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ROLES FOR NEUTRALS IN REMEDYING THE SCHOOL DISCIPLINE GAP

By
Stephen S. Worthington*

I. INTRODUCTION

At the outset of 2014, the United States Departments of Education and Justice released guidance that could dramatically affect civil rights enforcement in school discipline cases. In a “Dear Colleague” letter dated January 8, 2014, the Departments clarified that, when investigating racial discrimination in school discipline under Titles IV and VI of the 1964 Civil Rights Act, they will analyze discrimination in terms of both *different treatment* and *disparate impact*.¹ In other words, the Departments will not only investigate whether schools disciplined students differently on the basis of race, but will also investigate whether a facially neutral disciplinary policy has “a disproportionate and unjustified *effect*” on different racial groups, regardless of the policy’s intent.²

The Departments’ decision to pursue disparate impact discrimination in school discipline could have a dramatic impact for two reasons. First, mounting evidence suggests that racial disparities in school discipline rates are widespread.³ For instance, a 2015 study by the Civil Rights Project at the University of California, Los Angeles (“UCLA”) found that 10.1% of U.S. secondary students were suspended at least once during the 2011-2012 school year.⁴ Nearly half of school districts with a substantial number of black secondary students, however, suspended more than 15% of those students, while less than one tenth of school districts with a substantial number of white

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¹ U.S. DEPARTMENT OF JUSTICE AND U.S. DEPARTMENT OF EDUCATION, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [hereinafter DOJ & ED].

² *Id.* at 7 (emphasis in original).

³ *See* U.S. DEPARTMENT OF EDUCATION – OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE (2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> (minority students are disciplined at higher rates than White students at the national level); *see also* DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS (2013), *available at* <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools> (same).

⁴ DANIEL LOSEN, CHERI HODSON, MICHAEL A. KEITH II, KATRINA MORRISON, & SHAKTI BELWAY, THE CENTER FOR CIVIL RIGHTS REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 4 (2015), *available at* http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf.

secondary students suspended more than 15% of those students.⁵ Analysts refer to such disparities as the “school discipline gap.”⁶

Second, only the Departments have the legal authority to remedy disparate impact discrimination under Title VI of the 1964 Civil Rights Act (“Title VI”). In *Alexander v. Sandoval*, the United States Supreme Court held that Title VI only provides a private cause of action for intentional discrimination.⁷ Because *Sandoval* precludes federal courts from affording a remedy to private plaintiffs harmed by disparate impact discrimination, the task of remedying such discrimination is left to federal agencies using their regulatory power.⁸ Further, since discipline disparities are widespread and can only be remedied under Title VI through agency action, the Departments’ decision may drastically increase the number of school districts who find themselves subject to civil rights enforcement.⁹

In addition to clarifying how the Departments will investigate civil rights violations, the “Dear Colleague” letter explained how the Departments will take corrective action.¹⁰ Before initiating a formal enforcement action, the Departments will seek to form a voluntary agreement with a school to remedy any violations.¹¹ Some remedies may target a discrete number of affected students.¹² Other remedies would require schools to make systemic changes, such as revising discipline policies, adopting

⁵ LOSEN, HODSON, KEITH, MORRISON, & BELWAY, *supra* note 4, at 22. Here, a school district is deemed to have “substantial enrollment” of a racial group when at least 10 students who are members of the group are enrolled in the district. *See id.* at 15.

⁶ CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 1 (Daniel J. Losen ed., 2015).

⁷ 532 U.S. 275 (2001).

⁸ Under regulations promulgated by the Departments, schools that receive federal funding may not use “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of objectives of the program as respect individuals of a particular race, color, or national origin.” 34 C.F.R. § 100.3(b)(2); *see also* 28 C.F.R. §42.104(b)(2). Because the *Sandoval* parties did not directly challenge these regulations, the Supreme Court left them intact. 532 U.S. at 281. *See also* CATHERINE Y. KIM, DANIEL J. LOSEN, & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 39-40 (2010) (“[E]ven after *Sandoval*, administrative regulations interpreting Title VI to prohibit disparate impact may still be enforced by federal agencies.”).

⁹ *See* LOSEN, HODSON, KEITH, MORRISON, & BELWAY, *supra* note 4, at 31 (The Department of Education “started to step up enforcement efforts regarding potentially discriminatory discipline” even before the Departments released their Dear Colleague letter).

¹⁰ DOJ & ED, *supra* note 1, at 21.

¹¹ *Id.*

¹² Discrete remedies include, *e.g.*, modifying the disciplinary records of students who were inappropriately disciplined or providing compensatory education for students who were inappropriately suspended or expelled. *Id.*

specific discipline strategies, and conducting regular assessments of discipline practices.¹³

The Departments' decision to target disparate impact discrimination in school discipline may lead to greater demand for third party neutrals in discipline gap cases. The new focus on disparate impact comes at the same time as steadily increasing demands on the Departments' limited resources. In particular, the federal office tasked with resolving civil rights complaints against schools, the Department of Education's Office for Civil Rights ("OCR"), must bear a dramatically increasing caseload with a steadily declining staff.¹⁴ As a result, the caseload per staff member at OCR has nearly doubled over the past ten years.¹⁵ Nevertheless, OCR's own written procedures demand that its enforcement activities "will be thorough, and will be conducted throughout the life of every case to ensure high quality decisions, prompt investigations, and efficient use of OCR resources."¹⁶ Given these strong demands and limited resources, OCR may seek to economize its processing of discipline gap cases by enlisting outside assistance.¹⁷ This article will explore the potential roles that neutral third parties can play in providing such assistance. As a preliminary matter, this article will explain the theoretical bases for using consensual processes in administrative actions targeting the school discipline gap. Next, this article will consider OCR's current use of consensual processes. Finally, this article will explain specific functions neutrals could serve in enforcing antidiscrimination law in the school discipline context, including mediating, consulting, and monitoring.

II. USING CONSENSUAL PROCESSES TO REMEDY THE SCHOOL DISCIPLINE GAP

Disparate impact discrimination is systemic in nature, and systemic discrimination will require systemic remedies.¹⁸ Systemic remedies must be implemented by those who

¹³ DOJ & ED, *supra* note 1, at 21-22.

¹⁴ An OCR report revealed that, from 2002-2012, the number of complaints received by OCR grew by 57% (5,019 to 7,833), while the number of full-time equivalent staff fell by 17% (698 to 582). U.S. DEPARTMENT OF EDUCATION – OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION at 21 (2012), *available at* <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf> [hereinafter "OCR, HELPING TO ENSURE EQUAL ACCESS"].

¹⁵ *See id.*

¹⁶ U.S. DEPARTMENT OF EDUCATION – OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL (CPM) §301(a) (rev. 2015) *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [hereinafter OCR, CPM].

¹⁷ *See* Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005) (advocating for expanded use of special masters by federal courts in light of increasing budgetary pressures and case complexity).

¹⁸ *See* OCR, CPM, *supra* note 16, § 303(b) (resolution agreements must include steps to remedy any systemic discrimination); *see also* DOJ & ED, *supra* note 1, at 14-18 (noting several examples of systemic violations requiring systemic relief).

operate the system, specifically the administrators and teachers tasked with disciplining students. Therefore, remedying a school's discipline gaps cannot succeed without the acceptance and cooperation of the school.¹⁹ Schools will be much more willing to accept and implement a remedy if they have a strong voice in shaping the remedy.²⁰ Involving the target school in crafting a remedy for discipline gaps will thus increase the likelihood that the remedy will succeed.²¹

The affected parties' influence in developing the remedy is especially important in discipline gap cases because such cases typically involve school systems administered by public officials and members of historically marginalized racial or ethnic groups. Using consensual processes to remedy discrimination in this context is especially fitting for two reasons. First, promoting the participation of local school leaders in shaping the remedy will preserve the tradition of local control over public education. The historical and continuing importance of local control is enshrined in Supreme Court precedent.²² Because intensifying OCR's intervention in school discipline may be perceived as officious federal interference,²³ OCR's remedial processes will be received more favorably if they provide a voice for officials of targeted schools.²⁴ Second, promoting the participation of communities harmed by disparate impact discrimination can help to empower those communities. Overzealous intervention by OCR may inadvertently perpetuate the marginalization of these communities by fostering an "unhealthy reliance on the benevolent paternalism of the federal government."²⁵ By providing a direct voice

¹⁹ Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1365 (1991) ("[T]he remedial stage poses the challenge of achieving the understanding and acceptance of the remedy by those who must live with it.").

²⁰ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163 (rev. 2006) ("Those who feel that they have had a hand in the decision are typically much more accepting of its outcome, irrespective of what the outcome is.").

²¹ Sturm, *supra* note 19, at 1392 ("Participation in the formulation of the remedy serves the instrumental goal of increasing the likelihood that the remedy will succeed by promoting a higher level of acceptance of and commitment to the remedy.").

²² *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools;").

²³ See, e.g., Dan Liljenquist, Op-Ed, *New DOJ Guidelines Would Hurt School Discipline*, DESERET NEWS, Jan. 16, 2014, available at <http://www.deseretnews.com/article/865594198/New-DOJ-guidelines-would-hurt-school-discipline.html?pg=all> (former state legislator criticizing the Departments as "act[ing] like a national school board").

²⁴ Sturm, *supra* note 19, at 1403-06 ("[T]he allocation of governmental power critics identify an important attribute of legitimate public remedial decision-making: respect for the integrity of state and local governmental institutions.").

²⁵ Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1425 (2000); cf. Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 36 (2012) (explaining how mediation can enhance self-determination and mutual consideration).

for affected communities in shaping the remedy rather than seizing remedial control for itself, OCR can empower such communities to combat systemic discrimination.²⁶

The importance of involving the affected participants is supported by psychological research on perceived fairness, termed “procedural justice.”²⁷ Parties affected by a decision are more likely to comply when they perceive the decision-making process as fair.²⁸ One critical contributor to procedural justice is the parties’ control over the decision-making process.²⁹ Procedural justice literature distinguishes between two types of control: *decision control* (control over the actual decision) and *process control* (control over how a party’s case is presented to the decision-maker).³⁰ Both types of control have independent effects on perceived fairness.³¹ Perhaps surprisingly, process control can have an even greater effect than decision control.³² For discipline gap cases, this means that influence in crafting the process to shape the remedy may be more important than influence over actually shaping the remedy. Accordingly, the participation of the parties in fashioning procedures and selecting neutrals to shape the remedy will be crucial to the remedy’s legitimacy and ultimate success.

III. OCR’S CURRENT REMEDIATION PROCEDURES

Although OCR currently incorporates some consensual processes in its written remediation procedures, OCR can improve these procedures by placing greater emphasis on formal findings and consensually selected neutrals. This section first describes consensual processes in OCR’s current complaint resolution procedures, then explains how greater emphasis on formal findings and party-selected neutrals can improve those procedures.

OCR’s procedures feature three consensual processes: early complaint resolution, resolution during investigation, and resolution following investigation.³³ In early complaint resolution, OCR acts as an impartial, confidential facilitator to help the parties

²⁶ Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons learned from Antoine v. Winner School District*, 54 N.Y.L. SCH. L. REV. 955, 964 (2009).

²⁷ LEONARD L. RISKIN, JAMES E. WESTBROOK, CHRIS GUTHRIE, RICHARD C. REUBEN, JENNIFER K. ROBBENOLT & NANCY A. WELSH, *DISPUTE RESOLUTION AND LAWYERS: CASES AND MATERIALS* 897 (5th Ed. 2014).

²⁸ TYLER, *supra* note 20, at 82.

²⁹ *Id.* at 137 (“People also feel that procedures are fairer when they believe they have had some control in the decision-making procedure.”).

³⁰ *Id.* at 115.

³¹ *Id.* at 116.

³² *Id.* at 147.

³³ OCR, CPM, *supra* note 16, §§ 201, 302, 303(b).

reach a mutually acceptable resolution.³⁴ OCR offers the early complaint resolution process to the parties when it determines that the process is appropriate for a particular complaint.³⁵ OCR does not approve or monitor agreements reached through the early complaint resolution process,³⁶ but does consider breach of such agreements when investigating future complaints.³⁷

OCR may also use consensual processes to form resolution agreements during the course of investigation.³⁸ As in early complaint resolution, OCR will inform schools of this option when it determines that doing so is appropriate in a particular case.³⁹ If schools choose to pursue this process, OCR may temporarily suspend further investigation while negotiations are pending.⁴⁰

If resolution is not reached over the course of investigation and OCR determines that the school is in violation of civil rights law, OCR will propose a resolution agreement following investigation.⁴¹ After findings and a proposed resolution agreement are issued, OCR will negotiate with the school to reach a final agreement.⁴² If OCR and the school reach impasse or are unable to reach agreement within 90 days of the proposal, OCR will notify the school that it will commence a formal enforcement action unless resolution is reached within 10 days of the notice.⁴³

OCR would benefit from emphasizing formal findings in its enforcement activities because formal findings more effectively serve OCR's investigative function, deter civil rights violations, and inform remedial determinations. OCR's written procedures provide that "OCR will ensure that investigations are legally sufficient and that they are dispositive of the allegations and issues raised."⁴⁴ Agreements reached through early complaint resolution or during investigation undermine this function by

³⁴ OCR, CPM, *supra* note 16, § 201(a).

³⁵ *Id.* § 201.

³⁶ *Id.* § 201.

³⁷ *Id.* § 205.

³⁸ *Id.* § 302.

³⁹ OCR, CPM, *supra* note 16, § 302.

⁴⁰ *Id.* § 302(a) (providing that investigations may be suspended for up to 30 days pending resolution).

⁴¹ *Id.* § 303(b).

⁴² *Id.* § 303(b)(1).

⁴³ *Id.* §§ 303(b)(2)-(3).

⁴⁴ OCR, CPM, *supra* note 16, art. III.

foreclosing OCR from making dispositive findings.⁴⁵ OCR can better fulfill its investigative function by channeling its resources toward investigation rather than early resolution.⁴⁶ Shifting focus away from early resolution would also deter civil rights violations more effectively because schools would be more cautious about discipline policies and practices if they were less likely to resolve compliance issues without an admission or formal finding of wrongdoing.⁴⁷ Furthermore, formal findings would serve as a stronger deterrent than preliminary findings because OCR's commitment to formal findings would obviate attempts to persuade OCR to soften its investigative efforts.⁴⁸ Additionally, findings that are publicized can spur schools to remedy discipline gaps by rallying public support for systemic change.⁴⁹ Formal findings can also provide remedial decision-makers with clear information to craft appropriate remedial strategies.⁵⁰

OCR could channel resources toward investigation by enlisting outside neutrals to assist in its mediation and monitoring functions.⁵¹ Use of outside neutrals also holds other benefits, especially in the mediation context. OCR staff acting as mediators in school discipline gap cases must serve competing interests that may come into conflict. On one hand, limited resources require OCR to prioritize resolving cases quickly and efficiently.⁵² On the other hand, the mission of OCR is to "ensure equal access to education . . . through vigorous enforcement of civil rights."⁵³ OCR staff tasked with mediating complaints may be torn between protecting the interests of the complainant and reaching agreement swiftly.⁵⁴ Additionally, OCR's function as the enforcer of civil rights undermines the consensual nature of OCR-facilitated mediation because the mediator may inadvertently influence the parties. Complainants may be over-deferential

⁴⁵ Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 546 (1987) (former OCR attorney arguing that OCR's early complaint resolution procedures are "on shaky legal ground").

⁴⁶ See 34 C.F.R. §§ 100.7(c)-(d) (2014) (charging OCR with prompt investigation of alleged civil rights violations and conditioning resolution upon finding of noncompliance).

⁴⁷ Silver, *supra* note 45, at 541.

⁴⁸ *Id.* at 550 (OCR would be "more likely to acquiesce" to schools' position if OCR is not yet committed to its findings).

⁴⁹ See *id.* at 552 (formal findings "remind the relevant community . . . that such actions are illegal and will not be tolerated").

⁵⁰ *Id.* at 546-49.

⁵¹ See Fellows & Haydock, *supra* note 17.

⁵² OCR, CPM, *supra* note 16, § 301(a).

⁵³ *Id.* at Introduction.

⁵⁴ Silver, *supra* note 45, at 556.

to OCR mediators because of OCR's role in protecting their rights,⁵⁵ while schools may be over-deferential to OCR mediators because of OCR's control over the enforcement process.⁵⁶ OCR can avoid these ethical difficulties by allowing parties to consensually select a neutral mediator independent from OCR. Allowing the parties control over selecting mediators, consultants, and monitors also enhances the procedural justice of OCR's enforcement process.⁵⁷

IV. POTENTIAL ROLES FOR THIRD PARTY NEUTRALS IN DISCIPLINE GAP CASES

Neutrals can serve multiple roles in remedying school discipline gaps, especially if these procedures incorporate consensual processes. To provide context for illustrating potential roles for neutrals in discipline gap cases, this section frequently invokes the *Winner School District* case currently before the United States District Court for the District of South Dakota.⁵⁸ This section will first lay out the relevant factual background of the *Winner* case, and then turn to three potential roles for third party neutrals in the discipline gap context, drawing from the facts of *Winner* for illustrative purposes.

A. The Case of Winner School District

Winner School District is a rural school district bordering the Rosebud Sioux Reservation in South Dakota.⁵⁹ In 2006, the American Civil Liberties Union (“ACLU”) brought a class action against the school district in federal court on behalf of the district's Native American students, who comprise about one quarter of its enrollment.⁶⁰ The plaintiffs argued that the school district had violated Title VI by discriminating against Native American students in its school discipline practices, citing facts that supported both the *different treatment* and *disparate impact* theories of discrimination.⁶¹ The plaintiffs specifically alleged, *inter alia*, that Native American students were suspended

⁵⁵ Silver, *supra* note 45, at 556.

⁵⁶ *Id.* at 557.

⁵⁷ *Id.* at 526 (“[T]he greater the choice that a complainant or respondent has as to what procedure will be used, the greater the procedural fairness.”); *cf.* TYLER, *supra* note 20, at 147 (“[P]rocess control effects are larger than the effects of control over the decisions made by the third party.”).

⁵⁸ *W.I.H. v. Winner Sch. Dist. 59-2*, Civ. 06-3007, 2014 U.S. Dist. LEXIS 59904 at *3 (D.S.D. Apr. 29, 2014). The case was originally captioned “*Antoine v. Winner School District 59-2*” in 2006 but was re-captioned in 2014 after the named plaintiffs aged out of the class. Order to Substitute Parties and Amend Case Caption, *W.I.H. v. Winner School District 59-2*, Civ. 06-3007 (D.S.D. Apr. 28, 2014), ECF No. 78.

⁵⁹ Kim, *supra* note 26, at 967.

⁶⁰ *Id.* at 967, 969.

⁶¹ *Id.* at 967-69.

and arrested at ten times the rate of White students, and were punished more harshly for minor misconduct.⁶²

The school district consistently denied all allegations of wrongdoing, but agreed to mediate the dispute before a federal magistrate judge.⁶³ In the resultant consent decree, the school district agreed to make certain changes to its discipline policy and practices, hire a Native American ombuds, and engage an independent monitor to oversee implementation of the decree.⁶⁴ Most importantly, the school district and plaintiffs agreed to continue meeting with other stakeholders and a neutral facilitator to identify the specific goals and benchmarks that would determine how the district would reach full compliance with the decree.⁶⁵ These meetings, termed a “co-construction process” by the parties, involved parents of Native American students, representatives from the Rosebud Sioux Tribe, and school district officials.⁶⁶ During the process, the participants: identified baseline data on metrics such as disciplinary rates, academic achievement, and parental participation; set benchmarks for each of these metrics; and discussed strategies for reaching the benchmarks.⁶⁷ The participants approved these goals and strategies in writing, and their implementation was overseen by the independent monitor.⁶⁸

B. Proposed Roles for Neutrals

Given the normative and instrumental advantages of using consensual processes to remedy the school discipline gap, this subsection articulates three potential roles for third party neutrals in school discipline gap cases. Specifically, third party neutrals can: serve as mediators to facilitate the development of a remedy through a consensual “deliberative process;” provide expert consultation to implement remedial strategies; and monitor implementation of remedies.

1. Facilitating Deliberative Remediation

Professor Susan Sturm⁶⁹ has developed a model for crafting remedies targeted at complex public institutions using facilitative mediation.⁷⁰ Professor Sturm’s model,

⁶² Kim, *supra* note 26, at 968.

⁶³ *Id.* at 970.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 971.

⁶⁷ Kim, *supra* note 26, at 971.

⁶⁸ *Id.* at 971-72; Consent Decree at 11-12, *Antoine v. Winner Sch. Dist. 59-2*, Civ. 06-3007 (D.S.D. Dec. 10, 2007), ECF No. 64.

⁶⁹ George M. Jaffin Professor of Law and Social Responsibility, Columbia Law School.

termed the *deliberative* process, focuses on the participation of all key stakeholders.⁷¹ Although Professor Sturm articulates the deliberative model in the context of litigation, the model is readily applicable to administrative enforcement. Consistent with Professor Catherine Kim's⁷² use of Professor Sturm's model to explain *Winner's* co-construction process,⁷³ the following subsections rely extensively on *Winner* to illustrate how the deliberative model would operate in discipline gap cases. While the process followed in *Winner* "incorporated many of the elements" of the deliberative model,⁷⁴ it also departed from that model in several important ways discussed *infra*.

a. The Deliberative Remediation Process

In discipline gap cases, the deliberative process would begin after OCR issues a finding of noncompliance detailing the conditions which violate civil rights law,⁷⁵ such as wide racial disparities in suspension rates or in alternative education placement.⁷⁶ During this preliminary stage, OCR would describe the deliberative model to the complainants and school, and identify additional stakeholders whose input would be crucial in crafting a fair, effective remedy.⁷⁷ In the *Winner* case, participants included three Native American parents with children enrolled in the district, two representatives of the Rosebud Sioux Tribe, three district administrators, and three school board members.⁷⁸ After OCR invites the stakeholders to participate in the deliberative process, the participants would select an independent mediator.⁷⁹ OCR would then instruct the

⁷⁰ Sturm, *supra* note 19.

⁷¹ *Id.* at 1427-34.

⁷² Assistant Professor of Law, University of North Carolina. Professor Kim represented the plaintiffs during *Winner's* co-construction process as a staff attorney for the ACLU. Order to Admit Po Hac Vice, *Antoine v. Winner Sch. Dist. 59-2*, Civ. 06-3007 (D.S.D. Apr. 18, 2006), ECF No. 11.

⁷³ Kim, *supra* note 26.

⁷⁴ *Id.* at 972.

⁷⁵ For purposes of applying the deliberative model, a finding of noncompliance is analogous to a "court's finding of liability." See Sturm, *supra* note 19, at 1428-29.

⁷⁶ DOJ & ED, *supra* note 1, at 14-19.

⁷⁷ Sturm, *supra* note 19, at 1429.

⁷⁸ Kim, *supra* note 26, at 971.

⁷⁹ Sturm, *supra* note 19, at 1429-30. Professor Sturm distinguishes between facilitators, who promote communication and cooperation between the parties, and mediators, who help the parties devise and present options. *Id.* at 1423 n.371, 1432 n.405. Professor Sturm notes that the neutral in the deliberative model could act as facilitator or mediator. *Id.* at 1430. For ease of reference, I use the term "mediator" to refer to both functions.

participants in how to craft a remedy using the deliberative process.⁸⁰ Elements of the process include direct participation of all stakeholders involved in the deliberation, maintenance of minutes, consideration of each proposal using reasoned argument, focus on the noncompliant conditions identified in OCR's findings, and acceptance of the remedy by all participants.⁸¹

During actual negotiations, the mediator would help the participants determine how a decision will be reached, define their own roles, and undertake deliberations.⁸² Negotiations may include setting an agenda and ground rules for deliberation, additional fact-finding, identifying interests, brainstorming, and selecting goals and specific strategies to remedy the noncompliant conditions.⁸³ In the *Winner* case, strategies included reducing the number of suspensions and police referrals issued to Native American students by 50%, and limiting the number of Native American students who dropped out due to racial tensions.⁸⁴ Participants would also devise a method for monitoring the remedy's implementation.⁸⁵ For instance, the *Winner* parties agreed to hire an independent monitor selected by mutual consent.⁸⁶

If the participants reach a final consensus, the mediator would help them draft a resolution agreement to be authorized by their constituent organizations.⁸⁷ The participants would submit the agreement to OCR along with minutes from the negotiation and any factual reports used to make the decision.⁸⁸ If OCR is satisfied with the participants' procedural adherence to the deliberative process and their substantive remedy, OCR would authorize the resolution agreement.⁸⁹ If OCR is unsatisfied with either the process or outcome, OCR would remand for further deliberations.⁹⁰ If the participants are unable to reach agreement within the timeframe provided by OCR, OCR

⁸⁰ Sturm, *supra* note 19, at 1430.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Kim, *supra* note 26, at 971-72.

⁸⁵ Sturm, *supra* note 19, at 1441 n.441.

⁸⁶ Consent Decree, *supra* note 68, at 11-12.

⁸⁷ Sturm, *supra* note 19, at 1430-31.

⁸⁸ *Id.* at 1431.

⁸⁹ *Id.*

⁹⁰ *Id.*

would either initiate an administrative hearing or refer the case to the Department of Justice for judicial proceedings.⁹¹

As previously mentioned, the process followed by the *Winner* parties drew heavily from Professor Sturm's deliberative model, but also differed from that model in several important ways. First, while the deliberative process under Professor Sturm's model would not commence until after a formal finding that the public institution acted wrongfully, formal findings preceding the deliberative process in *Winner* were ambiguous at best.⁹² Second, the *Winner* parties didn't enter the deliberative process until after agreeing to do so in a consent decree mediated before a federal magistrate judge.⁹³ Consequently, some crucial facets of the remedy were crafted through the deliberative process, while other crucial facets were crafted through traditional mediation. Third, under Professor Sturm's model, participants determine how the remedy's implementation will be monitored during the deliberative process.⁹⁴ In *Winner*, however, the consent decree provided that a single neutral would both facilitate the deliberative process and monitor the remedy.⁹⁵

b. The Mediator's Role in Deliberative Remediation

Neutrals fulfilling the role of mediator in the deliberative process would be tasked with fostering reasoned deliberation among the participants with the goal of reaching consensus on the remedy. Specifically, the mediator would assist the participants in adhering to the process as outlined by OCR, communicating with each other, sharing and investigating relevant facts, identifying strategies, and arriving at consensus.⁹⁶ The issues that typify discipline gap cases, such as power imbalances, strong emotions stemming from parental impulses and ethnic tensions, and the complexity of educational institutions, will make the mediator's task more difficult. Successful mediators in discriminatory school discipline cases must be prepared to confront these issues.

⁹¹ Sturm, *supra* note 19, at 1431; OCR, CPM, *supra* note 16, §§ 601-602.

⁹² Winner School District underwent a compliance review by OCR from 1997 to 2000, when the district entered an agreement with OCR to address racial discrimination in its discipline practices. Kim, *supra* note 26, at 967-68. In 2004, OCR determined that the district had reached compliance based on reports submitted by the district, and released the district from oversight. *Id.* at 968. A subsequent investigation by the ACLU on behalf of the plaintiffs, however, found that discriminatory discipline practices persisted throughout that time. *Id.* at 968-69.

⁹³ Kim, *supra* note 26, at 970-72.

⁹⁴ Sturm, *supra* note 19, at 1441 n.441.

⁹⁵ Consent Decree, *supra* note 68, at 11-12.

⁹⁶ Sturm, *supra* note 19, at 1432.

As discussed in the preceding subsection, the deliberative process would only commence after OCR formally finds the district in violation of civil rights law.⁹⁷ This prerequisite has two ramifications for mediators. First, because the deliberative process would not commence until after students have experienced discrimination and filed an OCR complaint, schools have undergone an intrusive and perhaps adversarial OCR investigation, and OCR's other resolution processes have failed to resolve the complaint, emotional tensions are likely to run high when the mediator enters the dispute. Ethnic tensions⁹⁸ and parental impulses⁹⁹ are likely to intensify these emotions, perhaps to the point of volatility. Second, the fact that the school will have already violated civil rights law suggests that the deliberations will likely feature a sharp imbalance of power. Indeed, power imbalance between the school (a sophisticated, institutional actor with the aura of state authority) and its minority students (who are doubly subordinated as both minorities and children) serves as the *sine qua non* to discriminatory discipline.¹⁰⁰ The same power imbalance giving rise to the underlying violation will likely shape the ongoing deliberations.

Because discriminatory school discipline disputes will likely involve intense emotions and power imbalances, successful mediators in this context must be highly skilled facilitators. The dispute resolution literature features a long-running debate over how mediators should handle power imbalances stemming from structural inequities like the imbalance between minority students and schools.¹⁰¹ Resolving the tension between fairness and self-determination underlying many mediations is beyond the scope of this article. However, facilitative techniques such as building rapport, managing group dynamics, and dealing with disruptive behavior will be central strategies for any successful mediator handling power imbalances during the deliberative process,

⁹⁷ Sturm, *supra* note 19, at 1445-46 (liability determinations, which assign responsibility based on general standards and retrospective fact-finding, require a different decisional approach than remedial determinations, which focus on prospectively implementing standards in a particular context).

⁹⁸ Kim, *supra* note 26, at 972; *cf.* Isabelle R. Gunning *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68-80 (1995) (explaining roles of cultural myths and bias in mediation).

⁹⁹ Because dispute over educational matters “involve parents’ passionate aspirations and profound fears for their children[,] . . . mediation sessions are likely to be characterized by volatile emotions and vulnerability.” Nancy A. Welsh, *Stepping Back through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 662 (2004) (describing special education mediation).

¹⁰⁰ Gunning, *supra* note 98, at 74-75 (using hypothetical conflict between a school bus driver and a nine year old boy passenger to illustrate intersectionality of race and social status).

¹⁰¹ Compare Bush & Folger, *supra* note 25, (surveying scholarship on the role of mediation in social justice and positing a “transformative,” party-driven approach), with Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87 (2004) (advocating for an “activist” approach in which mediators openly address power imbalances).

regardless of theoretical approach.¹⁰² Such techniques are also essential for successfully handling the emotional tensions likely to arise over the course of deliberation.

Additionally, because disparate impact discrimination is systemic in nature and because schools are complex institutions,¹⁰³ remedying discipline gaps will require a multifaceted strategy.¹⁰⁴ Therefore, expertise in educational administration will be indispensable for mediators in discipline gap cases.¹⁰⁵ For example, the remedy in the *Winner* case incorporated strategies pertaining to curriculum & instruction,¹⁰⁶ human resources,¹⁰⁷ recordkeeping,¹⁰⁸ school climate,¹⁰⁹ school counseling,¹¹⁰ school governance,¹¹¹ professional development,¹¹² and other aspects of school administration. Mediators who have more familiarity with educational administration will grasp the intricacies and implications of these strategies more readily than mediators who are less

¹⁰² NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER, & CRAIG A. MCEWAN, DESIGNING SYSTEMS AND PROCESS FOR MANAGING DISPUTES 370-75 (2013); Compare Bush & Folger, *supra* note 25, at 45-46 (parties “can and do” address power imbalances when assisted by transformative mediator skilled in fostering communication) with Gunning, *supra* note 101, at 93-94 (activist mediators should use facilitative techniques also supported by proponents of transformative mediation).

¹⁰³ Kris D. Gutiérrez & William R. Penuel, *Relevance to Practice as a Criterion for Rigor*, 43 EDUC. RESEARCHER 19, 20 (2014) (emphasizing complexity of educational institutions in designing and implementing interventions).

¹⁰⁴ See U.S. DEPARTMENT OF EDUCATION, GUIDING PRINCIPLES: A RESOURCE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 2-4 (2014), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> (overviewing three-pronged approach to improving school climate and discipline and noting that implementation will be “highly complex work in practice”).

¹⁰⁵ Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 46-47 (1996) (“The complexity and importance of a technical issue should influence the nature and extent of the required subject-matter expertise.”).

¹⁰⁶ Status Report – Monitor’s First Quarterly Report, Progress Report #1, 2007-2008 at 4-5, *Antoine v. Winner Sch. Dist. 59-2*, Civ. 06-3007 (D.S.D. June 2, 2008), ECF No. 66-2 [hereinafter Progress Report #1] (creating a course on Native American history and training teachers in culturally sensitive pedagogy).

¹⁰⁷ *Id.* (creating an ombuds position and increasing the number of Native American employees).

¹⁰⁸ Status Report – Monitor’s First Quarterly Report, Exhibit E at 5-6, *Antoine v. Winner Sch. Dist. 59-2*, Civ. 06-3007 (D.S.D. June 2, 2008), ECF No. 66-7 [hereinafter Exhibit E] (modifying the student data system and auditing certain programs).

¹⁰⁹ *Id.* at 3-4 (creating a new code of student conduct and assessing perceptions of school climate through surveys).

¹¹⁰ *Id.* at 4-5 (counseling students with missing graduation requirements and reviewing exit interviews of students who have dropped out).

¹¹¹ Exhibit E, *supra* note 108, at 5 (improving parental participation in school meetings and collaborating with local tribe’s educational agency).

¹¹² *Id.* at 3-4 (training staff in bullying prevention and students’ due process rights).

familiar.¹¹³ Therefore, experts in educational administration are more likely to be effective mediators in discriminatory school discipline cases.

2. Consultation

After OCR secures an agreement with a school to remedy discipline disparities, the school may require technical assistance to implement the remedy. For instance, a school may be required to revise their discipline policies, adopt school-wide behavioral programs, train educators in disciplinary and classroom management techniques, gather and analyze disciplinary data, educate students and parents about discipline policies, create mentoring programs, or evaluate the practices of its school resource officers.¹¹⁴ Because schools may lack the resources, expertise, or infrastructure to implement these remedies, neutral experts may be engaged as consultants to help schools design and execute strategies to close discipline disparities. The school district in *Winner* for example, brought in a legal expert with the Associated School Boards of South Dakota to provide training on students' due process rights, hired the Center for Comprehensive School Reform and Improvement to draft a new code of student conduct, and engaged the InterWest Equity Assistance Center to train staff in anti-bullying programs and Native American education.¹¹⁵

Schools charged with remedying discriminatory discipline may consult educational experts on myriad strategies to implement their remedies. In a resource guide accompanying its January 2014 Dear Colleague letter, the U.S. Department of Education identified a number of strategies that could be featured in an OCR-required remedy.¹¹⁶ These strategies include collecting and analyzing disciplinary data,¹¹⁷ revising discipline policies,¹¹⁸ educator training focused on disciplining fairly,¹¹⁹ training and monitoring of

¹¹³ ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY 9-10 (2008) (finding that mediation users prefer mediators with subject matter expertise in complex cases, partially to understand details and implications of a dispute without extensive explanation); *but see* ROGERS ET AL., *supra* note 102, at 159 (reporting that researchers could not substantiate that mediators with subject matter expertise are more effective than those without).

¹¹⁴ DOJ & ED, *supra* note 1, at 21-22.

¹¹⁵ Progress Report #1, *supra* note 106, at 3-4.

¹¹⁶ U.S. DEPARTMENT OF EDUCATION, *supra* note 104.

¹¹⁷ *Id.* at 17-18.

¹¹⁸ *Id.* at 12-16.

¹¹⁹ *Id.* at 16-17; *see also* Anne Gregory, Joseph P. Allen, Amori Yee Mikami, Christopher A. Hafen, and Robert C. Pianta, *The Promise of a Teacher Professional Development Program in Reducing Racial Disparity in Classroom Exclusionary Discipline*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6, at 166.

school-based law enforcement officers,¹²⁰ restorative justice practices,¹²¹ social and emotional learning,¹²² and positive behavioral intervention and supports.¹²³ Additionally, Daniel J. Losen of The Civil Rights Project's Center for Civil Rights Remedies at UCLA has collected research showing other promising strategies for reducing racial disparities in school discipline.¹²⁴ These additional strategies include improving learning conditions, such as academic rigor and respectful climate¹²⁵ and student threat assessment.¹²⁶ Individuals and organizations with expertise in any of the above-listed strategies can play a vital role in remedying discipline gaps by serving as consultants for schools facing OCR compliance actions.

3. Monitoring

OCR procedures provide that once a school enters a resolution agreement to remedy civil rights violations, OCR will monitor the school's implementation of the agreement until the school reaches compliance.¹²⁷ OCR monitoring may include site visits,¹²⁸ and can last for years in complex cases.¹²⁹ OCR's procedures further provide that "Effective and vigorous case monitoring is essential to ensuring compliance with civil rights law."¹³⁰ Given the likelihood of a rapid increase in school discipline cases

¹²⁰ U.S. DEPARTMENT OF EDUCATION, *supra* note 104, at 9-11.

¹²¹ *Id.* at 12; *see also* Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6, at 151.

¹²² U.S. DEPARTMENT OF EDUCATION, *supra* note 104, at 7.

¹²³ *Id.* at 6-7; *see also* Claudia G. Vincent, Jeffrey R. Sprague, CHiXapkaid (Michael Pavel), Tary J. Tobin, & Jeff M. Gau, *Effectiveness of Schoolwide Positive Behavior Interventions and Supports in Reducing Racially Inequitable Disciplinary Exclusion*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6, at 207.

¹²⁴ CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6.

¹²⁵ David M. Osher, Jeffrey M. Poirier, G. Roger Jarjoura, & Russel C. Brown, *Avoid Quick Fixes: Lessons Learned from a Comprehensive Approach to Improve Conditions for Learning*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6, at 192.

¹²⁶ Dewey Cornell & Peter Lovegrove, *Student Threat Assessment as a Method of Reducing Student Suspensions*, in CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 6, at 180.

¹²⁷ OCR, CPM, *supra* note 16, § 301(c).

¹²⁸ *Id.* art. V.

¹²⁹ OCR, HELPING TO ENSURE EQUAL ACCESS, *supra* note 14, at 8.

¹³⁰ OCR, CPM, *supra* note 16, art. V.

under the new guidelines,¹³¹ OCR may have difficulty thoroughly monitoring these cases with its limited resources.¹³² To solve this problem, OCR may enlist outside experts to monitor implementation of its resolution agreements.¹³³

Third-party monitoring holds several advantages. First, delegating third parties to monitor resolution agreements will allow OCR staff to focus on other functions, such as investigation and enforcement proceedings.¹³⁴ Second, monitoring may be more effective and efficient if conducted by third parties who have subject matter expertise.¹³⁵ Efficiency is especially crucial because schools may revert to prior practices after oversight ends.¹³⁶ Long-term monitoring may be necessary to ensure that remedial strategies become fully ingrained into a school's institutional structure,¹³⁷ and such long-term monitoring is only viable if it is highly efficient. Third, schools are more likely to be committed to the remedy if they have a voice in determining how the remedy will be monitored.¹³⁸

As discussed *supra*,¹³⁹ the deliberative model allows participants to fashion the method of monitoring a remedy's implementation during deliberations.¹⁴⁰ In *Winner*, the parties agreed to hire Action Consulting and Evaluation Team, Inc., ("ACET") a private evaluation firm, to serve as a third-party monitor.¹⁴¹ ACET's monitoring duties included

¹³¹ See *supra* notes 3-9 and accompanying text.

¹³² See Silver, *supra* note 45, at 574-75 (OCR's "limited resources and the pressure to eliminate backlogs and keep current with incoming cases give monitoring a low priority.").

¹³³ See Fellows & Haydock, *supra* note 17.

¹³⁴ See OCR, CPM, *supra* note 16, art. III, VI.

¹³⁵ See James S. Degraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U.L. REV. 800, 801-03 (1991) (judges rely on special masters with subject matter expertise to monitor institutional reform).

¹³⁶ See Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides, & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876 (2012) (finding that desegregation tends to backslide after schools are released from court oversight).

¹³⁷ See OCR, CPM, *supra* note 16, § 504 (OCR first "determines that the recipient has fully and effectively implemented the terms of the resolution agreement" before concluding monitoring); see also Davin Rosborough, Note, *Left Behind, and Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH. U. L. REV. 663, 696 (2010) (noting that monitoring is especially important because lack of oversight enables schools to wrongfully exclude certain students).

¹³⁸ Sturm, *supra* note 19, at 1393. See also Fellows & Haydock, *supra* note 17, at 1278-79 (observing that a party may balk when it believes that a monitor is exceeding her authority).

¹³⁹ See *supra* Part IV.B.1.a.

¹⁴⁰ Sturm, *supra* note 19, 1441 n.441.

¹⁴¹ Progress Report #1, *supra* note 106, at 1.

analyzing disciplinary data, reviewing staff training records to ensure that educators attended required trainings, and submitting compliance reports to the participants and court.¹⁴² Similarly, participants in an OCR-initiated deliberative process may select neutral third parties to monitor the school's compliance with the resolution agreement. Individuals or organizations with expertise in evaluating educational institutions may be enlisted to serve this monitoring role.

V. CONCLUSION

The decision to target school discipline gaps by the U.S. Departments of Education and Justice may dramatically increase civil rights enforcement activity by the Department of Education's Office for Civil Rights ("OCR"). To handle the increased burden, OCR may opt to enlist independent third parties to help in remedying discipline gaps. Allowing stakeholders in discipline gap actions to consensually select neutral third parties holds several advantages. Schools will be more willing to implement remedies if they perceive the remedial process as fair, and they will be more likely to perceive the process as fair if they have a voice in selecting neutrals. Furthermore, allowing schools and impacted communities to consensually select neutrals serves the normative purposes of preserving local control over public education, and empowering marginalized communities. Although OCR's current procedures involve some consensual processes, OCR's procedures can be improved by placing greater emphasis on formal findings and consensually selected neutrals. Such neutrals can serve as facilitative mediators in the deliberative remediation process, expert consultants providing technical assistance, or monitors overseeing implementation of the remedy.

¹⁴² Status Report – Monitor's Second Quarterly Report, Progress Report #1 for Year 2, 2008-09, at 2-4 Antoine v. Winner Sch. Dist. 59-2, Civ. 06-3007 (D.S.D. Sep. 10, 2008), ECF 68-2.