consequently, according to the theory presented in the letter, a facially neutral disciplinary code that requires the suspension of any student who assaults a teacher, regardless of race, could still be considered a violation of Title VI if individuals violating this racially neutral policy disproportionately belong to one race.[39]

But the Department did not stop there. Using the Department's authority under Title VI not only to investigate allegations of race discrimination but also to pursue appropriate remedies, the Department's Office for Civil Rights (OCR), in practice, refused to conclude investigations unless a school district agreed to adopt the Department's policy prescription for school discipline, which was a standard based on "disparate impact." This policy appears to have had a predictable effect, pressuring school administrators to adopt race-based disciplinary policies or practices without regard to any finding of fault, and without regard to their deleterious effects on school safety and orderliness.

This federally promoted push to impose this disparate-impact analysis inevitably injected consideration of race into school discipline, as schools sought to avoid statistical disparities resulting from the neutral application of race-neutral discipline policies. Among other things, the effect was to push schools to ramp down enforcement generally, and especially to ramp it down when disciplining a student of a given race might lead to students of that race being overrepresented in aggregate discipline incidents as compared to students of other races. A 2018 report from the School Superintendents Association powerfully captured the sweeping effect of schools declining to discipline individuals simply based on their race and failing to remove them from the classroom to avoid OCR inquiry and penalties. That report included these responses from school leaders:

Reg. 30,449, Docket ID ED-2021-OCR-0068 (June 8, 2021); *Resource on Confronting Racial Discrimination in Student Discipline*, U.S. Dep't of Educ. & U.S. Dep't of Justice (May 2023), https://www.justice.gov/d9/press-releases/attachments/2023/05/26/tvi-student-discipline-resource-202305_0.pdf (2023 Dear Colleague Letter, 2023 letter, or 2023 guidance).

[38] 2014 Dear Colleague Letter at 7.

[39] *Id.*

- "There is a feeling that by keeping some students in school, we are risking the safety of students."
- "Students who are allowed to stay in school after gross offenses amp up their behavior in order to see how much they'll get away with without consequence."
- "We see victims of bullying and harassment tend to miss more days of school and are more likely to leave the district when the perpetrators are not removed from school."[40]

These perspectives were ignored during the drive to implement school discipline based on the flawed disparate-impact liability model. Traditional discipline policies, which allow teachers to issue consequences for misbehavior on an individual rather than racial basis and school administrators to typically trust the judgment of classroom teachers, are effective, at least according to those using them: 86% of classroom teachers say that suspensions are "useful for sending messages to parents about the seriousness of infractions," 84% report that suspensions are "useful for removing disruptive students so that other students can learn," and 79% agree that suspensions "help[] ensure a safe school environment."[41]

A nationwide poll of elementary educators in 2019 found that more than 70 percent believed that disruptive behavior had increased over the past three years since the use of "disparate impact" was mandated by OCR. The lead researchers suggested that disruptive behavior was "more widespread than … realized, and it may be that teachers are suffering a little bit in silence because of some of the efforts to stymie discipline referrals and suspensions."[42]

B. Restoring a Lawful Understanding of Title VI: 2018–2020

In 2018, OCR rescinded the 2014 Dear Colleague Letter, recognizing that the 2014 letter's use of "disparate impact" was deeply flawed both as a matter of law and policy.[43] The Departments of Education, Justice, Homeland Security, and Health and Human Services also published the Final Report of the Federal Commission on School Safety, which, in Chapter 8, explained the flaws of the Obama administration's 2014 guidance. The Final Report rejected the 2014 letter's disparate-impact liability theory in pupil disciplinary decisions and also reaffirmed that "[s]chool discipline is a complex issue that is affected by local circumstances" and that "[l]ocal solutions"—not federal mandates—"are best suited for dealing with the unique needs of local communities."[44]

The Commission concluded that the 2014 Dear Colleague Letter significantly harmed students, teachers, and the school environment and that the better course was to eschew disparate-impact analysis

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[40] *Final Report of the Commission on School Safety*, U.S. Dep't of Educ., U.S. Dep't of Homeland Security, U.S. Dep't of Health and Human Services & U.S. Dep't of Justice, 68 (Dec. 18, 2018), https://www.ed.gov/sites/ed/files/documents/school-safety/school-safety-reportpdf.pdf (2018 report or Final Report).

[41] David Griffith & Adam Tyner, *Discipline Reform through the Eyes of Teachers*, Fordham Inst. (July 30, 2019), https://fordhaminstitute.org/national/research/discipline-reform-through-the-eyes-of-teachers.

[42] Max Eden, *School Discipline Reform Is Harming Students' Academic Achievement and Safety*, The Manhattan Institute (June 11, 2019) (alteration in original) (citing EAB, *Breaking Bad Behavior: The Rise of Classroom Disruptions in Early Grades and How Districts Are Responding* (2019)), https://manhattan.institute/article/school-discipline-reform-is-harming-students-academic-achievement-and-safety.

[43] 2018 Dear Colleague Letter.

[44] *Final Report of the Commission on School Safety*, *supra*, at 68.

in discipline and to allow race-neutral local solutions to address school safety and orderliness. The Commission explained that because of the 2014 Dear Colleague Letter, "schools ignored or covered up—rather than disciplined—student misconduct in order to avoid any purported racial disparity in discipline numbers that might catch the eye of the federal government."[45] As a result, students who should have been suspended, expelled, or otherwise held accountable for dangerous or disruptive behavior remained in the classroom, making schools less safe and disrupting the learning environment. As the Commission found: "When school leaders focus on aggregate school discipline numbers rather than the specific circumstances and conduct that underlie each matter, schools become less safe," and "[r]esearch clearly indicates that the failure of schools to appropriately discipline disruptive students has consequences for overall student achievement."[46] The Commission thus straightforwardly concluded that "disciplinary decisions are best left in the hands of classroom teachers and administrators" and should be based on student behavior, rather than racial statistics.[47]

The Commission's conclusions have also been bolstered by further empirical evidence documenting harm to academic outcomes attributable to the prior approach. Researchers have examined school districts that tried to focus more on aggregate disciplinary statistics and trusted teachers less to ensure order and safety in their classrooms. For example, a study of a ban on suspensions for willful defiance in Philadelphia found that the policy caused a substantial decrease in reading and math performance.[48] And a study on suspension bans in four California districts found that it had a significant negative impact on math performance.[49]

Other government officials agreed with the Commission's report and criticized the arguments in favor of disparate-impact liability in student discipline. Indeed, a key criticism of the factual basis for the imposition of a disparate-impact liability model in the pupil-discipline context was penned by Commissioner Gail Heriot, when she criticized the U.S. Commission on Civil Rights's finding that "[s]tudents of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers" as "insupportable."[50] As Commissioner Heriot noted:

> The [commission's 2018 school discipline report] provides no evidence to support this sweeping assertion and there is abundant evidence to the contrary. Not the least of that evidence comes from teachers. When one looks at aggregate statistics concerning which

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[45] *Id.*

[46] *Id.* at 70.

[47] *Id.* at 72.

[48] Matthew P. Steinberg & Johanna Lacoe, *The Academic and Behavioral Consequences of Discipline Policy Reform*, Fordham Inst. (Dec. 5, 2017), https://fordhaminstitute.org/national/research/academic-and-behavioral-consequences-discipline-policy-reform.

[49] *See* Dominic Zarecki, *Banning Math Progress: The Academic Impact of California's Suspension Bans* (July 2, 2019), https://ssrn.com/abstract=3797279 or http://dx.doi.org/10.2139/ssrn.3797279 ("We find a negative but sometimes non-significant impact on reading performance in grades four through eight as well as a consistently significant, negative impact on math performance in grades four through seven. The impact occurred each of the three years after adopting a ban, and was equivalent to a decline from 50th percentile before a ban to the 39th percentile three years later. While the literature generally expects bans to improve academics, this paper complements and extends new studies that find unintended negative consequences for bans and other discipline reforms.").

[50] U.S. Comm'n on Civil Rights, *Beyond Suspensions Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, 177 (July 2019).

> students are sent to the principal's office by their teachers, there are strong differences. Denying those differences amounts to an accusation that teachers are getting it not just wrong, but very wrong. It is a slap in the face to teachers.[51]

Unsurprisingly, the first Trump administration's approach coincided with schools becoming safer and more orderly. The data showed that "reported incidents related to several crime and safety issues have become less prevalent at elementary and secondary schools when compared with about a decade earlier. Specifically, incidents of nonfatal student and teacher victimization, reports of student bullying, and reports of some unfavorable conditions at school have become less prevalent."[52]

C. Returning to the 2014 Letter Leads to Predictably Devastating Consequences: 2021–2024

The extended COVID school closures of 2021 and 2022 caused both widespread learning loss[53] and a "youth mental health crisis [that] reached unprecedented levels,"[54] including a jump in student suicides (12%–18%).[55] In 2023, the Biden administration issued a Dear Colleague Letter implying that the existence of statistical racial disparities in discipline could establish a violation of Title VI without a showing of intentional discrimination.[56] Again, schools were pressured to collect, analyze, and adjust their disciplinary policies in light of racial disciplinary data. The 2023 guidance thus effectively reinstated the practice of using Title VI to promote an approach to school discipline based on race.[57]

On June 8, 2021, the Department issued a Request for Information (RFI) soliciting comments about whether to restore the 2014 Guidance.[58] The RFI emphasized President Biden's Executive Order 13,985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which called for the federal government "to pursu[e] 'a comprehensive approach to advancing equity for all.'"[59]

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[51] *Id.*

[52] *Report on Indicators of School Crime and Safety: 2023*, Nat'l Center for Educ. Statistics (July 2024), https://nces.ed.gov/pubs2024/2024145.pdf.

[53] *See The Startling Evidence on Learning Loss Is In*, New York Times (Nov. 18, 2023), https://www.nytimes.com/2023/11/18/opinion/pandemic-school-learning-loss.html ("The evidence is now in, and it is startling. The school closures that took 50 million children out of classrooms at the start of the pandemic may prove to be the most damaging disruption in the history of American education. It also set student progress in math and reading back by two decades and widened the achievement gap that separates poor and wealthy children."). *See* National Center for Education Statistics. (2022). *Nation's Report Card: 2022 Long-Term Trend Reading and Mathematics Assessment at Ages 9* (NCES No. 2022121). U.S. Department of Education, National Center for Education Statistics. (https://nces.ed.gov/nationsreportcard/)

[54] Feife et al., *The Youth Mental Health Crisis: Quasi-Experimental Evidence on the Role of School Closures*, Sci. Adv. (Aug. 2023).

[55] Chiara Davico et al., *COVID-19 Pandemic School Disruptions and Acute Mental Health in Children and Adolescents*, J. of the Am. Medical Assoc. (Aug. 5, 2024).

[56] 2023 Dear Colleague Letter.

[57] Executive Order 14,280, 90 Fed. Reg. at 17,533.

[58] *See Request for Information Regarding the Nondiscriminatory Administration of School Discipline*, 86 Fed. Reg. 30,449, Docket ID ED-2021-OCR-0068 (June 8, 2021).

[59] *Id.* at 30,449.

The RFI was premised on the Department's assertion that "[s]tudents of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers—but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses."[60]

The RFI did not mention any requirement of discriminatory intent before identifying a Title VI violation; therefore based on past OCR practice a reader could infer that a simple disparity was enough. And the RFI offered no meaningful or reliable evidence for or against its assertion that "[s]tudents of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers."[61]

On May 26, 2023, the Biden administration issued a Dear Colleague Letter breathing renewed life into the Obama administration's policy of imposing disparate-impact liability.[62] The 2023 Dear Colleague Letter contained, among other things, a thinly veiled warning that school districts could be investigated and punished for racial discrimination under Title VI if the percentage of disciplinary incidents involving students from certain racial or ethnic demographics exceeded the racial or ethnic groups' percentage of the overall student body. And through a series of illustrative examples, the 2023 letter emphasized the Department's heavy reliance on "racial disparities," particularly where districts' disciplinary codes include so-called "subjective" offenses such as "classroom disruption" or "disrespect," to establish purported violations of Title VI.[63]

As the basis for this approach, the 2023 letter asserted that "[s]ignificant disparities by race—beginning as early as preschool—have persisted in the application of student discipline in schools," and "courts have concluded that violations of [Title VI] underlie these disparities."[64] Yet the letter did not cite a single material judicial ruling to support this claim. Instead, it listed examples of the Department's own enforcement actions—and the binding settlements that followed—where it accused school districts of violating the law because it supposedly observed "statistically significant disparities" in misconduct offenses between students of certain races without a "legitimate explanation."[65] The letter also repeated the unsupported premise of the 2021 RFI—that students of certain races are punished more frequently and severely than students of other races despite engaging in misconduct at the same rates—without providing any evidence or addressing the detailed factual findings issued by the Commission on School Safety in 2018.

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[60] *Id.* at 30,450–51. The RFI cited as evidence for this statement the "BEYOND SUSPENSIONS - Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities – Briefing Report" from the U.S. Commission on Civil Rights, Chaired by Catherine Lhamon (the same person who served as Assistant Secretary of Education for Civil Rights at the Department between August 2013 and December 2016 in the Obama administration, returned to the same position in the Biden administration between November 2021 and January 2025, and was responsible for the OCR actions noted herein adopting the disparate-impact liability theory).

[61] *See id.* at 177–216 (Dissenting Statements of Commissioner Gail Heriot and Commissioner Peter N. Kirsanow).

[62] 2023 Dear Colleague Letter.

[63] *Id.* at ii & n.ii.

[64] *Id.*

[65] *Id.* at iv, n.ii, 4.

The Biden administration's actions were met by confusion, with some declaring that the document required school districts to mandate equal outcomes in discipline and others declaring that it amounted to a retreat from federal pressure for equal outcomes in favor of equal treatment.[66] This confusion was perhaps an inevitable result of the misapplication of Title VI both in the 2021 RFI and the 2023 Dear Colleague Letter.[67]

As with the 2014 letter, the Biden administration's flawed understanding of Title VI was issued against a backdrop of increasing violence in schools.. In an April 2023 survey, 40% of schools reported "physical attacks or fights between students" and "threats of physical attacks or fights between students."[68] This spike in violence has also included an unprecedented 14% increase in threats and violence against pre-K to 12th grade teachers and other school personnel, with more than 50% of teachers now reporting being victims of physical violence from students.[69] And 41% of school personnel (teachers, principals, district leaders) said they felt less safe at work now than they did in preceding years.[70]

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[66] *See, e.g.*, Cory Brewer, Lauren Greuel & Will Flanders, *ED/DOJ "Resource on Confronting Racial Discrimination in Student Discipline" State Policy Network Clear Guidance Memo*, Wisconsin Institute for Law and Liberty, 7–8 (last accessed July 27, 2026), https://will-law.org/wp-content/uploads/2024/08/Clear-Guidance-Memo-Student-Discipline.pdf ("The Biden Guidance may not be accurately characterized as guidance at all as that term is generally understood …. While the Biden Guidance seems to recognize that disparate impact cannot be the sole evidence used to prove racial discrimination under Title VI, the facts from the investigations it discusses primarily (or solely) involve disparate impact. The Biden Guidance frequently does not make clear what other evidence (if any) it found. Whether the Biden Guidance is as aggressive as the Obama Letter will depend largely on its implementation.").

[67] *See, e.g.*, *Parents Defending Education's Comments on the Office for Civil Rights, Department of Education, Request for Information, "Request for Information Regarding the Nondiscriminatory Administration of School Discipline*," 86 Fed. Reg. 30,449, Docket ID ED-2021-OCR-0068, 2–5 (June 8, 2021); *Legality of "Dear Colleague" Letter on K-12 School Discipline Policies*, Parents Defending Education (Mar. 13, 2025), https://defendinged.org/wp-content/uploads/2025/03/PDE-Letter-Ed-Dept-re-School-Discipline-final.pdf; *see also* Dissenting Statement of Commissioner Gail Heriot, U.S. Comm'n on Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connection to School to Prison Pipeline for Students of Color with Disabilities*, 177, 186 (2019) ("no evidence" for the "sweeping assertion").

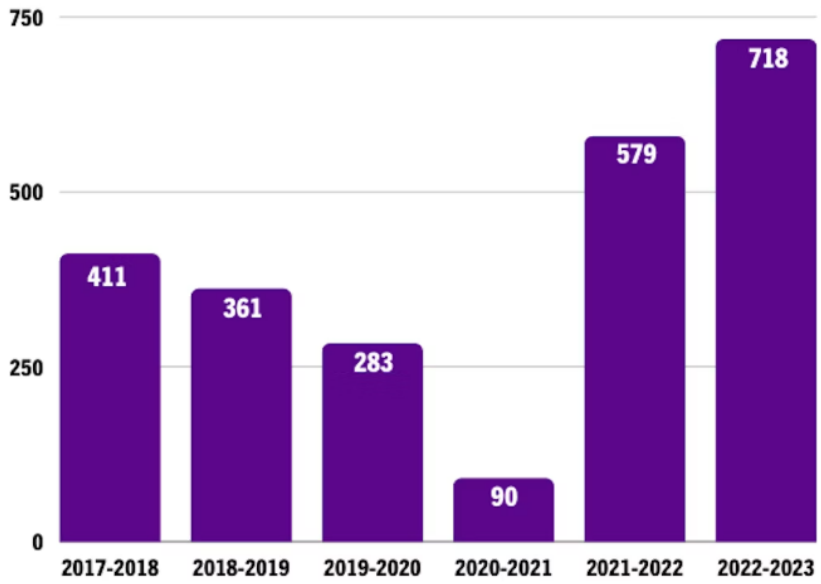
[68] *See* Arianna Prothero, *Student Behavior Isn't Getting Any Better, Survey Shows*, Educ. Week (Apr. 20, 2023), https://www.edweek.org/leadership/student-behavior-isnt-getting-any-better-survey-shows/2023/04 ("Seventy percent of educators—including 1,058 teachers, principals, and district leaders—say students in their schools are misbehaving more now compared with the fall of 2019, in an April 2023 survey. Student misbehavior has ticked up between 2021 and 2023.").

[69] 42% of teachers reported instances of physical violence with students prior to the pandemic, 14% during the pandemic and 56% after the pandemic restrictions lifted. *School Pulse Panel*, Institute of Education Sciences (2022), https://ies.ed.gov/schoolsurvey/spp/#read-more.

[70] Caitlynn Peetz, *Here's How Educators Feel about Their Safety at School*, Educ. Week (June 23, 2023), https://www.edweek.org/leadership/heres-how-educators-feel-about-their-safety-at-school/2023/06. And as the American Psychological Association reported: "Aggression and violence against educators and school personnel are major concerns that affect the well-being of school personnel and the students and families they serve. This study highlights a growing crisis in our schools that needs to be addressed nationally…. As a result, the percentage of teachers expressing intentions to resign or transfer rose from 49% during the pandemic to 57% afterward, the researchers found…. Teacher and staff turnover creates additional challenges for schools and students and makes the job more difficult for those who stay." Task

The number of students found with firearms also increased with the return of "disparate impact" policies. After President Trump's first administration's repeal of the Obama-era disparate impact guidance in 2018, the number of students with firearms fell to a low of 283 (even before COVID-related school closures) and then to a low of 90 (after those school closures).[71] But after the Biden's administration reintroduced Obama-era disparate impact policies, this number rose to 579 within a year, and rose to 718 in the following year.[72]

Figure 1: Number of firearms reported in schools: School Years 2017–2023



III. Neither Title VI nor the Constitution requires the use of race in student discipline, but prohibit the use of race absent truly extraordinary circumstances.

No American student should suffer known risks to learning or life based on a fundamental misunderstanding of the requirements of Title VI and the Constitution. Though the Department during President Trump's first administration took important steps to uphold Title VI and the Constitution and to protect students and teachers, the Biden administration reversed course and aligned itself with other administrations that pushed race-based policies and theories of disparate impact in the context of school discipline that were contrary to law and that resulted in disastrous consequences for students, teachers, and schools more broadly. The back-and-forth of administrative positions and actions under different administrations should not continue. After the U.S. Supreme Court's decision in *Loper Bright*,[73] holding that

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Force on Violence Against Educators and School Personnel, *Violence Aggression Against Educators Grew Post-Pandemic*, Am. Psychological Assoc. (May 30, 2024), https://www.apa.org/news/press/releases/2024/05/violence-against-educators-post-pandemic.

[71] *See, e.g.*, *Student Firearm Carrying in Schools*, Brady (last accessed July 15, 2026), https://www.brady-united.org/resources/research/analysis-student-firearm-carrying-schools.

[72] *Id.*

[73] 603 U.S. 369, 400 (2024).

statutes "have a single, best meaning" that is "fixed at the time of enactment," and in light of the Department's July 24, 2026, final rule modifying its regulations to eliminate disparate-impact liability, 91 Fed. Reg. 46,733 (July 24, 2026), this administration and future administrations cannot rewrite constitutional and statutory law by administrative fiat.

To protect students and ensure they have a safe and well-ordered learning environment, it is imperative for administrations to adhere to Title VI and the Constitution and for the Department here to provide guidance on the scope of Title VI and the Constitution in the context of student discipline. Neither Title VI nor the Constitution prohibits unintentional disparate impact; nor do they require schools to consider race in student discipline to address an unintentional disparate impact. In fact, the use or consideration of race by a school in student discipline violates Title VI and the Constitution absent truly extraordinary circumstances that satisfy strict scrutiny.

A. Title VI and the Constitution prohibit intentional discrimination, not unintentional disparate impact.

Title VI and the Constitution do not prohibit unintentional disparate impact; they prohibit intentional discrimination. Although data on disparate outcomes can be probative evidence of disparate treatment on a protected basis, disparate outcomes alone cannot substitute for the ultimate inquiry—whether the school *intentionally* discriminated based on race.

Recently in rulemaking, the Department rejected prior administrations' erroneous interpretation of Title VI to include disparate-impact liability. 91 Fed. Reg. 46,733 (July 24, 2026). As the Department explained, the Supreme Court has made clear that Title VI prohibits "intentional discrimination" and "permits" race-neutral policies that result in disparate outcomes when there is no discriminatory intent or disparate treatment based on race.[74] That is the "single, best meaning" of Title VI.[75] That reading of Title VI is confirmed by the fact that the Department's prior disparate-impact-liability interpretation itself encourages the very racial-conscious decision-making that violates Title VI and the Constitution's equal-protection guarantee.[76] For these reasons and the others explained in the Department's recent rulemaking amending its regulations to eliminate disparate-impact liability, neither Title VI nor the Constitution prohibits unintentional disparate impact but prohibits intentional discrimination.[77]

Without sufficient evidence of discriminatory intent or disparate treatment, disparate impact from the application of a facially neutral policy does not violate Title VI. And mere statistical disparities generally cannot show discriminatory intent or disparate treatment.[78] That is especially true in the school-discipline

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[74] *See, e.g.*, *Sandoval*, 532 U.S. at 280–81, 286 n.6.

[75] *See Loper Bright*, 603 U.S. at 400 (explaining that courts must give a statute its "single, best meaning" because "'every statute's meaning is fixed at the time of enactment").

[76] *See, e.g.*, Executive Order 14,281, 90 Fed. Reg. at 17,537 ("Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability. It not only undermines our national values, but also runs contrary to equal protection under the law and, therefore, violates our Constitution.").

[77] 91 Fed. Reg. at 46,734–38.

[78] There are rare circumstances where statistical disparity in outcome is so overwhelming, given the context, that a discriminatory purpose can be inferred from a facially neutral policy or law. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960); *Vill. of Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges

context because demographic disparities in school discipline are far more likely to reflect disparities in student behavior[79]—which are themselves the product of disparities in myriad other areas of life—than intentional discrimination by teachers and administrators.

Moreover, in the context of school discipline, teacher discretion and situational judgment is paramount. As the Federal Commission on School Safety found:

> By telling schools that they were subject to investigation, and threatening to cut federal funding because of different suspension rates for members of different racial groups, the Guidance gave schools a perverse incentive to make discipline rates proportional to enrollment figures, regardless of the appropriateness of discipline for any specific instance of misconduct.
>
> In response to OCR investigations involving school data, some school districts reportedly adopted racial quotas in school suspensions. Others entered into settlements with OCR that could be interpreted as imposing racial proportionality requirements in school discipline data.
>
> Although the Guidance did not expressly require any school to impose a strict racial quota in suspensions, it is inappropriate for the federal government to pressure schools to establish such quotas. The Guidance presented hypothetical examples of discipline policies that might lead to a federal investigation, thereby incentivizing schools to preemptively shield themselves from federal oversight by minimizing racial disparities in discipline rates. Such expansive application of disparate impact theory is in tension with the purpose of Title VI and leads to school environments where discipline decisions may be based on race rather than student safety.[80]

The Seventh Circuit has adopted a similar rationale. In *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, the court invalidated a lower-court decree that would have required the school district to engage in racial-proportionality requirements in discipline unless it eliminated all teacher discretion in applying discipline. The court reasoned that "important disciplinary criteria … are unavoidably judgmental and hence 'subjective'" and, again, that "racial disciplinary quotas violate equity in its root sense" because

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from the effect of the state action even when the governing legislation appears neutral on its face…. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence." (cleaned up)); 91 Fed. Reg. at 46,737. In those rare circumstances, statistical disparity of outcome is *circumstantial evidence* of *intentional* discrimination, and the defendant can, of course, rebut that inference as an evidentiary matter. *See, e.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) ("Statistical disparities … may be used as evidence to establish intentional discrimination."). This use of statistical disparity to establish, as an evidentiary matter, disparate-*treatment* liability radically differs from disparate-*impact* liability.

[79] Max Eden, *School Discipline Reform Is Harming Students' Academic Achievement and Safety*, The Manhattan Institute (June 11, 2019) (alteration in original) (citing EAB, *Breaking Bad Behavior: The Rise of Classroom Disruptions in Early Grades and How Districts Are Responding* (2019)), https://manhattan.institute/article/school-discipline-reform-is-harming-students-academic-achievement-and-safety.

[80] *Final Report of the Commission on School Safety*, *supra*, at 71.

"[t]hey entail either systematically overpunishing the innocent or systematically underpunishing the guilty."[81]

Thus, for purposes of Title VI and the Constitution's equal-protection guarantee, there is nothing inherently unlawful with a school adopting discipline policies with mandatory punishments, discipline standards that give schools flexibility in enforcing discipline policies, or discipline standards that require a teacher's or a school administrator's use of discretion (*e.g.*, offenses for classroom disruption, disrespect, insubordination, or inappropriate behavior)—if the discipline policies are facially neutral, applied even-handedly without regard to race, and adopted and applied without wrongful racial intent. Indeed, it may be beneficial to adopt flexible policies that allow teachers and school administrators to act based on their experience and unique understanding of the students and the classrooms.[82]

In sum, neither Title VI nor the Constitution requires schools to eliminate or reduce mere statistical racial disparities in student discipline. To the extent that schools have used or considered race in the disciplinary process or in crafting discipline policy in an attempt to systematically and consciously eliminate or reduce statistical racial disparities, these schools' practices sacrifice individualized disciplinary treatment of students for racial considerations, are not required by Title VI or the Constitution, and may violate Title VI or the Constitution, as further explained below.

B. The use of race in student discipline violates Title VI and the Constitution absent extraordinarily rare circumstances that satisfy strict scrutiny.

As explained, Title VI and the Constitution prohibit intentional discrimination based on race. Indeed, "the general rule" is that Title VI and the Constitution "almost never permit[]" a federal funding recipient or the government "to discriminate on the basis of race."[83] When an institution discriminates based on race, that discrimination is illegal unless the institution satisfies strict scrutiny.[84] Strict scrutiny is "unforgiving," and as "a practical matter," is "fatal in fact absent truly extraordinary circumstances."[85]

Those same rules apply in student discipline. The right to "public education 'must be made available to all on equal terms'" without regard to race.[86] Title VI and the Constitution forbid institutions from "us[ing] race as a factor in affording educational opportunities among its citizens."[87] "[R]acial discrimination is invidious in all contexts," including student discipline.[88] Thus, the use or consideration of race in student discipline is illegal unless the school surmounts strict scrutiny, which occurs only in truly extraordinary and rare circumstances.

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[81] 111 F.3d 528, 538 (7th Cir. 1997).

[82] *See, e.g.*, *Final Report of the Commission on School Safety*, *supra*, at 67 ("Teachers are often best positioned to identify and address disorderly conduct at school. They have an understanding of the students entrusted to their care and can see behavioral patterns on an ongoing basis.").

[83] *Callais*, 146 S. Ct. at 1152.

[84] *See, e.g.*, *Fisher*, 570 U.S. at 307; *SFFA*, 600 U.S. at 206–07; *Callais*, 146 S. Ct. at 1146, 1152; *Constitutionality of Race-Based Department of Education Programs*, *supra*, slip op. at 5.

[85] *Free Speech Coal.*, 606 U.S. at 484–85.

[86] *SFFA*, 600 U.S. at 204.

[87] *Id.* (cleaned up).

[88] *Id.* at 214.

1. The consideration of race in student discipline is race discrimination.

For Title VI and the Constitution, race discrimination occurs in numerous ways, including when a school adopts a policy that facially classifies based on race, adopts a facially neutral policy with racially discriminatory intent or purpose, uses race, intentionally treats individuals differently based on race, or has race play a role in its decisionmaking. Any action "'that treats a person differently on account of his race or ethnic origin is inherently suspect.'"[89] Race discrimination occurs when a federal funding recipient or the government "distributes burdens or benefits on the basis of individual racial classifications."[90] "A benefit provided to some [students] but not to others necessarily advantages the former group at the expense of the latter."[91] Thus, the consideration or use of race in school-discipline policies, practices, or decisions constitute race discrimination.

In the context of student discipline, race discrimination can occur in numerous ways. For example, a school discriminates based on race when it decides to forego, reduce, or increase discipline because of the student's race. Similarly, a school discriminates based on race when it foregoes, reduces, or increases a student's discipline to ensure that the discipline matches that of another student simply because that other student is of a different race. Such race-based or race-conscious decision-making, like racial quotas and racial balancing, constitutes race discrimination.[92] Further, a school's decision to change its discipline policies with the purpose of avoiding or reducing racial disparities in discipline constitutes race discrimination. In such a circumstance, "race played a role in a decision made by" the school.[93] While it is not race discrimination under Title VI for a school to design its discipline policies to ensure they are fair to all students regardless of race, it is race discrimination under Title VI for the school to evaluate the racial outcomes of their discipline policies and to make decisions based on or because of those racial outcomes.

By contrast, it is not race discrimination when a school adopts a facially neutral discipline policy with mandatory punishments if the school evenhandedly enforces the policy with respect to race and did not adopt the policy because of race. Nor is it race discrimination when the school adopts discipline policies with standards that give schools flexibility in enforcing the policies or that require a teacher or a school administrator to use discretion in applying the policies if the discipline policies are facially neutral, applied evenhandedly without regard to race, and adopted and applied without wrongful racial intent.

2. Race discrimination in student discipline is subject to strict scrutiny, which is fatal in fact absent truly extraordinary circumstances.

Because "all racial classifications … must be analyzed … under strict scrutiny," the use or consideration of race in school discipline must survive strict scrutiny to not violate Title VI and the Constitution.[94] To surmount strict scrutiny, the race discrimination must further a "compelling … interest[]" and the use of race must be "'narrowly tailored'—meaning 'necessary'—to achieve that interest."[95] The school "bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably

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[89] *Fisher*, 570 U.S. at 310.

[90] *Parents Involved*, 551 U.S. at 720 (plurality).

[91] *See SFFA*, 600 U.S. at 218–19.

[92] *People Who Care*, 111 F.3d at 538.

[93] *Callais*, 146 S. Ct. at 1146; *see also, e.g.*, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 544–45 (2024) (Alito, J., dissenting from denial of certiorari).

[94] *Adarand*, 515 U.S. at 227.

[95] *SFFA*, 600 U.S. at 206–07.

legitimate.'"[96] Strict scrutiny is "unforgiving" and "'the most demanding test known to constitutional law.'"[97] Strict scrutiny, "as a practical matter," is "fatal in fact absent truly extraordinary circumstances."[98]

The Supreme Court has "identified only two compelling interests that [may] permit resort to race-based … action": (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" and (2) "avoiding imminent and serious risks to human safety in prisons."[99] Interests that are stated "at a high level of generality" or are imprecise are insufficient.[100] So too are interests that "cannot be subjected to meaningful judicial review," such as interests that are "elusive" or "not sufficiently coherent" or "measurable."[101]

In general, the only compelling interest relevant in the school-discipline context is "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[102] Thus, as relevant in the school-discipline context, to assert a compelling interest, the school must identify specific, identified instances of past discrimination that violated the Constitution or a statute that the school discipline policy, practice, or decision is remedying.

To constitute a compelling interest of remediating specific, identified instances of past discrimination that violated the Constitution or a statute, the school must satisfy two conditions.[103] First, the discrimination must be "identified discrimination."[104] The institution "must identify the specific instances of past discrimination that it aims to remediate and, in light of that specification, must determine the precise scope of the injury it seeks to remedy."[105] The desire to "alleviate the effects of societal discrimination" is not sufficient.[106] Neither is "[a] generalized assertion of past discrimination in a particular industry or region."[107]

Second, after identifying the specific instance of discrimination and before taking action, the school "must have a strong basis in evidence to conclude that its remedial action is necessary."[108] The instances of past discrimination must be shown by particularized evidentiary findings by the entity asserting the

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[96] *Fisher*, 570 U.S. at 310 (cleaned up).

[97] *Free Speech Coal.*, 606 U.S. at 484; *see also, e.g.*, *SFFA*, 600 U.S. at 206 (calling strict scrutiny "daunting"); *Fisher*, 570 U.S. at 310 ("searching inquiry").

[98] *Free Speech Coal.*, 606 U.S. at 485; *see also, e.g.*, *SFFA*, 600 U.S. at 208 ("the most extraordinary case").

[99] *SFFA*, 600 U.S. at 207; *see generally, e.g.*, *Callais*, 146 S. Ct. at 1152–53; *Constitutionality of Race-Based Department of Education Programs*, *supra*.

[100] *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021).

[101] *SFFA*, 600 U.S. at 214–15.

[102] *Id.* at 207.

[103] *Callais*, 146 S. Ct. at 1152–53 (citing *Shaw v. Hunt*, 517 U.S. 899, 909 (1996)).

[104] *Id.* (cleaned up).

[105] *Id.* (cleaned up).

[106] *Shaw*, 517 U.S. at 909–10; *see also Callais*, 146 S. Ct. at 1152–53.

[107] *Shaw*, 517 U.S. at 909.

[108] *Callais*, 146 S. Ct. at 1153 (cleaned up).

compelling interest.[109] In general, mere "[s]tatistical disparities don't cut it."[110] And as the Supreme Court has repeatedly emphasized, "'[r]acial balance is not to be achieved for its own sake'";[111] "'outright racial balancing'" is not a compelling interest but is "'patently'" unlawful.[112] Race-based action simply cannot be justified by an interest in "assur[ing] … some specified percentage of a particular group merely because of its race or ethnic origin."[113]

Even if the school establishes a compelling interest, it must then show why its "use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest."[114] That, too, is a heavy burden. Whether the use of race is necessary to achieve a compelling interest can require analyzing numerous considerations.[115] For example, it is relevant whether there are "workable race-neutral alternatives."[116] If a race-neutral approach promotes the compelling interest "about as well and at tolerable administrative expense," then the school "may not [use or] consider race."[117] Also relevant is whether the "racial categories" the school uses are "arbitrary," "undefined," "overinclusive," or "underinclusive."[118] Under these principles, a system of racial quotas will never satisfy narrow tailoring. That is because racial quotas are definitionally incompatible with the "truly individualized consideration" that strict scrutiny requires.[119]

Though the Department does not prejudge any particular case as the inquiry generally may involve a highly fact-specific inquiry of the particular facts and circumstances of the individual case, law and precedent establish that the intentional use of race in student discipline is highly suspect and violates Title VI and the Constitution "except in the most extraordinary case" where strict scrutiny is satisfied.[120]

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[109] *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 404 (2022) ("'[T]he institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" (emphasis in original) (quoting *Shaw*, 517 U.S. at 910)); *Constitutionality of Race-Based Department of Education Programs*, *supra*.

[110] *Vitolo*, 999 F.3d at 361–62.

[111] *Parents Involved*, 551 U.S. at 729–30 (plurality).

[112] *SFFA*, 600 U.S. at 223.

[113] *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003).

[114] *SFFA*, 600 U.S. at 207.

[115] *See, e.g.*, *Constitutionality of Race-Based Department of Education Programs*, *supra*, slip op. at 7–8 (listing "five factors for determining whether a race-based government action is narrowly tailored": (1) "whether the race-based measures are applied flexibly or amount to a per se unconstitutional quota," (2) "whether the government has made a good-faith effort to achieve its policy goals through workable race-neutral alternatives," (3) "whether the program has a definite duration," (4) "whether the measure uses arbitrary or undefined racial categories," and (5) "whether … the government has made appropriate steps to minimize the burden on other racial groups").

[116] *Fisher*, 570 U.S. at 312.

[117] *Id.* (internal quotation marks omitted).

[118] *SFFA*, 600 U.S. at 215–16.

[119] *Fisher*, 570 U.S. at 334.

[120] *SFFA*, 600 U.S. at 208.

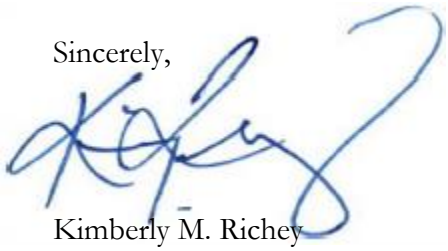
IV. Conclusion

Parents and their minor students have enough things to worry about. Whether their children will be safe and treated equally based on race when they drop them off at school or walk them to the bus stop each morning should not be one of them. Nor should teachers fear for their safety when they stand in front of a classroom. Schools should no longer be hamstrung by erroneous interpretations of Title VI and the Constitution. To protect students from unlawful discrimination and to ensure they have a safe and well-ordered learning environment, it is imperative to follow the original understanding of Title VI and the Constitution.

Title VI and the Constitution prohibit intentional discrimination, not unintentional disparate impact. As the Department's recent rulemaking shows,[121] neither Title VI nor the Constitution require the consideration or use of race in student discipline, and race-neutral student-discipline policies administered in an evenhanded way and adopted and applied without wrongful racial intent or different treatment based on race do not violate Title VI or the Constitution. Instead, Title VI and the Constitution prohibit the consideration or use of race in school disciplinary decisions, "except in the most extraordinary case."[122] While exceptions are theoretically possible, they are, at best, rare and exceedingly narrow: A school must establish that the use of race furthers a compelling interest and is narrowly tailored to that interest.[123]

Thank you for your commitment to promoting a safe and stable learning environment, free of racial discrimination, for America's students.[124]

Sincerely,



Kimberly M. Richey
Assistant Secretary for Civil Rights

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[121] 91 Fed. Reg. at 46,733–42.

[122] *SFFA*, 600 U.S. at 208.

[123] *Id.* at 206–08.

[124] To reiterate, this guidance is an interpretive rule that does not determine anyone's rights or obligations or have direct legal consequences. This guidance merely advises the public of the Department's interpretation of the statutes and rules that it administers. The Department does not prejudge any particular investigation. Determining whether race discrimination is occurring or whether a use of race surmounts the strictures of strict scrutiny may be a highly fact-specific inquiry based on the particular facts and circumstances of each case. The Department is available to provide technical assistance to support schools' efforts to comply with Title VI and to provide a safe and stable learning environment for students that is free of unlawful race discrimination.