By now, the major components of school safety law are clearly established. The duty of educators to maintain a safe learning environment and the role of school resource officers to assist these efforts is beyond question. What lies on the horizon is a new lawsuit on a set of principles, equally clear and well established. Courts now impose liability for failure of the duty to implement campus safety rules fairly.

"Selective enforcement" is now a growing concern. Students challenge not the policy itself, but the manner in which the school safety team carries out its mission.

In the selective enforcement lawsuits, the student accuses the team of either indifference or playing favorites among the student body such that the disciplinary process contains a bias in favor of some students and against others. Juveniles who commit crimes on campus or who threaten to harm themselves routinely speak of the hopelessness of their desire to have school rules enforced for the benefit of all students. It may be more common than strip searches and unlawful interrogations and potentially more toxic than both combined. So why is it so hard to stop selective enforcement?

The selective enforcement cases go far beyond the historical race and gender lawsuits to protect all students from discrimination. The U.S. Supreme Court says about such cases that, "the purpose ... is to [protect] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Courts are beginning to rigorously apply the laws that prohibit discrimination to the selective enforcement cases.

Despite the great familiarity with the federal discrimination statutes, educators, SROs, school districts and police departments may not be fully aware of the manner in which the right to equal protection of the laws is applied in the school safety context. The school safety team is required to protect all students in the same manner as others similarly situated or else have a justification that is tied to a legitimate educational objective. Not all exercises of discretion in meting out discipline will be discrimination. However, where liability for selective enforcement occurs, it is usually a regrettable, but foreseeable result of improper selection, training, supervision and assessment of school safety personnel.
Test your “Selective Enforcement IQ” on the following 5 scenarios:

1. On the bus ride home from school, Student A, an eighth grade student, got into a fight with Student B, who was a seventh grade student at the Middle School. Student B started the fight by throwing his book bag, which was full of books, at Student A’s face. Student B then punched Student A in the face three times, breaking Student A’s glasses in half. Student B then turned around and sat down in his seat. Student A then stood up and began to punch Student B in the back of his shoulder and head. Once the fight was broken up, Student A realized that, during his retaliation, he had been holding his metal tuba mouthpiece in his hand. The mouthpiece lacerated Student B’s skin and required stitches. School officials decided that Student B had violated the Fighting Policy but not the Assault Policy and suspended him for five days. But Student A was found to have violated the Assault Policy and was suspended for the remainder of the school year. Student A’s parents filed a “class of one” lawsuit, claiming a bias based on a previous disagreement with educators over a classroom incident. Do the different suspensions constitute selective enforcement in violation of the law?  

2. Parents filed a lawsuit under Title IX against the local public school for failure to stop sexual harassment and assaults inflicted on their daughter. The student who committed the acts was known by educators to have significant disciplinary and behavioral problems. Teachers who knew about the misconduct did not inform administrators or the victim’s parents. The principal, when told, investigated the incident, and responded by suspending the victim only, but did not notify law enforcement officials or social services about the incident. Do the actions of the educators constitute selective enforcement in violation of the law?  

3. Parents filed a lawsuit based on Title VI against the local public school for failure to redress the racially hostile environment encountered by their African-American son. During the school year, the campus experienced heightened racial tension. Incidents escalated during the school year with fights, property destruction and graffiti, culminating with a tip from law enforcement that someone was planning to pull the fire alarm and kill African-American students. A hit list with names of African-American students was posted as graffiti on the school building. Police maintained a presence on campus and offered a $500 reward, later increased to $1000, for information leading to the arrest of those responsible for the “hit list.” Do these facts establish a claim that educators acted with deliberate indifference in the face of a racially hostile environment in violation of the law?  

4. Several parents of children who had been fined for truancy filed a lawsuit for selective enforcement. The public school district had issued more than 800 citations for truancy during the school year. Under state law, educators were allowed to impose fines up to $300 per citation. However, the school district imposed fines in varying amounts, some in excess of $300. When the practice was discovered, the school district defended the policy and offered restitution of excessive amounts to only a few parents. Does the school policy constitute selective enforcement in violation of the law?  

5. The parents of an African-American student who was expelled filed a lawsuit under 42 U.S.C. § 1981 for selective enforcement. Their son was involved in a fight on campus. The fight began when a white student shouted racial epithets at black students. The expelled student responded to the words by grabbing and hitting the white student in the eye. School officials and the SRO investigated the incident. A decision was made to arrest the African-American student who was later expelled. The white student was not arrested, but was suspended for three days. After the lawsuit was filed, the parents gave the court school disciplinary records that showed that while minority students made up 22% of the student body, black students accounted for 39% of the disciplinary actions taken. The school officials showed the court the code of conduct, which expressly states that acts of violence require expulsion. Did the school’s response to the fight constitute selective enforcement in violation of the law?
Anti-Discrimination and School Safety: The Liability Tool Box

The general principle of anti-discrimination is clear enough. Its foundation in education law is based on the belief that discrimination in the enforcement of an otherwise valid policy is beyond the legitimacy of the education mission. Therefore, a variety of federal statutes (and a number of state laws) may be brought to bear against school officials and SROs.

§ 1981 Lawsuits

Selective enforcement lawsuits brought under 42 U.S.C. § 1981 involve race discrimination. A student in a section 1981 case must show that racial bias is intentional and involves the selective application of a school policy. Proof of the bias may be shown by direct evidence or through circumstantial evidence. For example, statements made to a student by an educator or SRO that reflect racial invective will support such a claim. In addition, a disparity in discipline would establish the bias if a student identifies arbitrary disciplinary practices, undeserved or unreasonable punishment of students based on race, or the failure to discipline students for similar misconduct based on race. When this is shown, the burden shifts to the school or the police to explain what happened. The explanation must be a legitimate, non-discriminatory reason for the action.

Title VI of the Civil Rights Act

Title VI of the Civil Rights Act (42 U.S.C.A. § 2000d), represents another claim that may be brought against schools for selective enforcement. Title VI forbids discrimination by any person or institution that receives federal funds on the basis of race, color, or national origin. Stated this way both public schools and private schools that receive funding may be sued. A student cannot maintain a Title VI action against an individual school official or SRO in either their individual or official capacities because lawsuits under Title VI can only be brought against the institution that receives the federal grant money, not an individual. However, students who successfully assert a claim under Title VI are entitled to money damages from the school district or police department by showing that educators or SROs intentionally discriminated against them. In this type of action, intent can be inferred by deliberate indifference to an environment hostile to students based on race, color or national origin.

Therefore, Title VI is a fertile tool for students in schools where a racially hostile environment exists and has been allowed to fester with foreseeable consequences. The student will assert that the school safety team had actual or constructive notice of pervasive racial discrimination at the school and that by allowing these conditions to persist created a hostile environment. See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (March 10, 1994).

A school violates Title VI when:

1. There is a racially hostile environment;
2. The district had actual or constructive notice of the problem; and
3. The district failed to respond adequately to redress the racially hostile environment.

“A racially hostile environment is one in which racial harassment is "severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from [an education]." Id., Investigative Guidance, at 11449. The courts have held that it is not necessary for the victimized student to quit attending school to establish a violation of Title VI. Instead, the student must show that the learning environment has been compromised such that "victim-students are effectively denied equal access to an institution’s resources and opportunities.” Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999). See also Zeno v. Pine Plains Cent. Sch. Dist., 2009 U.S. Dist. LEXIS 42848 (S.D.N.Y. May 19, 2009).

Both student-on-student as well as staff-on-student misconduct are prohibited under Title VI. Once educators are on notice of a problem, they have a legal duty to take reasonable steps to eliminate
the racially hostile environment. Moreover, where a school district has actual knowledge that its efforts are ineffective, and it continues to use those same methods to no avail, the educators have violated Title VI. When a school is deliberately indifferent to its students’ right to a learning environment free of racial hostility and discrimination, it is liable for damages under Title VI.

**Title IX Claims**

Title IX claims are identical to Title VI lawsuits for selective enforcement, except that it prohibits gender discrimination, not race, color, or national origin discrimination. It applies to all education programs receiving federal funds. The law declares that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Under Title IX, a school’s deliberate indifference to a hostile environment, teacher-on-student or student-on-student harassment is a violation of the law. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).

The U.S. Supreme Court has held that Title IX lawsuits cover, "intentional sex discrimination in the form of a [school official’s] deliberate indifference to a teacher’s sexual harassment of a student, or to sexual harassment of a student by another student." Jackson v. Birmingham Board of Education, 544 U.S. 167, 173 (2005). As with Title VI, a student in a Title IX selective enforcement case must prove that severe, pervasive, and objectively offensive harassment occurred; that the harassment deprived her of educational opportunities or benefits; that the educational institution had actual knowledge of the harassment; and, finally, that the institution’s deliberate indifference caused the student to be subjected to the harassment.


**Section 1983 Claims**

Selective enforcement claims under 42 U.S.C. §1983 are lawsuits based on violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Like the section 1981 claim, the student must show that he was treated differently from similarly situated pupils and that the unequal treatment can only be explained by discriminatory intent.

Unlike section 1981 claims, students have three ways of establishing improper intent in selective enforcement claims based on the Equal Protection Clause. First, the student can link the discrimination to race, gender, alienage, national origin, illegitimacy or show that selective enforcement of school policies denied him a fundamental right. This is not as difficult to do as one might suppose. For example, a student can point to an official school policy or a repeated practice that is so common as to constitute a custom of the school. When proven, courts apply strict judicial scrutiny and quickly impose liability on school officials.

Second, a student can prove discriminatory intent without pointing to a written policy if a principal, teacher, or SRO who has final policymaking authority over discipline commits a single discriminatory act. When proven, courts apply strict judicial scrutiny and quickly impose liability on school officials.

Third, the courts are beginning to recognize a new kind of section 1983 claim that is specifically useful for non-minority students who believe they are victims of selective enforcement. Under a “class of one” lawsuit, the student does not claim that he is a member of a “suspect” class or that he was denied any fundamental right. Instead, the student must only show that (1) educators intentionally treated him differently from others similarly situated; and (2) this different treatment was not rationally related to a legitimate educational objective. The courts have created this type of claim to allow a student to show that an educator’s stated justification for selectively enforcing a school policy is a pretext for an irrational animus.

**Tips for Avoiding Selective Enforcement**

1. Keep accurate records of incidents. The documentation should include the frequency, if any, of the misconduct, a thorough and factual account of what happened, and a precise statement of the discipline meted out.

2. Meet periodically with students to discuss the importance of good behavior and spell out the conduct that is unacceptable. Tell them that if they experience verbal or physical harassment or violence to notify a teacher or administrator so that the problem can be addressed.

3. Train all teachers, administrators, and staff on the school code of conduct. Discuss the importance of fair and consistent reporting, intervention and supervision of students. Tell them that verbal harassment of a young child by fellow students that is tolerated or condoned in any way by adult authority figures is likely violating legal rules. Establish that it is unacceptable for any student to receive noxious racial epithets, or be shamed and humiliated, while having the school authorities ignore or reject the student’s complaints. A school where this sort of conduct occurs unchecked is utterly failing in its mandate to provide a nondiscriminatory educational environment.

4. Place a phrase about the importance of a “safe and effective learning environment” in the school mission statement.

5. Be prepared to explain and justify disciplinary decisions without putting the blame on specific students. For example, “the school has an interest in disciplining students who violate the school’s Code of Conduct by behaving violently towards and causing injury to other students,” or, “the school has an interest in disciplining students who do not take responsibility for their actions under the Code.”
student will establish such a case when he presents evidence that other students, who are identical or comparable to the student, have been treated more favorably. The “class of one” selective enforcement case protects a wider range of students (non-minority, impoverished, handicapped, personal grudges, perceived homosexuality) who may claim that they have been victimized by deliberate indifference or an irrational animus. The student merely claims that educators intentionally treated him differently from other similarly situated students without a plausible justification. The U.S. Supreme Court explained the reason for such a lawsuit by stating, “[t]he cases have recognized successful equal protection claims brought by a “class of one,” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

**Selective Enforcement and Disciplinary Reform**

The potential for liability based on selective enforcement is becoming more relevant as policymakers and school officials rethink school disciplinary approaches. The spectrum of options, from zero-tolerance to treating student misconduct as a non-disciplinary educational problem are worthy of reassessment. To avoid liability, great care should be taken in implementing different approaches to campus disruptions. At one end of the spectrum, it is becoming apparent that eliminating the exercise of discretion by educators in matters of discipline sacrifices the opportunity to be thoughtful about the context of student behavior. But zero-tolerance does successfully avoid selective enforcement issues. At the other end of the spectrum, treating transgressions of school rules as a non-disciplinary educational problem has its own drawbacks. When traditional discipline is eliminated in favor of an individualized, teachable moment that is tailored to the needs of each student, the seeds of selective enforcement are unwittingly planted.

Selective enforcement of the school code of conduct also leads to downstream crimes of obstruction of justice and violating the rights of victims. For example, as the gravity of student misconduct increases, affirmative duties to report the incident to various agencies for investigation and response are triggered. While school officials clearly maintain the independent authority to address even these offenses through their disciplinary process, the decisions reached by educators are, at best, concurrent to, and often preempted by the rules of justice.

**IQ Test Answers**

In the IQ test, the answer is “Yes” to fact patterns Two, Three and Four and “No” to fact patterns One and Five.

In Question One, the court ruled that Student A did plead a prima facie “class of one” claim for violation of the Equal Protection Clause. Student A asserted a plausible, irrational basis for selective enforcement. However, the court ruled that the different suspensions did not constitute selective enforcement. The two students were not similarly situated because Student A used a weapon to cause injury to Student B, which was significantly more serious, and because the long-term suspension was required by the Assault Policy. See E.W. v. Wake County Bd. of Educ., 2011 U.S. Dist. LEXIS 39163 (E.D.N.C. Apr. 11, 2011).

In Question Two, the court ruled that the educators did violate the law. It held that Title IX provides a cause of action for a school’s failure to prevent and remedy student-on-student sexual harassment, and that the School District had a constitutional duty to protect Jones from assaults by a fellow student. Title IX liability applies unless educators act improperly by remaining deliberately indifferent to acts of harassment of which it has actual knowledge. The court found that the principal made a conscious decision to permit sex discrimination and exercised substantial control of the school environment. Therefore, the administrator’s single act could be charged to the School District for purposes of liability. See Murrell v. School Dist. No. 1, 186 F.3d 1238 (10th Cir. Colo. 1999).

In Question Three, the court held that a form of selective enforcement in violation of Title VI had been established and that there was a genuine issue of material fact as to whether the School District acted with deliberate indifference in the face of the escalating racial tension at the school. The court noted that, “where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts are ineffective and it continues to use those same methods to no avail, the educators have violated Title VI.” See Cleveland v. Blount County Sch. Dist. 00050, 2008 U.S. Dist. LEXIS 6011 (E.D.Tenn. Jan. 28, 2008). See also, See Tesoriero v. Syosset Central School District, 382 F.Supp.2d 387 (E.D.N.Y. 2005); Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000); Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009). Zeno v. Pine Plains Cent. Sch. Dist., 2009 U.S. Dist. LEXIS 24848 (S.D.N.Y. May 19, 2009); and Williams v. Port Huron Area Sch. Bd. of Educ., 2010 U.S. Dist. LEXIS 30472 (E.D. Mich. Mar. 30, 2010).

In Question Four, the court ruled that the parents successfully plead a prima facie “class of one” claim for violation of the Equal Protection Clause. The court ruled that the Equal Protection Clause prohibits an arbitrary classification of persons for unfavorable government treatment. The parents established sufficient facts to support a finding that similarly situated individuals were treated differently and that no rational basis exists for the distinction between the excessive fines that were reduced and those that were not. See Rivera v. Leb. Sch. Dist., 2011 U.S. Dist. LEXIS 132286 (M.D. Pa. Nov. 16, 2011).

In Question Five, the court ruled that the school officials presented a legitimate, non-discriminatory reason for having the student arrested and expelled. The court also found that the parents did not present evidence that their son would not have been arrested or expelled if he was not African-American. The court ruled that the parents did not show that white students would not be subjected to the same punishments. The court reasoned that while use of racial epithets is highly objectionable, it was not the equivalent to violence, which led to physical injury.

Finally, the court held that the fact that the white student was not expelled was not evidence of discriminatory intent. The school code of conduct expressly listed “fighting” as a “serious violation of the discipline code,” but it does not explicitly deem crude or offensive language to be such. See Watson v. Jones County Sch. Dist., 2008 U.S. Dist. LEXIS 69008 (S.D. Miss. Sept. 11, 2008).

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