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

The Honorable Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC, 20530-201

February 18, 2014

Dear Secretary Duncan and Attorney General Holder:

We write to you in our capacity as two individual members of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole,[1] to comment on the recently released Department of Justice ("DOJ") and Department of Education ("ED") "Dear Colleague letter" concerning race and school discipline and accompanying materials ("the Guidance"). We have several concerns. One, we think that the Guidance has significant legal problems—both from the standpoint of administrative procedure and from a substantive civil rights law perspective. Two, even if the legal issues could be resolved in ED and DOJ's favor, the Guidance does not reflect sound policy. It is likely to make the nation's classrooms more chaotic, and thus make it harder for students (especially racial and ethnic minority students) to learn.

In April of 2012, the Commission published a report, *School Discipline and Disparate Impact*, which examined ED's enforcement policies in this area.[2] That report was based on a day-long briefing held at the Commission's offices, at which five public school teachers, seven administrators, and one Department of Education official presented written and oral testimony. The Commission also solicited letters from fifteen different school districts asking about how (if at all) they have modified disciplinary policies in response to ED's discipline initiatives, which have now been formalized in the Guidance; all responses received are included in the report.

Although the report was published before the release of the Guidance, ED's policy of aggressive enforcement of disparate impact theory in the school discipline

[1] The U.S. Commission on Civil Rights is an independent, bipartisan agency that makes appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice. 42 U.S.C. § 1975(a).
[2] The full text of the report can be found online at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

context was already apparent, and the report attempts to detail the many problems with that policy. Rather than rehearse in this letter the points made in that report, we have attached the full report as well as separate copies of the statements by Commissioners Todd Gaziano (whose term on the Commission has since expired) and Gail Heriot. We encourage you to read them. We believe they are as pertinent today as they were before the release of the Guidance. In addition, we attach *People Who Care v. Rockford*, 111 F.3d 528 (7th Cir. 1997), which we believe casts further doubt on the legality of the policy currently being followed by DOJ and ED.

One additional aspect of this debate, which has arisen only since the publication of the Commission's report, is the Guidance's legal sufficiency as a matter of administrative procedure. Relying primarily on Title VI of the Civil Rights Act of 1964 for its authority, the Guidance purports to prohibit both actual discrimination and disparate impact in school discipline.[3] But Title VI prohibits only actual discrimination, not neutral policies that have a disparate impact. See, e.g., *Alexander v. Sandoval*: "It is similarly beyond dispute –and no party disagrees – that § 601 [of Title VI] prohibits only intentional discrimination."[4] The Guidance is thus at odds with the statute.

In *Alexander v. Sandoval*, the Court did not address whether agencies with rule-making power under Title VI may rely on disparate impact theory in issuing *prophylactic rules* aimed at a specific problem and designed to ensure that actual discrimination does not slip by undetected.[5] Even if an agency could do so, school discipline would be an unlikely candidate for such prophylactic rules, since the best evidence shows that differing rates of discipline are not ordinarily due to race discrimination but rather to differing rate of misbehavior.[6] Moreover, DOJ and ED, by failing to provide a method by which a school district that absolves itself from accusations of actual discrimination can get out from under liability for disparate impact, has clearly has gone beyond any possible permissible use of disparate impact as prophylaxis. 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

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[3] The citation to the seldom-invoked Title IV appears to be intended as a make-weight. That provision is all about efforts to desegregate schools following the massive resistance to Brown v. Bd. of Educ., 347 U.S. 483 (1954), which have little or no bearing on the issues here. This is not a case about a school district attempting to maintain a dual-track school system—one for African Americans and one for whites.

[4] 532 U.S. 275, 280 (2001).

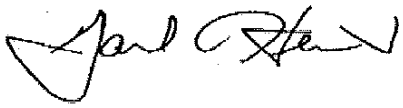
[5] We note that some, mostly notably Justice Antonin Scalia, have suggested that disparate impact liability is unconstitutional altogether. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J. concurring).

[6] See also Hans Bader, "Obama Administration Undermines School Safety, Pressures Schools to Adopt Racial Quotas in Student Discipline," Open Market, January 13, 2014, available at http://www.openmarket.org/2014/01/13/obama-administration-undermines-school-safety-pressures-schools-to-adopt-racial-quotas-in-student-discipline/ (summarizing research on racial disparities in the criminal justice system that do not appear to stem from racial bias.)

impact liability on school districts, however, this Guidance is doing exactly that—making up new duties. It is therefore invalid.

We therefore respectfully request that the disparate impact provisions be withdrawn from the Guidance and that all persons who were sent the Guidance be specifically advised of their withdrawal. If you have questions for us about this letter, you may reach us via Gail Heriot's special assistant, Alison Schmauch Somin, at either (202)376-7671 or aschmauch@usccr.gov.

Sincerely,



Gail Heriot

Peter Kirsanow