



October 27, 2015

Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Assistant Secretary Lhamon:

Thank you for your September 23, 2015 response to my letter of August 31, 2015.

Although I appreciate your response, it did not address the substance of my letter, and raises additional questions.

You state in your response that, “we do not share your concerns, as both the Guidance and Campaign are fully consistent with the law.” However, you do not address in either the letter or the Guidance how incorporating disparate impact into Title VI is consistent with the Supreme Court’s decision in *Alexander v. Sandoval*. As I noted in my previous letter, the Supreme Court stated in *Sandoval*:

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]¹

To simply assert that the Guidance is consistent with the law when the Supreme Court has expressed its doubts about incorporating disparate impact into Title VI suggests that OCR may not have taken *Sandoval* seriously. One’s doubts increase when neither the Campaign website nor the Guidance ever acknowledge that disparate impact may be impermissible in regard to Title VI, let alone provide a legal analysis of why OCR believes that disparate impact is permissible under Title VI despite the language in *Sandoval*.

¹ *Alexander v. Sandoval*, 532 U.S. 275, n. 6 (2001).



You also state in your response “the Campaign seeks to advance the national conversation about reducing the overuse of unnecessary out of school suspensions and expulsions and replacing those practices with positive alternatives that keep students in school and engaged in learning.” I am curious about the “overuse of unnecessary out of school suspensions and expulsions”. What, precisely, does “unnecessary” mean? Are these students not misbehaving and are teachers disciplining them for doing nothing? If so, why haven’t the teachers been fired? And if the suspensions and expulsions are unnecessary, why are you trying to reduce their “overuse”? Shouldn’t the goal be for there to be *no* unnecessary suspensions and expulsions, not just to reduce their number?

Perhaps the key to your reasoning lies in the Guidance. Example 6 on page 18 provides the following scenario: a school district’s disciplinary rules provide that “use of electronic devices” is an infraction for which the maximum penalty is an in-school suspension.

The investigation reveals that school officials, however, regularly impose a greater, unauthorized punishment – out-of-school suspension – for use of electronic devices. The investigation also shows that African-American students are engaging in the use of electronic devices at a higher rate than students of other races. Coupled with the school’s regular imposition of greater, unauthorized punishment for using electronic devices, therefore, African-American students are substantially more likely than students of other races to receive a punishment in excess of that authorized under the school’s own rules.

There is no evidence that the disproportionate discipline results from racial bias or reflects racial stereotypes. Rather, further investigation shows that this excessive punishment is the result of poor training of school officials on the school rules that apply to use of electronic devices.

Under these circumstances, the Department could find a violation of Title VI. Although there is no finding of intentional discrimination, the misapplication of the discipline rules by school officials results in an adverse impact (disproportionate exclusion from education services) on African-American students as compared with other students. Because this practice has an adverse racial impact, the school must demonstrate that the practice is necessary to meet an important educational goal. The school cannot do so, however, because there is no justification for school officials



to disregard their own rules and impose a punishment not authorized by those rules.²

This example raises an important point that is ignored by almost all the hubbub surrounding disparities in school discipline: African-American students in this example are disproportionately likely to be disciplined *because they are disproportionately likely to be engaged in bad behavior*. If discipline is applied without regard to race, the type of discipline is less important. If the school rules prescribe a lesser sanction for the use of electronic devices than school officials believe is warranted, perhaps the better thing to do is to change the rules to comport with the experience of teachers and administrators trying to maintain order in the classroom. But to say a particular form of discipline is “unnecessary” is simply second-guessing by OCR that should not occur. OCR is supposed to investigate civil rights violations, not be the ultimate school board for every school district in the country.

Example 6 illustrates one other flaw in the Campaign and Guidance. The impetus behind this campaign is not that students in general are subject to too much discipline, but rather that there are racial disparities in discipline. Even if the school starts only meting out in-school suspensions for the use of electronic devices, the racial disparity in discipline will still exist. The racial disparity will simply exist at a lower level of discipline. If African-American students are disproportionately likely to be disciplined because they are disproportionately likely to be engaged in bad behavior, that racial disparity will persist unless schools discipline African-American students less or white and Asian students more. In two years, OCR will be back at the unfortunate school in Example 6, find that African-American students are more likely to receive in-school suspensions because they are more likely to use electronic devices, and then urge the school to do away with this as a behavioral offense altogether. You cannot honestly reduce racial disparities in discipline unless you reduce racial disparities in behavior.

Thank you again for your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Kirsanow".

Peter Kirsanow
Commissioner

² U.S. DEPT. OF ED. AND U.S. DEPT. OF JUSTICE, Dear Colleague Letter: Nondiscriminatory Administration of School Discipline, at 18, Jan. 8, 2014, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.