



Kevin Lindsey  
Commissioner  
Minnesota Department of Human Rights  
Freeman Building  
625 Robert Street North  
Saint Paul, MN 55155

March 29, 2018

Dear Commissioner Lindsey:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I am writing to express my concern over reports that the Minnesota Department of Human Rights has initiated investigations of 43 schools that have racial disparities in discipline.<sup>1</sup>

As a preliminary matter, I am concerned that you have refused to release the letters to the schools. Surely parents and taxpayers are entitled to know which schools are under investigation. If teachers are indeed disciplining students differently based on race, the public should know. If, on the other hand, teachers are not discriminating on the basis of race, but the disparities instead are the result of differing rates of misbehavior, and this investigation leads to less discipline and greater disorder in the schools, the public should know what prompted the policy change.

The premise of your investigation appears to be that differences in discipline rates are the result of discrimination, not differences in behavior. If teachers are indeed disciplining black and Native American students more harshly than white students, then that must change. But when the Department of Education's Office for Civil Rights tackled racial disparities in discipline, its effort relied on a disparate impact theory of discrimination – that is, that a race-neutral policy had disparate effects on different racial groups.<sup>2</sup> Thus, I suspect that the discipline disparities in Minnesota schools are also primarily the result of disparate *impact*, not disparate *treatment*.

Since you have refused to make the letters public, I can only guess about the bases for claims of discrimination. I surmise, however, it goes something like this: There are stark racial disparities in school discipline; there are anecdotal claims of different treatment based on race; ergo, there must be pervasive invidious racial discrimination, or at least implicit bias, at work.

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<sup>1</sup> Erin Hinrichs and Greta Kaul, *Minnesota Department of Human Rights warns 43 school districts and charters over discipline disparities*, MinnPost, Feb. 2, 2018, <https://www.minnpost.com/education/2018/02/minnesota-department-human-rights-warns-43-school-districts-and-charters-over-disc>; Katherine Kersten, *Undisciplined: Chaos may be coming to Minnesota classrooms, by decree*, Minneapolis Star-Tribune, Mar. 19, 2018, <http://www.startribune.com/undisciplined-chaos-may-be-coming-to-minnesota-classrooms-by-decree/477145923/>.

<sup>2</sup> Catherine Lhamon and Jocelyn Samuels, *Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline*, Jan. 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.



Evidence shows it is more likely that the racial disparities reflect disparities in offending. A MinnPost article in which you are quoted notes that “African-American students were eight times more likely to be suspended than their white peers, while Native American students were 10 times more likely to be suspended than their white peers.”<sup>3</sup> The inference is that teachers are ten times more biased against Native American students than white students, and eight times more biased against black students than white students.

I suggest a different inference: Occam’s Razor. Racial disparities in discipline are more likely primarily due to racial disparities in behavior.<sup>4</sup> For example, in a 2014 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.<sup>5</sup>

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).<sup>6</sup>

This is even suggested, inadvertently, by the earlier-mentioned MinnPost article, which says, “Pulling kids out of the classroom to correct behavior doesn’t work, Morris said: one of the best predictors of whether a kid will get suspended is if he or she has previously been suspended.”<sup>7</sup> This is unsurprising. If a child is badly-behaved enough to get suspended once, it is not surprising that he would misbehave again. People tend to be consistent.

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<sup>3</sup> Hinrichs and Kaul, *supra* note 1.

<sup>4</sup> See Gail L. Heriot and Alison Somin, *The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, *Tex. Rev. of L. and Politics* (forthcoming), Jan. 1, 2018, at 32-44 (discussing studies of misbehavior by school children), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3104221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221).

<sup>5</sup> 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), <https://www.sciencedirect.com/science/article/pii/S0047235214000105>.

<sup>6</sup> *Id.* at 264.

<sup>7</sup> Hinrichs and Kaul, *supra* note 1.



Additionally, the purpose of suspensions is not solely to correct disruptive students' behavior. It is also to remove disruptive students from the classroom so other students can learn. Many of these students will be black and Native American themselves. In 2011, the Commission held a hearing on school discipline and disparate impact. At this briefing, teacher Allen Zollman testified:

When a student disturbs the decorum and instructional progress of a class, is not responding to requests or reminders, or generally has tried a teacher's patience to the limit, the teacher can call the office and request help. This is where the school's disciplinary procedures come into play. Before the student can be removed and placed in 'time out', the teacher must prepare a disciplinary referral – what many of us used to call a 'pink slip'. This is a two-page form with space for three offenses – not just one – and a checklist of measures taken by the teacher before issuing this referral. These measures include a private conference with the student, a change of seat location, a lunch time or after-school detention, or a phone call to a parent. Sometimes the foregoing strategies are effective, but often they are not. What is important to note here is that in order to get a disciplinary referral for disruption in my school, there must be three infractions and they must be documented in writing BEFORE the student can be removed from the classroom. . . . [F]or mere disruption, it is no simple thing to have a student removed at the time of the disruptive behavior. This means that for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom.<sup>8</sup>

Artificially narrowing the discipline gap by discouraging teachers from suspending and otherwise disciplining students will merely paper over the problem, and is likely to exacerbate it. In your state, the St. Paul school system undertook a similar campaign to reduce racial disparities in discipline, with dreadful consequences.<sup>9</sup> Reduced discipline led to chaos in schools and classrooms, which harmed the education of well-behaved students. Students and teachers were injured. Additionally, this lack of discipline likely harmed some students who were on the margins – who ordinarily would not misbehave if punishment was swift and certain, but would act out if misbehavior and disorder were tolerated.

I fully support investigations in cases where it appears a teacher has treated a student differently because of his race. But it is almost certain that the racial disparity in discipline reflects a disparity in misbehavior. As disheartening as the racial discipline gap is, it is more disheartening if we no longer think that black and Native American students are capable of meeting the same disciplinary standards as white and Asian students. I urge you to release the letters sent to the 43

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<sup>8</sup> Statement of Allen Zollman, in *School Discipline and Disparate Impact*, U.S. Commission on Civil Rights, Oct. 2011, at 24, [http://www.usccr.gov/pubs/School\\_Disciplineand\\_Disparate\\_Impact.pdf](http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf).

<sup>9</sup> Katherine Kersten, *No Thug Left Behind*, City Journal, Winter 2017, <https://www.city-journal.org/html/no-thug-left-behind-14951.html>.



UNITED STATES COMMISSION ON CIVIL RIGHTS

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schools that are under investigation, and also to focus your investigation on any allegations of disparate treatment, not disparate impact.

Sincerely,

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

Peter Kirsanow  
Commissioner

Cc: Dr. Brenda Cassellius, Commissioner of Education