

BFF v. U.S. Department of Education D.D.C. No. 21-1741

From: Hans Bader (hfb138@yahoo.com)
To: kathleene.molen@usdoj.gov
Bcc: hfb138@yahoo.com; sampere1@yahoo.com
Date: Tuesday, October 19, 2021, 07:58 PM EDT

Here's an additional example of a work-related email being sent to sgoldb1@law.columbia.edu. To support plaintiff's request that that non-official email account be searched for responsive records (a request I've previously made, such as in my Sept. 3 at 5:20 pm email). In addition to the responsive emails I mentioned earlier that involve correspondence with sgoldb1@law.columbia.edu.

Thanks.

----- Forwarded Message -----

From: Darius Thomas <dariusgthomas@gmail.com>

To: "sgoldb1@law.columbia.edu" <sgoldb1@law.columbia.edu>

Sent: Tuesday, May 11, 2021, 11:37:58 AM EDT

Subject: Re: "Examining Disparities in School Discipline and the Pursuit of Safe and Inclusive Schools" (ED/DOJ event on May 11, 2021)

Dear Acting Assistant Secretary Goldberg:

Different problems have different solutions. Racial disparities in school discipline rates result from a variety of social problems, not -- for the most part -- racism.

These problems fuel differences in school misbehavior rates, which vary a lot for different racial groups. Michael Petrilli is an education expert and the president of the Thomas B. Fordham Institute, which conducts research on the educational system. He acknowledges that large differences exist in school misbehavior rates, by race, according to students themselves. As Petrilli [pointed out](#) in an article at *Education Next*, "In 2015, high school students were asked if they had been in a fight on school property at any time in the past 12 months. African American students were [2.2 times](#) more likely to say yes than white students — 11.4 percent to 5.2 percent."

Petrilli was citing the Education Department's own statistics, which show differences in misbehavior rates by race. Petrilli was citing from the National Center for Education Statistics, *NCES Indicators of School Crime and Safety: 2016*. Specifically, he was citing data from Figure 13.2 on page 87 of that publication, available at <https://nces.ed.gov/pubs2017/2017064.pdf>

(Petrilli himself helped create the Education Department's Office of Innovation and Improvement).

If racial disparities are due to veiled or overt racism, the Education Department's Office for Civil Rights should target them under Title VI of the Civil Rights Act.

But if they are not due to racism in our schools, and instead are the result of other social problems, then *those* problems should be fixed. If a problem is not a civil-rights problem, it may not be fixable by a civil-rights agency like the Office for Civil Rights or DOJ's Civil Rights Division. Indeed, a non-civil-rights agency may have more expertise and authority to address the problem. The Education Department should confer with other agencies that may have expertise in resolving such problems. Or if no government agency currently has the power to deal with such a problem, it should brief members of Congress, who have the power to address social problems of all kinds.

For example, only Congress can adopt anti-poverty programs, which would gradually reduce racial disparities in school suspension rates. Poverty, which disproportionately afflicts Black households, is linked to higher rates of misbehavior in school. The National Center for Education Statistics pointed out in 2007 that major "discipline problems" were much higher in schools with many poor students, and frequent "verbal abuse of teachers" occurred at nearly five times the rate in those schools with many poor students. See [Indicators of School Crime and Safety: 2007](#), page 26.

It is no secret to anyone that Black students are more likely to end up being delinquent because of the higher risk factors they

face, such as poverty and family breakdown, which are linked to misbehavior..As Deputy Assistant Secretary Dixon [pointed out](#) back in 2005, "we know the risks that lead to poor outcomes, delinquency and incarceration. Second, we know that poor and minority children experience these risks at a disproportionately high rate." See Judith A. Browne & Monique L. Dixon, *The Schoolhouse to Jailhouse Track--Lawyers and Organizers Partnering for Change*, 14 Poverty and Race 10, 13 (July/Aug. 2005).

As a Brookings Institution report pointed out in 2017, "black students are also more likely to come from family backgrounds associated with school behavior problems" including "single-parent families." See Loveless, *The 2017 Brown Center Report on American Education: How Well Are American Students Learning?*, Brookings Institution, at pages 30-31 (2017).

If disparities in school suspension rates are not mostly due to racism, then they can't be fixed simply by an anti-racism rule from the Office of Civil Rights. The Seventh Circuit Court of Appeals overturned a provision requiring a school district not "to refer a higher percentage of minority students than of white students for discipline unless the district purges all 'subjective' criteria from its disciplinary code." The [judges ruled](#) that such "racial disciplinary quotas" are illegal, and "violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty." See *People Who Care v. Rockford Board of Education* (1997).

The overturned anti-disproportionality provision seems to have been based on the mistaken assumption that subjectivity is the primary reason for school discipline disproportionality. But courts such as the Third Circuit Court of Appeals have indicated that subjectivity *isn't* the primary reason for school discipline disparities. The Third Circuit [pointed out in 1996](#) that "statistical data" showed larger differences in discipline rates by race for major, "very objective" offenses than for milder, "less objective" offenses. Like several other circuits, it did not accept the premise that school discipline disparities were due to racism in the schools. (See *Coalition to Save Our Children v. State Board of Education of Delaware*).

Accordingly, other branches and levels of government will need to take action to address the root causes of delinquency and alienation that lead to racial disparities in school suspension rates.

And ED and DOJ should examine such realities with a broad lens, in their May 11 joint event, "Brown 67 Years Later: Examining Disparities in School Discipline and the Pursuit of Safe and Inclusive Schools."

Thanks a lot for taking my input into account.

Re: BFF v. DOE No. 1741 : Questions about redactions

From: Hans Bader (hfb138@yahoo.com)

To: kathleene.molen@usdoj.gov

Date: Friday, September 3, 2021, 05:20 PM EDT

Thanks.

I believe that correspondence covered by plaintiff's FOIA request was sent to Suzanne Goldberg's Columbia email account, sgoldb1@law.columbia.edu, such as from attorney James P. Scanlan.

Did the Education Department search that email account for responsive records? *Compare Competitive Enterprise Institute v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (ruling that agency officials' private non-official email accounts, not merely their official email accounts, are subject to FOIA, and that my client accordingly could seek records in OSTP Director John Holdren's private email account, jholdren@whrc.org).

On Thursday, September 2, 2021, 10:24:54 PM EDT, Molen, Kathleene (USADC) <kathleene.molen@usdoj.gov> wrote:

Hello Hans,

I sent your additional questions to agency counsel. As soon as I have additional information, I will send your way.

Thank you,

Katy

From: Hans Bader <hfb138@yahoo.com>

Sent: Thursday, September 2, 2021 5:03 PM

To: Molen, Kathleene (USADC) <KMolen@usa.doj.gov>

Subject: BFF v. DOE No. 1741 : Questions about redactions

Could you also have agency counsel address the questions below as well?

Many pages contain redactions invoking Exemption 6 of FOIA, 5 USC 552(b)(6).

Looking through the 357 pages of responsive emails, I have noticed that most of the "(b)(6)" redactions are shaded in blue, while a smaller number (on pp. 314-316 and pg. 349) are shaded in a pinkish color, with "(b)(6)" written in smaller type.

Does the color refer to a type of redacted information? Such as blue reflecting redacted names, and pink reflecting redacted email addresses or cell phone numbers?

Are there recipients of responsive emails for whom all identifying information has been redacted? (Leaving neither their name nor their email address)?

Any information about the recipient seems to have been redacted for certain recipients on pg. 316 of 357. There is both a blue (b)(6) redaction and a pinkish (b)(6) redaction, redacting all material between two semi-colons, between "Morgan-Cosic, Letisha;" and lfont@wcpss.net. There is a pinkish (b)(6) redaction on pg. 316 of 357 redacting all material between two semi-colons, between "lm.mcwilliams@assumption.edu" and "lcliment@ed.sc.gov"

To me, that likely suggests the redaction of both a name, and an email address.

Is that the case? Are there recipients who have had both their name and their email address redacted?

That may be true as well for other recipients. There are two successive "(b)(6) (b)(6)" redactions in a row on pp. 314-317 of 357, before hayley@cfrights.org and jalas@lonestarlegal.org and jnance@mdlab.org and kala_goodwine@charleston.k12.sc.us and kp Polishchuk@apa.org and landerso@umd.edu and lauriericard@sclegal.org and "Valtierra, Loredana" and "lschrader@azdot.gov" and "maryb@vlas.org" and "melina_kiper@newprofit.org." And three

successive "(b)(6) (b)(6) (b)(6) redactions in a row before "makenzie.schiemann@tngconsulting.com".

Does the presence of successive "(b)(6)" notations, reflect the redaction of multiple names in succession (for example, the redaction of two people's names in a row, or one person's name right after another person's name)?

Thank you for your information.

Hans Bader

Counsel for Plaintiff

On Wednesday, September 1, 2021, 03:48:33 PM EDT, Molen, Kathleene (USADC) <kathleene.molen@usdoj.gov> wrote:

Hello Hans,

I reached out to agency counsel with your questions/comments. I will get back to you as soon as I have information.

Thank you,

Katy

From: Hans Bader <hfb138@yahoo.com>
Sent: Wednesday, September 1, 2021 10:38 AM
To: Molen, Kathleene (USADC) <KMolen@usa.doj.gov>
Subject: Re: Welcome to USAfx - Please Register Your Account

Thanks. I was able to access and download the files.

Is this intended to be the complete production? Or are more records expected, on a rolling basis?

It seems to me that there should be more responsive records. There were various emails forwarded or blind carbon copied to people I know that appear in the produced records (like James P. Scanlan's in the 301-357 tranche of responsive records -- Scanlan customarily copies or forwards his emails to various think-tanks or lawyers after writing to the Department of Education or DOJ) but not others, which don't show up in the produced records -- there are very few in the responsive records produced thus far, suggesting records were overlooked, or certain search terms not used.

Do you know what search terms were used to yield these responsive records? And what email accounts were searched?

(Sometimes, the specified persons' email addresses don't include their full name, or exact name, as in jps@jpscanlan.com and fredwoerhle@gmail.com; in emails, James P. Scanlan shows up as "jps," although I guess his email address should be in the metadata on "jps." I see a few emails from jps@jpscanlan.com, a prolific emailer, but I don't see any emails from fredwoerhle@gmail.com, which I would expect to see).

On Wednesday, September 1, 2021, 09:54:07 AM EDT, Molen, Kathleene (USADC) <kathleene.molen@usdoj.gov> wrote:

I sent you the link. Please let me know if you cannot access the files.

Thank you,

Katy

From: Hans Bader <hfb138@yahoo.com>
Sent: Wednesday, September 1, 2021 9:51 AM
To: Molen, Kathleene (USADC) <KMolen@usa.doj.gov>
Subject: Fw: Welcome to USAfx - Please Register Your Account

I set up the USAfx account. (Hopefully, the records will appear soon). Thanks.

----- Forwarded Message -----

From: no-reply@usdoj.gov <no-reply@usdoj.gov>
To: "hfb138@yahoo.com" <hfb138@yahoo.com>
Sent: Wednesday, September 1, 2021, 09:43:44 AM EDT
Subject: Welcome to USAfx - Please Register Your Account

An account has been created for you on the DOJ USA File Exchange (USAfx).

To access your account, please click [here](#) and login using your email address.

The temporary password required to complete your registration has been delivered via SMS to the phone number 703-399-6738. If prompted for an old password, you must provide this temporary password.

If you have any questions, please contact your sponsor.

- USAfx Administrator