PACIFIC LEGAL FOUNDATION

July 23, 2021

Office for Civil Rights
U.S. Department of Education
Potomac Center Plaza
550 12th Street S.W.
Washington, DC 20024

Via Federal eRulemaking Portal

Re: Pacific Legal Foundation Comments on the Administration of School Discipline in Schools Serving Students in Pre-K through Grade 12

The Pacific Legal Foundation is a nonprofit organization that defends Americans' liberties when threatened by overreach and abuse and sues the government when it violates Americans' constitutional rights. This comment is in response to a request for information regarding the administration of school discipline in schools serving students in pre-K through grade 12 as it appears at 86 Fed. Reg. 30,449 (June 8, 2021). Thank you for the opportunity to offer comments on this extremely important topic.

A core principle of civil rights law is that government should treat individuals as individuals and avoid arbitrary classifications based on membership in a particular racial or ethnic group. This Comment[1] discusses the application of this principle to student

[1] Alison Somin is an attorney and Legal Fellow at Pacific Legal Foundation. This comment draws in substantial part on a longer piece (attached) that I co-authored with Gail Heriot, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. 471 (2018), *available at* https://drive.google.com/file/d/1cVGVsjGZASMuUhu3_3xzhZWr0momaYSj/view.

The notice requesting comment, as well as an OCR webinar on disciplinary disparities, indicate that OCR may be interested in issuing guidance that goes beyond the 2014 Guidance and that prohibits not only disciplinary practices with a racial disparate impact but also those with a disparate impact based on sex, sexual orientation, gender identity, and/or disability. Both this letter and the article that I co-wrote with Professor Heriot focus on the problems with racial disparate impact guidance rather than on these other forms of disparate impact. Although the constitutional analysis about any such guidance would proceed somewhat differently because different tiers of scrutiny apply, the legal conclusion should be the same, and my main concern — that individuals should be judged on their behavior and not on the basis of their membership in some group — would also pertain to any other such disparate impact guidance.

discipline in public schools. The Constitution and applicable statutes prohibit different treatment of students based on race. To effectuate prohibitions on different treatment, federal agencies may sometimes promulgate rules reaching practices or policies that have a disproportionate impact on a particular racial or ethnic group if those rules are congruent and proportional to preventing different treatment. Earlier OCR guidance on school discipline was not a congruent and proportional response and, by encouraging some schools to adopt disciplinary quotas, even encouraged race discrimination. OCR should not make the same mistake again and should not promulgate guidance substantially similar to that unlawful earlier guidance.

I. Title VI is a Disparate Treatment Statute That Does Not Itself Prohibit Disparate Impact Discrimination.

The Constitution requires that the government treat persons equally: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class."'"[2] In *Brown v. Board of Education*, the Supreme Court recognized that this constitutional principle prohibited race discrimination in K-12 public education.[3] Title VI of the Civil Rights Act of 1964 further prohibits what is known as disparate treatment race discrimination by recipients of federal funding, i.e. virtually all public K-12 schools. These statutory and constitutional prohibitions extend to banning race discrimination in school discipline.[4]

Title VI does not by itself, however, prohibit practices that merely have a disproportionate effect on a particular racial group — what is known as disparate impact discrimination.[5] As the Fourth Circuit put it: "disparity does not, by itself, constitute discrimination.[6] Further, as another court of appeals observed, "Racial disciplinary quotas violate equity" by "either systematically overpunishing the innocent or systematically

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[2] Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))

[3] Dear Colleague Letter, Dec. 21, 2018, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[4] People Who Care v. Rockford Board of Education, 111 F.3d 528 (7th Cir. 1997) (striking down a provision in a magistrate judge's decree that forbade the school district to refer to a higher percentage of minority students than of white students for discipline unless the district purged all subjective criteria from its disciplinary code).

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

[6] Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305, 332 (4th Cir. 2001) (*en banc*) (quoting Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228, 281 (W.D.N.C. 1999)).

underpunishing the guilty" and thus violate the requirement that "discipline be administered without regard to race or ethnicity.[7]

II. While Title VI Disparate Impact Rules May Sometimes Be Justified to Remedy Against Disparate Treatment Discrimination, There Must Be Congruence and Proportionality Between the Means the Rule Uses and the Ends to Be Achieved.

In some circumstances, however, a federal agency may promulgate disparate impact regulations that are congruent and proportional to preventing disparate treatment discrimination. 42 U.S.C. § 2000d-1 gives agencies the authority to promulgate rules to enforce Title VI's core prohibition on disparate treatment. The Supreme Court has left open the question of whether a department or agency with Title VI rulemaking power may promulgate prophylactic rules that employ a disparate impact standard.[8] As a general

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[7] *People Who Care*, 111 F.3d at 538.

[8] Some claim that the Department of Education has already promulgated general disparate impact rules at 34 C.F.R. § 100.3(b)(2) using notice and comment rulemaking procedures. That provision reads, in relevant part, "A recipient … may not … utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." The 2014 Guidance has been said to be permissible because it is a mere elaboration on that rule.

There are several problems with this claim. First, it is unclear whether 34 C.F.R. § 100.3(b)(2) really is a general disparate impact rule. It is better interpreted as "a very limited prohibition on extreme cases of disparate impact" – situations involving "certain characteristics that are so overwhelmingly identified with race, color, or national origin as to be virtual stand-ins for them." *See* Somin & Heriot, *supra* n.1, at 544, 554, 546.

If 34 C.F.R. § 100.3(b)(2) is interpreted as a general disparate impact rule, its breadth raises constitutional concerns. As the Supreme Court has recognized, disparate impact rules not only permit but affirmatively require disparate treatment discrimination when a disparate-impact violation would otherwise result. They place a "racial thumb on the scale," often requiring funding recipients "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." That type of racial decisionmaking is discriminatory. *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

Disparate impact liability "has always been properly limited in key respects that avoid the serious constitutional questions." Texas Dep't of Housing and Cmty. Affairs v. Inclusive Communities Project, 576 U.S. 519, 540 (2015). One such important and appropriate means of ensuring that disparate-impact liability is properly limited" is to give authorities "leeway to state and explain the valid [non-discriminatory] interest served by their policies." *Id*. at 541. Disparate impact is supposed to facilitate the "removal of artificial, arbitrary, and unnecessary barriers," *id*. at 540 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)), not the

matter, a regulation's conformity to statutory authority is to be measured by the same standard as a statute's conformity to constitutional authority.[9] Title VI forbids only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.[10] It follows that Section 602, which gives federal agencies power to enforce Title VI's core prohibition on race discrimination, should be read *in pari materia* with the provision of the Fourteenth Amendment that gives Congress power to enforce the Fourteenth Amendment's guarantee of equal protection. Congress may only use this enforcement power if those rules are congruent and proportional to the Fourteenth Amendment violation sought to be remedied.[11] As the Supreme Court said in *City of Boerne*, the appropriateness of remedial measures must be considered in light of the evil presented.[12] Strong measures appropriate to address a grave harm may be an unwarranted response to another, lesser one.

III. Previous OCR Discipline Disparate Impact Guidance Was Not Congruent and Proportional to Disparate Treatment Violations, and It Is Doubtful That Similar But Updated Guidance Could Meet the Relevant Congruence and Proportionality Legal Standard.

As OCR noted in its request for information, it previously issued an informal guidance document in 2014 ("2014 Guidance") on the topic of race discrimination in student discipline.[13] This guidance recognized correctly that Title VI prohibits disparate treatment racial discrimination in discipline but went further and asserted that it also prohibits disciplinary practices with a disparate impact. That guidance was withdrawn in

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displacement of valid, non-racially-motivated governmental policies. In employment, this limit is referred to as the business necessity defense. That particular terminology is not used in housing, but the Court recognized a similar limit in *Inclusive Communities Project*.

Because 34 C.FR. § 100.3(b)(2) contains no such necessity defense or equivalent, a constitutional problem arises if it is read as imposing a general prohibition on educational practices with a disparate impact. To avoid such a constitutional difficulty, the Education Department should adopt the narrower reading that it only applies as a very limited prohibition on extreme cases of disparate impact.

[9] Boske v. Comingore, 177 U.S. 459, 470 (1900).

[10] Regents of California v. Bakke, 438 U.S. 265, 287 (1978).

[11] City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997). A more extended discussion about the legal limits of agencies' authority to promulgate Title VI rules may be found in Heriot & Somin, *supra* n.1, at 530-63.

[12] *City of Boerne*, 521 U.S. at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[13] Dear Colleague Letter, Jan. 8, 2014, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

2018 on that grounds that it "advance[d] policy preferences and positions not required or contemplated" by the relevant governing statutes.[14] OCR was correct to withdraw the guidance then. Because significant evidence of disparate treatment race discrimination in school discipline is lacking, it would be unlawful to put in place the same or similar guidance now.

The 2014 Guidance was not congruent and proportional to effectuating Title VI's ban on disparate treatment discrimination. While there are racial disparities in discipline rates, the most persuasive evidence indicates that these disparities do not mainly stem from the disparate treatment discrimination that Title VI forbids. One empirical study found that "ethnic match between students and their teachers did not reduce the risk for referrals among Black students."[15] Or, in other words, Black teachers were just as likely to refer Black students to the principal's office for discipline as were white teachers. Indeed, one 2014 study finds that controlling for measures of prior misbehavior largely accounts for the differences in suspension between white and Black students.[16] It may also be worth noting that K-12 teaching is one of the most politically liberal professions in the nation, meaning it is unlikely that many quiet racists lurk there.[17] Finally, while previous OCR guidance and its prominent public proponents cited some studies that purport to show such bias, all have serious limitations or flaws.[18]

The Federal Register notice cites a United States Commission on Civil Rights report for the proposition that there are no racial disparities in behavior. However, as both two dissenting Commissioners and *The Washington Post* acknowledged when the report was published, that contention was demonstrably wrong.[19] The Civil Rights Commission's

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[14] Dear Colleague Letter, *supra* n.3.

[15] Catherine P. Bradshaw, et al., *Multilevel exploration of factors contributing to the overrepresentation of black students in office disciplinary referrals*, 102 J. EDUC. PSYCHOL. 508 (2010), *available at* https://psycnet.apa.org/record/2010-08635-018.

[16] John Paul Wright, et al., *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014) (stating that "great liberties have been taken in linking racial differences in suspensions to racial discrimination").

[17] Ana Swanson, *Chart: The most liberal and conservative jobs in America*, WASH. POST, June 3, 2015, *available at* https://www.washingtonpost.com/news/wonk/wp/2015/06/03/why-your-flight-attendant-is-probably-a-democrat/.

[18] For an extended discussion of these studies, see Heriot & Somin, *supra* n.1, at 514-23.

[19] Laura Meckler, *Civil rights commission calls for schools to combat racial disparities in discipline*, WASH. POST, July 23, 2019, *available at* https://www.washingtonpost.com/local/education/civil-rights-commission-calls-for-schools-to-combat-racial-disparities-in-discipline/2019/07/22/7cdbedf6-acbc-11e9-bc5c-e73b603e7f38_story.html.

report, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* (June 2019),[20] asserted that "Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers—but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses."[21] *The Washington Post* took a careful look at the report's claim and concluded to the contrary:

> Lhamon [Catherine Lhamon, then Chair of the Civil Rights Commission] and her aides pointed to a few spots in the 224-page report to back up the claim that there are no underlying differences in student behavior. But those citations did not offer such evidence. One set of data referenced in the report showed the opposite, documenting small but statistically significant differences in behavior of black and Hispanic students, compared with whites.
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> One of the commissioners who voted against adoption of the report, Gail Heriot, said she was disturbed by the finding that students of color do not commit more offenses warranting discipline than their white peers. "The report provides no evidence to support this sweeping assertion and there is abundant evidence to the contrary[.]"
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> She added that the commissioners who voted for the report had "misread" studies that find discrimination may account for some — but not all — of the discipline disparity. "To my knowledge, no researcher makes such a claim," she wrote.

The 2014 Guidance also spurred school districts to engage in race discrimination that violated Title VI, and any substantially similar future guidance is unlikely to be congruent and proportional to remedying disparate treatment violations. Take, for example, Minneapolis, where OCR opened an investigation into disciplinary practices in 2012 and entered into a resolution agreement in 2014. According to a November 9, 2014, article in the *Minneapolis Star Tribune*: "Minneapolis public school officials [have made] dramatic changes to their discipline practices by requiring the superintendent's office to

[20] Available at https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf.

[21] *Id*. at 45-46, 161.

review all suspensions of students of color."[22] The Superintendent or someone on her leadership team had to review every proposed suspension of Black, Hispanic, or Native American students that did not involve violent behavior. No such review was required for suspensions of white or Asian American students. In other words, Black and Hispanic students got an extra opportunity to convince school authorities that they should not be suspended that white and Asian American students did not. This different treatment based on race appears to be a simple Title VI and Equal Protection Clause violation.

In another instance, differential race discrimination was required directly by OCR. Oakland Unified School District's Resolution Agreement required "targeted reductions" in suspensions for African American and Hispanic students, but not for white and Asian American students.[23] Because this provision is requiring different treatment of students based on race, it appears more a basic violation of Title VI than a remedy for Title VI violations.

OCR resolution agreements also required special administrator scrutiny of individual teachers who disproportionately disciplined minority students.[24] Disproportionality in the other direction did not require such scrutiny. It is hard to avoid the message behind these measures: your discipline numbers must come out in certain proportions, even if you must mete out discipline unfairly to get there. This message likely led to Title VI and equal protection violations. OCR should not lawfully promulgate any new guidance that would again cause funding recipients to break civil rights laws.

IV. Disparate Impact Rules Are Not Interpretative Rules and Therefore May Only Be Promulgated by Notice and Comment Rulemaking Procedures.

The 2014 Dear Colleague letter purported to be a mere guidance, a term sometimes used to refer to what the Administrative Procedure Act (APA) calls "interpretative rules"

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[22] Alejandra Matos, *Minneapolis schools to make suspending children of color more difficult*, STAR TRIBUNE, Nov. 9, 2014.

[23] *Agreement to Resolve Oakland Unified School District OCR Case Number 09125001*, U.S. DEP'T OF EDUC. (Sept. 7, 2012), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-b.pdf.

[24] *See*, *e.g.*, Voluntary Resolution Agreement Against Christian County Public Schools OCR Case No. 03-11-5002 at 15 (Jan. 9, 2014); Resolution Agreement #05-12-5001 Minneapolis Public Schools at 17-18 (Nov. 11, 2014); Voluntary Resolution Agreement Tupelo Public School District OCR Case No. 06-11-5002 at 16 (Sept. 15, 2014); Resolution Against Christina School District OCR Case No. 03-10-5001 at 15 (Feb. 28, 2014); Resolution Agreement #05-10-5003 Rochester Public School District at 13 (Sept. 1, 2015); and Resolution Agreement Amherst County Public Schools, OCR Complaint No. 11-14-1224 at 14-15 (Sept. 1, 2015).

and/or "general statements of policy." The APA's notice and comment rulemaking requirements do not apply to those two types of agency documents, and, if the letter is a proper Title VI guidance, it means that it is exempt from that statute's presidential signature requirement.

According to the APA, an interpretative rule is an interpretation of an existing statute. An interpretative rule cannot create new duties or rights not specified in the statute itself. In the Title VI context, because Title VI is not itself a disparate impact statute, that means that an agency cannot issue disparate impact rules as interpretative rules. As the D.C. Circuit put it, "[A]n agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment."[25] Any disparate impact rule that the Department wishes to issue concerning race and discipline must therefore be issued pursuant to notice and comment rulemaking procedures.

Similar analysis applies if a disparate impact rule is treated as a "general statement of policy." Though the APA itself does not define this term, the Department of Justice has relied on the "working definition" that general statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency propose[d] to exercise a discretionary power."[26] But an agency cannot use its discretion to exercise a power that it is not directly granted by statute, again meaning that disparate impact discipline rules must be promulgated by notice and comment.

V. OCR's Legal Errors Have Led to Increased Classroom Disorder and Have Harmed Students Who Are Themselves Racial and Ethnic Minorities.

The 2014 Guidance was not just bad law, it is also bad policy that led to increased disorder in classrooms across the nation. Intentional discrimination against students of color in discipline should not be tolerated, and if that was all the 2014 Guidance prevented, it would be lawful and praiseworthy. But that's not what the record shows. News stories from across the country indicate that the pressure on schools to have racially proportional discipline rates led some schools to avoid disciplining some students in order to keep their numbers looking right, or at least pleasing to federal education funders.

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[25] Fertilizer Institute v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

[26] Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

The problem is that if misbehavior is not punished, there tends to be more of it. Detailed and credible news stories about the 2014 Guidance's effects indicated that many schools lessened their use of exclusionary discipline and that bad classroom behavior increased significantly as a result. After investigation by OCR in 2015, Oklahoma City reduced suspensions by 45%. Teachers disliked the policy, with about 60% responding to a survey that the amount and frequency of misbehavior had increased. An article in *The Oklahoman* reported:

> Students are yelling, cursing, hitting and screaming at teachers and nothing is being done but teachers are being told to teach and ignore the behaviors," another teacher reported. "These students know there is nothing a teacher can do. Good students are now suffering because of the abuse and issues plaguing these classrooms.[27]

Another news piece about Oklahoma City reported that "referrals would not require suspension unless there was blood."[28] An administrator explained that he thought that "nothing [was] being done" because "the district's main reason for wanting to develop a new code of conduct [was] simply to get the civil rights complaints off the table."[29]

Indianapolis had a similar experience. It adopted a policy designed to reduce suspensions, especially for Black students, in mid-2015. A few months later, the local teachers' union head said that "I am hearing from a lot of places that the teachers don't feel safe."[30] In the same news story, a teacher told the school board that "a student assaulted a teacher in broad daylight in a hallway of our school … He was back the next day."[31] Though it is unclear if new policies in Lafayette Parish, Louisiana, and St. Paul,

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[27] Tim Willert, *Many Oklahoma City School District Teachers Criticize Discipline Policies in Survey*, *Oklahoman*, Oct. 31, 2015, *available at* https://www.oklahoman.com/article/5457335/many-oklahoma-city-school-district-teachers-criticize-discipline-policies-in-survey.

[28] The Oklahoman Editorial Board, *Survey Shows Disconnect Between OKC School District and Its Teachers*, *Oklahoman*, Nov. 4, 2015, *available at* https://www.oklahoman.com/article/5457999/survey-shows-disconnect-between-okc-school-district-and-its-teachers.

[29] Willert, *supra* n.26.

[30] Dylan Peers McCoy, *Effort to Reduce Suspensions Triggers Safety Concerns in Indianapolis Public Schools*, CHALKBEAT, Mar. 23, 2016, *available at* https://in.chalkbeat.org/2016/3/23/21100642/effort-to-reduce-suspensions-triggers-safety-concerns-in-indianapolis-public-schools.

[31] Andrew Polley, *Speech to the IPS School Board*, YOUTUBE (Feb. 28, 2016), https://www.youtube.com/watch?v=KNVDUdVzYcg.

Minnesota, were directly motivated by OCR guidance, the same troubling rises in disorder occurred in those places.[32]

Students need some basic level of order in the classroom to be able to learn and realize their full potential as adults. These educational opportunities are perhaps most valuable to children who have the fewest resources at home, some of whom are themselves racial and ethnic minorities. OCR should not promulgate discipline guidance that will lead to learning losses for those young learners.

Conclusion

The Constitution's requirements of equal protection under law and the major federal civil rights statutes exist to secure the principle that individuals should be treated as individuals, not as representatives of their racial groups. In narrow circumstances, government may depart from that principle and rely on statistical targets to remedy past discrimination. But the law requires that any such departures be limited in time and scope to prevent the balkanization and divisiveness that stem from different treatment on the basis of race. While the Department of Education's 2014 Guidance may have been well intentioned, it lay beyond the scope of the Department's legal authority. It also appears to have backfired by increasing disorder in classrooms, limiting the opportunity and promise of education to some of the students who could benefit from it most. The Department should not repeat its earlier error.

Sincerely,

Alison Somin
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Separation of Powers

[32] *See* Heriot & Somin, *supra* n.1, at 498-503.