UNITED STATES COMMISSION ON CIVIL RIGHTS

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November 24, 2014

Dear Superintendent Johnson:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I write in response to the Minneapolis School District's recent announcement that administrators will automatically review the suspensions of every "black or brown student". I welcome your clarification that schools remain free to suspend students and that the administrative review will be geared toward reducing such suspensions.[1] However, I am concerned that this new program will nonetheless result in racial quotas for disciplinary actions, with negative consequences for the learning experience of students.

In recent years, various members of the Commission, including myself, have repeatedly addressed the problem of school discipline and disparate impact.[2] I particularly commend to you the statements of Commissioner Heriot and former Commissioner Todd Gaziano in the Commission's 2012 report on disparate impact and school discipline.[3] The report is included with this letter.

The new discipline policy is legally and constitutionally suspect. It is understandable that you would believe the new policy poses no legal or constitutional problems because it has been approved by the Department of Education's Office of Civil Rights [OCR]. However, OCR's approval has legal and constitutional problems of its own. It is based on its embrace of disparate impact theory, which is not contemplated in the text of Title VI and the use of which was questioned by the Supreme Court in footnote 6 of *Alexander v. Sandoval*.[4] Furthermore, the Court assumed without deciding

[1] Minneapolis Public Schools, Statement from Dr. Johnson regarding inaccurate information reported in the Star Tribune (Nov. 10, 2014), http://www.mpls.k12.mn.us/uploads/supt_statement_-_inaccurate_reporting.pdf

[2] *See* Letter from Commissioners Gail Heriot and Peter Kirsanow to Secretary Arne Duncan and Attorney General Eric Holder, February 18, 2014, at 2-3, http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/2.17.14-School-Discipline-Guidance-Comment.pdf.

[3] U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT (Apr. 2012); Statement and Rebuttal of Commissioner Todd Gaziano, 87-96; Statement and Rebuttal of Commissioner Gail Heriot, 97-114.

[4] Alexander v. Sandoval, 532 U.S. 275, n. 6 (2001).

> 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

in *Alexander v. Sandoval* that disparate impact *regulations* were permissible under Title VI. Under the Administrative Procedure Act, which binds the Department of Education, it is impermissible for OCR to use something less than a duly promulgated regulation to place new burdens on school districts. The Guidance regarding racial disparities in school discipline is not a duly promulgated rule, and therefore the legality of the Guidance is questionable.[5] It also exposes you to potentially violating § 601 of Title VI, which forbids disparate treatment on the basis of race, in an effort to avoid a racially disparate impact which is permitted by Title VI.

The use of disparate impact theory in this context also has constitutional problems, as efforts to ameliorate disparate impacts often do. I would have to be profoundly naïve to believe that this policy is not introducing a racial quota system for school discipline. According to the statement announcing the new discipline policy, "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."[6] This is a racial quota system for school discipline, because it has nothing to do with whether any particular individual deserved to be punished for his misbehavior.

The Seventh Circuit has addressed the problem of racial quotas in school discipline. In *People Who Care v. Rockford Bd. of Educ.*, Judge Posner wrote, "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

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> 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]

[5] *See* Letter from Commissioners Gail Heriot and Peter Kirsanow to Secretary Arne Duncan and Attorney General Eric Holder, *supra* note 2, at 2-3.

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

[6] 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.

entitlements."[7] The Seventh Circuit's criticisms apply as well to Minneapolis's new quotas for racial discipline. It too exposes students who belong to non-preferred races to a stricter discipline policy than students who belong to preferred races. It teaches them that justice is not colorblind and that we do not stand or fall on our individual merit. In the event of litigation, I expect that the Eighth Circuit will find its sister circuit's reasoning persuasive.

This profound inequity is the potential constitutional problem with this discipline policy. Achieving a state of affairs where there is no racial disparity in discipline by 2018 means that there will have to be differential treatment of misbehaving students based on their race. There is, to our knowledge, no substantive allegation that black or brown students are being treated more harshly in Minneapolis schools on the basis of their race. If there were such an allegation, this new policy would refer to concrete examples of racially disparate treatment rather than racial disparities in discipline. Racial disparities in school discipline have been common knowledge for years. If it were possible for such disparities to be solved through racially neutral policies, it would have happened by now. The idea that MPS will be able to eliminate the racial disparity in discipline by 2018 without either treating black and brown students more leniently or white students more harshly is unrealistic and absurd.

This is the dark side of disparate impact. In trying to avoid disparate impacts caused by racially neutral policies, entities begin to deliberately discriminate by treating people differently based on race. This was the situation that led to the Supreme Court case *Ricci v. DeStefano*. As Justice Scalia noted, attempts to avoid disparate impact that result in disparate treatment—even when sanctioned by statute, which is not the case here—may violate the Equal Protection Clause.[8] The fact that the OCR is compelling you to engage in these practices does not excuse a constitutional violation.[9]

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[7] People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 538 (7th Cir. 2007).

[8] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("[R]esolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[9] *Id.*

> Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers 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, as the Court explains, discriminatory.
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> To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is unclear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, not retail, level. "[T]he Government must treat citizens as individuals, not as simply

In short, by trying to remedy the disparate impact of facially neutral disciplinary policies that do *not* violate Title VI, you are exposing MPS to liability for racially disparate treatment that *is* banned by Title VI, as well as violating the Equal Protection Clause.

You may object that I am missing the real problem, which is that "black and brown" students are being "over-punished". While alluring, that explanation is unlikely to be the case. It is more likely that the discipline disparity reflects differential involvement in behavior that needs to be disciplined. In a new 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.[10]

> 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).[11]

This brings us to another problem. If the differences in discipline rates reflect actual misbehavior on the part of students, and this behavior is of long duration and seemingly intractable, what is to be done?[12] Is the solution simply not to punish the misbehaving students because we do not want ten black kids to be punished and only five white kids to be punished? Do we let the five "extra" black kids go unpunished? And if

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components of a racial, religious, sexual or national class." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted). And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

[10] 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), available at http://www.sciencedirect.com/science/article/pii/S0047235214000105.

[11] *Id.* at 264.

[12] *Id.* at 263-64.

we do, what is the effect on the students in the class who are well-behaved, are trying to learn, and who often are "black or brown" themselves?

At the Commission's 2011 briefing on school discipline and disparate impact, Allen Zollman, who taught English as a Second Language and remedial math and reading classes at a school that at the time was 74% African-American, testified that it was time-consuming and difficult to have a disruptive student referred for discipline. As a result, "it is no simple thing to have a student removed at the time of the disruptive behavior. This means for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom."[13] When the witnesses who were teachers were asked what effect it would have on non-disruptive students if the disruptive student were back in class, the witnesses agreed it would be very negative. This is partly because the disruptive student continues to disrupt the classroom. But it also has a negative effect on other students because it demonstrates that there is no real punishment for misbehavior.[14] As an educator, you are doubtless aware of this, yet your new policy is designed to make it more difficult to remove disruptive students from the classroom. You may disavow that is the case, but teachers and administrators will get the message: we must reduce racial disparities in discipline, so suspend fewer black and brown kids.

Thank you for your attention to these concerns. If you have any questions or concerns, you may contact my special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

Peter Kirsanow
Commissioner

[13] U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT (Apr. 2012), at 24, available at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.
[14] U.S. COMMISSION ON CIVIL RIGHTS, Briefing on Disparate Impact in School Discipline, February 11, 2011, transcript at 51-52, http://www.usccr.gov/calendar/trnscrpt/BR_02-11-11_School.pdf; *see also* Hans Bader, *Obama Administration Undermines School Safety, Pressures Schools to Adopt Racial Quotas in School Discipline*, COMPETITIVE ENTERPRISE INSTITUTE, Jan. 13, 2014, https://cei.org/blog/obama-administration-undermines-school-safety-pressures-schools-adopt-racial-quotas-student.