UNITED STATES COMMISSION ON CIVIL RIGHTS

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The Honorable Arne Duncan, Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

August 31, 2015

Dear Secretary Duncan:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I urge you to rethink the Department of Education's "#RethinkDiscipline" Campaign.[1] Based on the Department of Education's #RethinkDiscipline website, much of the impetus for this campaign is that black, Hispanic, and Native American students are more likely to be suspended and expelled than are white students. Insofar as this campaign is an effort to eliminate the discipline disparity between different racial groups, it is in danger of running afoul of the constitutional prohibition on treating people differently based on race. Insofar as it is an effort to eliminate or reduce suspensions and expulsions, it is a deeply misguided policy. I also am concerned that the Department's effort to reduce discipline of students with disabilities suggests that this discipline disparity is due to animus, when instead it may be due to differences in misbehavior.

Ever since the Commission held an extensive 2011 briefing on school discipline and disparate impact, members of this Commission have repeatedly addressed the problem, including in a letter to you in February 2014.[2] I particularly commend to you the statements of Commissioner Heriot and former Commissioner Todd Gaziano in the Commission's 2012 report on disparate impact and school discipline based on the briefing.[3]

The Department of Education's "#Rethink Discipline" initiative and the Dear Colleague letter[4] on which it is based are on thin ice, both legally and constitutionally. The Dear Colleague letter is based on disparate impact theory, which is not contemplated

[1] U.S. DEPT. OF ED., School Climate and Discipline, http://www2.ed.gov/policy/gen/guid/school-discipline/index.html.
[2] *See* Letter from Commissioners Gail Heriot and Peter Kirsanow to Secretary Arne Duncan and Attorney General Eric Holder, February 18, 2014, at 2-3, http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/2.17.14-School-Discipline-Guidance-Comment.pdf.
[3] U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT (Apr. 2012); Statement and Rebuttal of Commissioner Todd Gaziano, 87-96; Statement and Rebuttal of Commissioner Gail Heriot, 97-114.
[4] U.S. DEPT. OF ED. AND U.S. DEPT. OF JUSTICE, Dear Colleague Letter: Nondiscriminatory Administration of School Discipline, Jan. 8, 2014, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf.

in the text of Title VI and the use of which was questioned by the Supreme Court in footnote 6 of *Alexander v. Sandoval*.[5] Furthermore, the Court assumed without deciding in *Alexander v. Sandoval* that disparate impact *regulations* were permissible under Title VI. Under the Administrative Procedure Act, which binds the Department of Education, it is impermissible for OCR to use something less than a duly promulgated regulation to place new burdens on school districts. The Guidance regarding racial disparities in school discipline is not a duly promulgated rule, and therefore the legality of the Guidance is questionable.[6] It also exposes school districts to potentially violating § 601 of Title VI, which forbids disparate treatment on the basis of race in an effort to avoid a racially disparate impact, which is permitted by Title VI.

The use of disparate impact liability in this context also has constitutional problems, as efforts to ameliorate disparate impacts often do. I would have to be profoundly naïve to believe that this policy is not introducing what is, effectively, a racial quota system for school discipline. For example, last year OCR entered into a settlement with the Minneapolis public schools regarding racial disparities in discipline. According to the statement announcing the new discipline policy, "MPS must aggressively reduce the disproportionality between black and brown students and their white peers every year for the next four years. This will begin with a 25 percent reduction in disproportionality by the end of this school year; 50 percent by 2016; 75 percent by 2017; and 100 percent by 2018."[7] This is a racial quota system for school discipline, because it has nothing to do with whether any particular individual deserved to be punished for his misbehavior. If the

[5] Alexander v. Sandoval, 532 U.S. 275, n. 6 (2001).

> We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with,' § 601, when § 601 permits the very behavior that the regulations forbid. See *Guardians*, 463 U.S., at 613, 103 S.Ct. 3221 (O'Connor, J., concurring in judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination ..., regulations that would proscribe conduct by the recipient having only a discriminatory *effect* ... do not simply 'further' the purpose of Title VI; they go well *beyond* that purpose"). [citations omitted]

[6] *See* Letter from Commissioners Gail Heriot and Peter Kirsanow to Secretary Arne Duncan and Attorney General Eric Holder, *supra* note 2, at 2-3.

> But even assuming Title VI would permit a limited use of disparate impact theory in prophylactic rules in this context, a guidance is not a rule. It is a mere general statement of policy concerning how an agency intends to exercise its discretionary authority in enforcing the underlying statute. It tells regulated persons which kinds of cases the agency is likely to pursue. Rules must be subject to notice and comment and must comply with a number of other procedural requirements, while guidances need not. But a guidance cannot impose new duties on regulated persons. See, e.g., Chamber of Commerce v. Dept. of Labor, 147 F.3d 206 (D.C. Cir. 1999). Making up new duties not contained in the statute itself is not part of an agency's discretionary enforcement authority. By purporting to apply disparate impact liability on school districts, however, this Guidance is doing exactly that—making up new duties. It is therefore invalid.

[7] Minneapolis Public Schools, Minneapolis Public Schools sees progress with new behavior standards and sets goal for school year (Nov. 7, 2014), http://www.mpls.k12.mn.us/november_7.html.

Department of Education hopes to extend this sort of policy to school districts around the country, it risks running afoul of the 14th Amendment.

The Seventh Circuit has addressed the problem of racial quotas in school discipline. In *People Who Care v. Rockford Bd. of Educ.*, Judge Posner wrote, "Racial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty. They place race at war with justice. They teach schoolchildren an unedifying lesson of racial entitlements."[8] The Seventh Circuit's criticisms apply as well to the #RethinkDiscipline campaign and its graphs about the percentages of black, Hispanic, disabled, and Native American students suspended in districts across the country. It is noteworthy that there are no such graphs for whites and Asians.[9] This campaign is about reducing the discipline meted out to favored groups, not about ensuring that everyone gets their just deserts.

This is the flaw in disparate impact. There is no reason to think that all racial groups will misbehave at exactly the same rate, just as there is no reason to think that boys and girls will misbehave at exactly the same rate.[10] But disparate impact tries to force discipline numbers to be exactly the same, which requires treating some people more harshly and others more leniently based on their race. In trying to avoid disparate impacts caused by racially neutral policies, entities begin to deliberately discriminate by treating people differently based on race. This was the situation that led to the Supreme Court case *Ricci v. DeStefano*. As Justice Scalia noted, attempts to avoid disparate impact that result in disparate treatment—even when sanctioned by statute, which is not the case here—may violate the Equal Protection Clause.[11]

You may object that I am missing the real problem, which is that "black and brown" students are being "over-punished". While alluring, that explanation is unlikely

[8] People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 538 (7th Cir. 2007).

[9] Percent of Students with Disabilities (IDEA) who Have Received One or More Out of School Suspensions by District (2011-12), http://www2.ed.gov/policy/gen/guid/school-discipline/images/allswdmissing.png; Percent of Black Students who Have Received One or More Out of School Suspensions by District (2011-12), http://www2.ed.gov/policy/gen/guid/school-discipline/images/bstdmissing.png; Percent of Hispanic Students who Have Received One or More Out of School Suspensions by District (2011-12), http://www2.ed.gov/policy/gen/guid/school-discipline/images/hstdmissing.png; Percent of Native American Students who Have Received One or More Out of School Suspensions by District (2011-12), http://www2.ed.gov/policy/gen/guid/school-discipline/images/nastdmissing.png.

[10] U.S. COMMISSION ON CIVIL RIGHTS, Briefing on Disparate Impact in School Discipline, February 11, 2011, transcript at 34-38 (teacher witnesses discussing whether boys or girls are more disruptive in class), http://www.usccr.gov/calendar/trnscrpt/BR_02-11-11_School.pdf.

[11] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("[R]esolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

to be the case and in any circumstance may be addressed under the "disparate treatment" provisions of Title VI, which bans actual discrimination because of race. It is more likely that the discipline disparity reflects differential involvement in behavior that needs to be disciplined. In a recent study published in the Journal of Criminal Justice, researchers found that accounting for prior problem behavior reduced the black/white suspension gap to insignificance. In the study, parents and teachers were asked about problem behaviors in children during kindergarten and grades 1-3, and then in eighth grade parents were asked if their child had ever been suspended. Problem behaviors reported in kindergarten through third grade were predictive of suspensions in both whites and blacks.[12]

The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth. Thus, our results indicate that odds differentials in suspensions are likely produced by pre-existing behavioral problems of youth that are imported into the classroom, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials. Differences in rates of suspension between racial groups thus appear to be a function of differences in problem behaviors that emerge early in life, that remain relatively stable over time, and that materialize in the classroom (citations omitted).[13]

This brings us to another problem. If the differences in discipline rates reflect actual misbehavior on the part of students, and this behavior is of long duration and seemingly intractable, what is to be done?[14] Is the solution simply not to punish the misbehaving students because we do not want ten black kids to be punished and only five white kids to be punished? Do we let the five "extra" black kids go unpunished? And if we do, what is the effect on the students in the class who are well-behaved, are trying to learn, and who often are "black or brown" themselves?

At the Commission's 2011 briefing on school discipline and disparate impact, Allen Zollman, who taught English as a Second Language and remedial math and reading classes at a school that at the time was 74% African-American, testified that it was time-consuming and difficult to have a disruptive student referred for discipline. As a result, "it is no simple thing to have a student removed at the time of the disruptive behavior. This means for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom."[15] When the witnesses who were teachers were asked what effect it would have on non-disruptive students if the disruptive student were back in class, the witnesses agreed it would be very negative. This is partly because

[12] J.P. Wright, et al., *Prior problem behavior accounts for the racial gap in school suspensions*, 42 J. OF CRIM. JUSTICE 257, at 263 (2014), available at http://www.sciencedirect.com/science/article/pii/S0047235214000105.
[13] *Id.* at 264.
[14] *Id.* at 263-64.
[15] U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT (Apr. 2012), at 24, available at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

the disruptive student continues to disrupt the classroom. But it also has a negative effect on other students because it demonstrates that there is no real punishment for misbehavior.[16] You certainly must be aware of this – it is common sense. Yet your new policy is designed to make it more difficult to remove disruptive students from the classroom. Ironically, given that many of these "black and brown" students attend predominantly "black and brown" schools, many of the students harmed by this initiative will also be black and Hispanic. The Department may disavow that is the case, but teachers and administrators will get the message: we must reduce racial disparities in discipline, so suspend fewer black and brown kids.

I must also note the complete absence of common sense in regard to the charge of disproportionate discipline of disabled students. In studying the prevalence of discipline experienced by disabled students, the Department examined students who received out of school suspensions who also received services under IDEA.[17] The IDEA defines "child with a disability" as follows:

(3) Child with a disability
(A) In general
The term "child with a disability" means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9
The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child –

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

[16] U.S. COMMISSION ON CIVIL RIGHTS, Briefing on Disparate Impact in School Discipline, February 11, 2011, transcript at 51-52, http://www.usccr.gov/calendar/trnscrpt/BR_02-11-11_School.pdf; *see also* Hans Bader, *Obama Administration Undermines School Safety, Pressures Schools to Adopt Racial Quotas in School Discipline*, COMPETITIVE ENTERPRISE INSTITUTE, Jan. 13, 2014, https://cei.org/blog/obama-administration-undermines-school-safety-pressures-schools-adopt-racial-quotas-student.

[17] Percent of Students with Disabilities (IDEA) who Have Received One or More Out of School Suspensions by District (2011-12), http://www2.ed.gov/policy/gen/guid/school-discipline/images/allswdmissing.png.

(ii) who, by reason thereof, needs special education and related services.[18]

Approximately half the disabilities listed are some sort of intellectual or emotional disability, not a purely physical disability like blindness or orthopedic impairments. Anyone who looks at a group of people that specifically includes people with autism, serious emotional disturbance, and social and developmental delays would expect behavioral problems to occur at a higher rate among that group than among the non-disabled group. It is disingenuous for the Department to illustrate its "disabled discipline disparity" meme[19] with an image of a person in a wheelchair when these statistics are almost certainly being driven by people who have serious mental and emotional disabilities. It is not the fault of these children that they have these intellectual and emotional disabilities, but that does not mean that their behavior is not objectively disruptive and inappropriate. It is unwise for the Department to try to reduce schools' ability to discipline these students.

In closing, it is beneath the dignity of a Cabinet-level agency to engage in a misleading hashtag campaign to gin up support on behalf of a public policy issue. It does, however, speak to what is driving this initiative: a desire to placate favored groups and lend additional support to the false narrative that American society is systematically biased against blacks and Hispanics. This initiative will, in the end, only harm the purported beneficiaries.

If you have any questions or concerns, you may contact my special assistant, Carissa Mulder, at cmulder@usccr.gov or (202) 376-7626.

Sincerely,

Peter Kirsanow
Commissioner

[18] 20 U.S.C. § 1401.
[19] http://www2.ed.gov/policy/gen/guid/school-discipline/images/rethink-discipline_3.png