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July 23, 2021

Miguel Cardona
Secretary of Education
Department of Education
400 Maryland Ave SW
Washington, DC 20202

Alejandro Reyes
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Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline
Docket ID ED-2021-OCR-0068

Dear Secretary Cardona:

The undersigned state attorneys general ("Attorneys General") respectfully submit the following comments concerning the Request for Information Regarding the Nondiscriminatory Administration of School Discipline (the "RFI") of the Office of Civil Rights ("OCR") and the Department of Education ("ED"). The Attorneys General submit this comment in support of retaining the December 21, 2018 Dear Colleague Letter (the "2018 Letter") and against reinstatement of any part of the guidance from the January 8, 2014 Dear Colleague Letter (the "2014 Letter").

The Attorneys General oppose reinstatement of the 2014 Letter, or similar policy, for the following three reasons: 1) the disparate impact approach adopted by the 2014 Dear Colleague letter was illegal, as it violated the governing statutory provisions that it purported to implement; 2) the 2014 Dear Colleague Letter was disastrous as a policy matter, and had numerous pernicious effects such as impairing learning environments for students and inviting race-based decision-

making that violates both the Fourteenth Amendment and the Civil Rights Act; and 3) the 2014 Letter's premises were contrary to the actual evidence.

I. A Disparate Impact Standard for School Discipline Is Unlawful

The 2014 Dear Colleague Letter purports to implement Titles IV and VI of the Civil Rights Act of 1964, which serve as the sole possible legal sources of legal authority for its issuance. But unlike other provisions of the Civil Rights Act, such as Title VII, neither Title IV nor VI impose liability for disparate impacts. Instead, both Title IV and VI prohibit only *intentional* discrimination and not disparate impacts. The 2014 Letter thus purported to impose liability that its underlying statutes did not permit.

Title IV, which addresses school desegregation, only applies to cases of intentional discrimination and not to disparate impacts.[1] Similarly, the Supreme Court held in *Alexander v. Sandoval* that Title VI "directly reaches only instances of intentional discrimination" and does not prohibit activities that might have a disparate impact on different racial groups.[2] As the Eighth Circuit succinctly explained, "Title VI prohibits only intentional discrimination. Proof of disparate impact is not sufficient."[3]

Sandoval further clarified that Section 601 of Title VI does not go beyond what is prohibited by the Equal Protection Clause of the Fourteenth Amendment and by the Fifth Amendment.[4] It is for this reason that *Sandoval* held that there is no private right of action under Title VI for disparate impact.

Section 602 of Title VI empowers federal agencies to adopt regulations to "effectuate the provisions of" Section 601.[5] But ED cannot "effectuate" a provision by transforming it into something that it is not: *i.e.*, a disparate-impact provision. Indeed, the Supreme Court "c[ould] not help observing ... 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."[6] In an earlier concurrence, Justice O'Connor said much the same thing, noting that regulations promulgated pursuant to Title VI may not impose a disparate impact standard and pointing out that if "the purpose of Title VI is to proscribe only purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative

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[1] *See*, *e.g.*, *Cannon v. Univ. of Chicago*, 648 F.2d 1104, 1108 (7th Cir. 1981).
[2] 532 U.S. 275, 280-281 (2001).
[3] *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 794 (8th Cir. 2010).
[4] *Sandoval*, 532 U.S. at 280-81.
[5] 42 U.S.C.A. § 2000d-1
[6] *Sandoval*, 523 U.S. at 286 n. 6 (citations omitted).

regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply 'further' the purpose of Title VI; they go well beyond that purpose."[7]

As the Federal Commission on School Safety (FCSS) (which was made up of the Attorney General and the Secretaries of Education, Homeland Security, and Health and Human Services) pointed out, "authorities, including the United States Supreme Court, have questioned the applicability of a disparate impact legal theory to Title VI of the Civil Rights Act of 1964, upon which the Guidance relies, thus calling into question its legal basis in the school discipline context."[8]

Furthermore, the 2014 Letter and other similar attempts at eliminating racial disparities in discipline have often resulted in unlawful quotas. The FCSS found that "[b]y telling schools that they were subject to investigation, and threatening to cut federal funding because of different suspension rates for members of different racial groups, the [2014 Letter] gave schools a perverse incentive to make discipline rates proportional to enrollment figures, regardless of the appropriateness of discipline for any specific instance of misconduct."[9] For example, following the 2014 Letter, Minneapolis Public Schools set numerical quotas as part of its plans to decrease racial disparities in discipline.[10] Such quotas are not only unlawful, they are unwise. "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."[11]

Because the 2014 Letter purported to impose disparate-impact liability in a manner directly contrary to the statutory provisions it allegedly implements and

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[7] *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 612–15 (1983) (O'Connor, J., concurring); *see also, S. Camden Citizens in Action v. New Jersey Dep't of Env't Prot.*, 274 F.3d 771, 789–90 (3d Cir. 2001). ("Inasmuch as the [Supreme] Court found previously that the only right conferred by section 601 was to be free of intentional discrimination, it does not follow that the right to be free from disparate impact discrimination can be located in section 602. In fact, it cannot.").

[8] FEDERAL COMMISSION ON SCHOOL SAFETY, *Final Report of the Federal Commission on School Safety*, 67, 70-72 (December 18, 2018), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

[9] *Id.* at 71.

[10] STAN ALLEYNE, 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 [https:// web.archive.org/web/20141120054651/http://www.mpls.k12.mn.us/november_7.html] ("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.").

[11] *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 538 (7th Cir. 1997).

also encouraged the imposition of illegal quotas, it was unlawful and should not be reinstated.

II. The 2014 Dear Colleague Letter and Its Imposition of a Disparate Impact Condition Impaired Learning Environments for Students

In addition to being unlawful, the 2014 Letter was terrible policy, and actually harmed its stated goal of "ensur[ing] that all students have an equal opportunity to learn and grow in school."[12] The FCSS found that "[w]hen school leaders focus on aggregate school discipline numbers rather than the specific circumstances and conduct that underlie each matter, schools become less safe." [13] Schools, teachers, and administrators trying to apply the 2014 Letter and similar state-level or local mandates have consistently found that, in practice, the only way to achieve such requirements is to loosen discipline standards and adopt a more permissive approach to misbehavior in schools.[14] That makes sense as "[t]he easiest and safest strategy would be clear: Reduce suspensions for minority students in order to make your numbers look good."[15] ED, however, "fail[ed] to consider the other side of the coin—that African-American students may be disproportionately victimized by disorderly classrooms—[and therefore its] policy threatened to do more harm than good even for the group [ED] was trying to help."[16]

The FCSS found that the 2014 Letter "create[d] a chilling effect on classroom teachers' and administrators' use of discipline by improperly imposing, through the threat of investigation and potential loss of federal funding, a forceful federal role in what is inherently a local issue." [17] Even worse, "the threat of investigations by the

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[12] 2014 Letter at 5.
[13] FEDERAL COMMISSION ON SCHOOL SAFETY, *supra* note 8 at 68.
[14] Chris Papst, *Baltimore County Teachers: Culture of Leniency Leading to Violence*, FOX 5 NEWS, June 11th 2018, https://foxbaltimore.com/news/project-baltimore/baltimore-county-teachers-culture-of-leniency-leading-to-violence; Jay Rey, *Buffalo teacher survey points to disruptive students, lack of discipline*, THE BUFFALO NEWS, Jan 29, 2018, https://buffalonews.com/news/local/education/buffalo-teacher-survey-points-to-disruptive-students-lack-of-discipline/article_a3c99653-9374-5131-8742-09274b929704.html; Jason L. Riley, *Another Obama Policy Betsy DeVos Should Throw Out*, WALL STREET JOURNAL, Sept. 12, 2017, https://www.wsj.com/articles/another-obama-policy-betsy-devos-should-throw-out-1505256976; Tim Willert, *Survey: Oklahoma City teachers struggle to maintain classroom order*, THE OKLAHOMAN, October 30, 2017, https://www.oklahoman.com/article/5570005/survey-oklahoma-city-teachers-struggle-to-maintain-classroom-order; Mackenzie Mays, *As expulsions, suspensions decrease at Fresno schools, concerns about out-of-control classrooms grow*, THE FRESNO BEE, Dec. 16, 2015, https://www.fresnobee.com/news/local/education-lab/eye-on-education/article49482150.html.
[15] Gail 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*, 22 TEX. REV. L. & POL. 471, 474 (2018).
[16] *Id.* at 477.
[17] FEDERAL COMMISSION ON SCHOOL SAFETY, *supra* note 8 at 67.

Office for Civil Rights (OCR) under sub-regulatory documents such as the 'Rethink School Discipline' Guidance . . . likely had a strong, negative impact on school discipline and safety."[18] Indeed, the FCSS found that "[s]urveys of teachers confirm that the [2014 Letter's] chilling effect on school discipline—and, in particular, on the use of exclusionary discipline—has forced teachers to reduce discipline to non-exclusionary methods, even where such methods are inadequate or inappropriate to the student misconduct, with significant consequences for student and teacher safety."[19]

Educators, parents, and experts described to the FCSS "how their schools ignored or covered up—rather than disciplined—student misconduct in order to avoid any purported racial disparity in discipline numbers that might catch the eye of the federal government. They also argued that some alternative discipline policies encouraged by the [2014 Letter] contributed to incidents of school violence, including the rape of an elementary school student with a disability, the stabbing of one student by another student, and numerous assaults of teachers by students."[20] Experts testified to the FCSS "about the need for more local flexibility in handling student discipline and that the Guidance endangers school safety. These experts noted that disciplinary policy is most effectively addressed at a local level and that federal intervention in day-to-day disciplinary matters undermines local decision-making."[21]

Notably, the RFI cites statistics on racial disparities in discipline, but fails to cite any statistics or narratives evaluating whether the laxer school discipline effectively mandated by the 2014 Letter was actually beneficial for students. In fact, the available data show the opposite: that lax discipline impairs student learning and growth.[22]

An illustrative example of the negative effects of the type of policies demanded by 2014 Letter comes from New York City, which implemented two rounds of discipline reform (during the 2011-12 and 2013-14 school years) that resulted in laxer discipline standards and decreased student suspensions.[23] A

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[18] *Id.*
[19] *Id.* at 69.
[20] *Id.* at 68.
[21] *Id.*
[22] *E.g.*, Scott Imberman, *et. al.*, *Katrina's Children: Evidence on the Structure of Peer Effects from Hurricane Evacuees*, NBER WORKING PAPER 15291, August 2009, https://www.nber.org/papers/w15291; Josh Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 INTERNATIONAL ECONOMIC REVIEW 355, Jan. 23, 2013.
[23] MAX EDEN. MANHATTAN INSTITUTE, *School Discipline Reform and Disorder: Evidence from New York City Public Schools, 2012–16*, 5, 24 (March 2017), https://media4.manhattan-institute.org/sites/default/files/R-ME-0217v2.pdf; *see also* Max Eden, *Backsliding on school*

survey administered citywide to teachers and students also showed measurable negative impacts in school climate following the reforms. For example, increased percentages of students reported physical fights in school, more frequent drug and alcohol abuse, and increased gang activity, particularly at schools with greater numbers of minority and low-income students.[24] In New York City schools, "incidents of harassment, discrimination and bullying during the 2017-2018 academic year" increased "more than 300 percent" from the 2013-2014 school year.[25]

Similarly, during the 2012-13 school year, Philadelphia schools implemented discipline "reform" to reduce out-of-school suspensions. The change led to increased school attendance for students who had been suspended before the reform, but not to any improved achievement among those same students. Even worse, at disadvantaged schools, students who had never before been suspended experienced decreases in achievement.[26] A randomized control trial in Pittsburgh schools to test the effects of discipline reform on academically disadvantaged schools found that while such reforms reduced rates of school suspensions, they failed to decrease arrest rates of students, did not have a significant impact on school absences, and had a negative effect on test scores for African American and middle school students.[27] Press reports from across the country report similar outcomes from discipline reform, with learning conditions suffering as problem students are allowed to disrupt classrooms without consequence.[28]

Indeed, the 2014 Letter "contribut[ed] to the problem of disorderly classrooms, especially in schools with high minority student enrollment."[29] For example:

- Oklahoma City teachers "were told that referrals would not require suspension unless there was blood."[30]

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discipline: How de Blasio's suspension reforms are producing classroom disorder, NY DAILY NEWS, Mar. 14, 2017, https://www.nydailynews.com/opinion/backsliding-school-discipline-article-1.2996805.

[24] EDEN, MANHATTAN INSTITUTE, *supra* note 23, at 24.

[25] Selim Algar, *Bullying in NYC schools hit unprecedented levels last year*, NEW YORK POST, May 9, 2019, https://nypost.com/2019/05/09/bullying-in-nyc-schools-hit-unprecedented-levels-last-year/.

[26] Matthew P. Steinberg and Johanna Lacoe , THOMAS B. FORDHAM INSTITUTE, *The Academic and Behavioral Consequences of Discipline Policy Reform: Evidence from Philadelphia*,26-30 (Dec. 2017), https://fordhaminstitute.org/sites/default/files/publication/pdfs/1205-academic-and-behavioral-consequences-discipline-policy-reform-evidence-philadelphia.pdf.

[27] Catherine H. Augustine, *et. al.*, RAND, *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*, 51, 55 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2800/RR2840/RAND_RR2840.pdf

[28] *See supra*, note 13.

[29] Heriot, *supra* note 15 at 478.

[30] *Id.* at 497.

- In Louisiana: "At the beginning of the year, a student assaulted a teacher in broad daylight in a hallway of our school…. He was back the next day."[31]
- "I had a student threaten me physically in my classroom, to put his hands on me and, he would have been back in the classroom the very next morning had I not said, 'I will get an attorney and I will get a restraining order against this student.' Otherwise, the administration would have done nothing."[32]
- "Students who are allowed to stay in school after gross offenses amp up their behavior in order to see how much they'll get away with without consequence."
- "There is a feeling that by keeping some students in school, we are risking the safety of students."
- "Without proper additional staffing and facilities to keep these students in school, staff do experi-ence a perceived (sometimes real) safety concern."
- "Schools are not equipped to provide supports to mentally or emotionally unstable children. We need help."
- "We have received numerous complaints from parents and staff about students who should not be in school based on their disciplinary records."
- "We see victims of bullying and harassment tend to miss more days of school and are more likely to leave the district when the perpetrators are not removed from school."[33]

This evidence of the effects of the 2014 Letter demonstrates that it was terrible public policy, and further that it would be arbitrary and capricious to reinstate the same failed policy.

III. Measurable Differences in Student Behavior and Conduct Account for Most Disparities in School Discipline Rates

The Seventh Circuit has observed that "statistical disparities" do not necessarily "reflect discrimination, intentional or otherwise," and that a number of factors beyond discrimination often explain differences in outcomes in schools, such as poverty and "the educational attainments of the student's parents and the extent of their involvement in their children's schooling."[34] Similarly, the Fourth Circuit has explained that "disparity does not, by itself, constitute discrimination."[35]

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[31] *Id.* at 498.
[32] *Id.* at 499.
[33] FEDERAL COMMISSION ON SCHOOL SAFETY, *supra* note 8 at 68.
[34] *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 534, 537 (7th Cir. 1997)
[35] *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 332 (4th Cir. 2001) (en banc) (rejecting claim that disparate racial impact in discipline rates was caused by discrimination, and stating that "[t]he idea that [the school district] should have a disciplinary quota is patently absurd")

Several federal courts have rejected arguments that racial disparities in school discipline are caused by unlawful discrimination.[36]

The RFI presupposes that the only explanation for disparities in discipline rates is discrimination, but ED has never identified evidence demonstrating that this assumption is correct. Instead, as Commissioner Heriot explained in her dissent to a 2019 report by the U.S. Commission on Civil Rights ("USCCR"):

> If discrimination were to blame, it would take discrimination of epic proportions to account for all that. It would mean that two out of three African Americans who are suspended would not have been suspended if they had been white. Similarly, it would mean that huge numbers of white students would not have been suspended if they had been Asian. Teachers, guidance counselors, principals and school district officials of every race and ethnicity would have had to cooperate together to produce such a result.
>
> No explanation is ever given to as why teachers would be so pro-Asian and so anti-Pacific Islander if there is really no difference in their behavior. To believe that they are would require one to take it on faith that the country is not just deeply racist, but arbitrarily racist: One minority group, many of whose members are fairly recent immigrants, is treated especially well; another minority group with many members who are fairly recent immigrants, is treated especially poorly.[37]

The data do not show any pattern of actual discrimination in school discipline rates. The 2018 Letter's guidance is therefore more in line with the actual data.

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[36] *Coal. to Save Our Child. v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 775 (3d Cir. 1996) (affirming district court's rejection of argument that disparate impact in discipline rates was caused by discrimination, and noting that there was no "authoritative literature to support" the assumption that "'undiscipline' or misbehavior is a randomly distributed characteristic among racial groups" and also noting that racial disparities in the case were highest for serious offenses which had more objective definitions); *Tasby v. Estes*, 643 F.2d 1103, 1107-1108 (5th Cir. 1981) (holding that statistical evidence of racial disparities in discipline rates was insufficient to establish prima facie case of racial discrimination by school district absent proof that administration of student discipline was actually motivated by discriminatory purpose).

[37] U.S. COMMISSION ON CIVIL RIGHTS, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, 183-184 (July 23, 2019), https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf.

IV. Conclusion

"[D]iscipline is a matter on which classroom teachers and local school leaders deserve both autonomy and deference."[38] The 2014 Letter adopted an illegal and ill-considered approach that is not supported by reason or evidence. The guidance that it imposed worsened learning environments for students and likely led to results diametrically opposed to its stated goal of reducing racial disparities in education. Moreover, the disparate impact approach that it adopted was unlawful. A return to the 2014 Letter would be a giant step backward for education in the United States. As more and more students return to school following the COVID-19 pandemic, OCR and ED should leave undisturbed the guidance of the 2018 Letter.

Respectfully,

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[38] FEDERAL COMMISSION ON SCHOOL SAFETY, *supra* note 8 at 68 (quoting testimony of Francisco Negron, General Counsel for the National School Boards Association).

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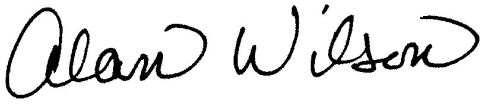

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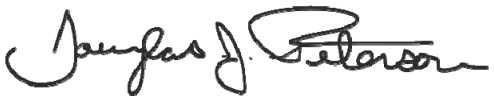

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