



Filed Electronically

July 23, 2020

Hon. Miguel Cardona
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Parents Defending Education’s Comments on the Office of Civil Rights, Department of Education, Request for Information, “Request for Information Regarding the Nondiscriminatory Administration of School Discipline,” 86 Fed. Reg. 30449, Docket ID ED-2021-OCR-0068 (June 8, 2021)

Dear Secretary Cardona:

Parents Defending Education (“PDE”) is a nationwide, nonpartisan, grassroots organization whose members are primarily parents of school-aged children. PDE’s mission is to prevent—through advocacy, legislation, and, if necessary, litigation—the politicization of K-12 education. PDE submits these comments regarding school discipline and to oppose any changes to OCR’s current policies. The Department of Education’s Office of Civil Rights was right in 2018 to rescind prior guidance.¹ That prior guidance warned school officials that differences in disciplinary rates could be evidence of discrimination.² Implicitly, such warnings encourage school administrators to revise disciplinary policies to institute disciplinary quotas based on race (versus the individual circumstances of each individual disciplinary incident). That is unlawful discrimination, plain and simple.

PDE believes that teachers and principals at the local level are best situated to address disciplinary issues and ensure the well-being of their communities. Every student is a unique individual and should be treated as such, regardless of his or her race or sex. A nationwide policy reviving old and rescinded guidance sends exactly the opposite message. Should OCR do so, OCR would be inviting school officials to discriminate on

¹ See *Dear Colleague Letter*, U.S. Department of Education Office for Civil Rights (Dec. 21, 2018), <https://bit.ly/3zeftrw> (“2018 Dear Colleague Letter”) (“States and local school districts play the primary role in establishing educational policy, including how to handle specific instances of student misconduct and discipline, and in ensuring that classroom teachers have the support they need to implement appropriate discipline policies.”).

² See *Nondiscriminatory Administration of School Discipline*, U.S. Department of Justice & U.S. Department of Education Office for Civil Rights (Jan. 8, 2014), <https://bit.ly/3B8OMQJ> (“2014 Dear Colleague Letter”).

the basis of race. For the following three reasons, OCR should not set schools on a path of adopting racially motivated disciplinary policies:

First, the premise of OCR’s Request for Information is fundamentally flawed. OCR has assumed that “[s]tudents 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.”³ OCR cites only three sources for this claim: a 2019 report issued by the U.S. Commission on Civil Rights (“*Beyond Suspensions*”), a 2018 report issued by the Government Accountability Office, and OCR’s own superficial analysis of school discipline statistics from the 2017-18 school year. None hold up under scrutiny.

The 2019 *Beyond Suspensions* report⁴ has been roundly criticized as statistically illiterate, including by a member of the Commission on Civil Rights itself.⁵ As Commissioner Gail Heriot observed when the report was published, there is “no evidence” to support the Commission’s “sweeping assertion” about disciplinary disparities and there is in fact “abundant evidence to the contrary.”⁶ The report’s statistical analysis—adopted wholesale here by OCR—is flawed many times over.

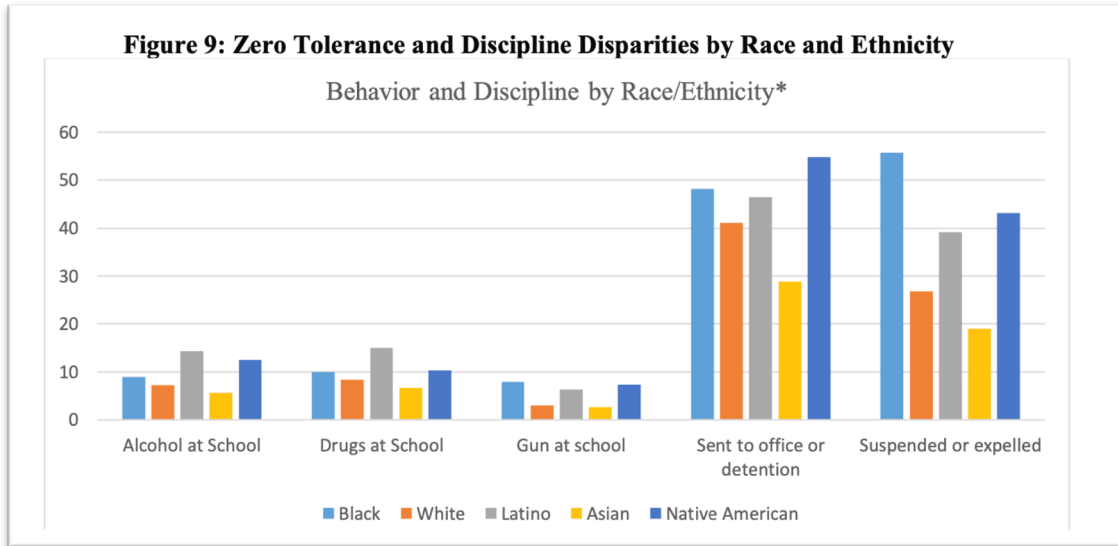
Consider this chart from *Beyond Suspensions*, meant to illustrate the premise that incidents of misconduct are equal across all racial groups while discipline rates widely vary:

³ *Request for Information Regarding the Nondiscriminatory Administration of School Discipline*, 86 Fed. Reg. 30449, 30450-51 (June 8, 2021).

⁴ *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, U.S. Commission on Civil Rights (July 2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (“*Beyond Suspensions*”).

⁵ Dissenting Statement of Commissioner Gail Heriot, *Beyond Suspensions* 177; see also Dissenting Statement of Commissioner Peter N. Kirsanow, *Beyond Suspensions* 192.

⁶ *Id.* at 177.



Beyond Suspensions at 114, fig. 9.

The chart is unconvincing at best and misleading at worst. For starters, the underlying data is woefully incomplete, based only on self-reported incidents of misconduct and discipline by male 10th graders.⁷ Moreover, it “appears to have been deliberately designed to make the differences in behavior seem as small as possible.”⁸ To the left, it displays misconduct rates (for only three particular offenses) on a scale that ranges from 0.5 to 15.0. To the right, it displays disciplinary outcomes (for misconduct generally) on a much broader scale, ranging from 0 to 60. This is overt visual manipulation. The misconduct rates are on a compressed scale, while the discipline rates are on an expanded scale.⁹ Combining them, the chart creates an artificial perception that misconduct rates and discipline rates are mismatched. Worse, the misconduct rates and

⁷ *Beyond Suspensions* at 114. Indeed, in some cases sample sizes were too small to draw any statistically significant conclusions. See Heriot, *supra*, 182 n.954 (“the failure to prove a difference to a statistically significant level is emphatically not the same thing as proof that the behavior is the same”); see also, e.g., *id.* at 181-82 n.953 (criticizing other data relied upon in *Beyond Suspensions*, including an experiment that did not purport to gauge rates of misbehavior in school by race).

⁸ Heriot, *supra*, 181 & n.952 (“For misbehavior rates, the bar graph on page 116 reports figures that range from 0.5 to 15.0. Yet the Y-axis runs from 0 to 60. This necessarily makes the differences look small. If the Y-axis had run from 0 to 20 things would have looked a lot different. To justify this unusual method for presenting data, the Commission could say that it wanted to present data on office visit/detention rates and on suspension/expulsion rates in the same graph. But there was no good reason to combine those issues into the same graph. Office visits, detention, suspensions, and expulsions are not merely a response to the misbehaviors (e.g. gun possession) addressed in the graph. They are a response to all types of misbehavior combined. The effect of the graph is to mislead.”).

⁹ This compression alone is misleading. For example, at least according to the *Beyond Suspensions* report, Black, Latino, and American Indian male 10th graders were roughly twice as likely as Asian and White students to bring a gun to school. But by compressing the misconduct data, the difference appears *de minimis*.

the discipline rates are apples and oranges—on two completely different scales that cannot be meaningfully compared. The Commission limited its aggregation of misconduct to incidents involving “alcohol at school,” “drugs at school,” or “guns at school,” but its aggregation of disciplinary incidents broadly included discipline for *any misbehavior* that resulted in a visit to a principal’s office, suspension, or expulsion.¹⁰ Without that additional data, the chart proves nothing about rates of misbehavior versus discipline. And as Commissioner Heriot has already exhaustively explained, nothing else in *Beyond Suspensions* fills that gap.¹¹

OCR’s remaining two sources—the 2018 GAO report and the 2017-18 data collected by OCR—are likewise devoid of any real evidence of racially discriminatory discipline. By OCR’s own admission, the data shows only that some students are disproportionately disciplined (*i.e.*, a disproportionate number of boys are disciplined when compared to the percentage of boys in the class overall).¹² Of course, comparing discipline rates to *total* school population tells us nothing. The comparison instead must be discipline rates among the *subset* of those committing misconduct. For instance, OCR has relied on statistics showing that 73.6% of expelled students were male students of all races, even though male students made up only 51.4% of the public-school student population.¹³ OCR has not argued that this disproportionate discipline rate alone reveals systemic, nation-wide discrimination against male students in public schools. The more obvious explanation is that there are confounding variables at play—for example, male students might commit more expulsion-eligible offenses than female students.

Even if OCR’s school discipline data were accurate and complete (which, again, it isn’t), its analysis of that data is one-sided and unfinished. There is no attempt to make a more thorough analysis of misconduct rates and discipline across all races. Instead, the discussion of disciplinary disparities is almost entirely limited to those for white students versus black students. For example, OCR’s analysis curiously omits disciplinary

¹⁰ Heriot, *supra*, at 190 & n.952.

¹¹ *Id.* at 185-91.

¹² RFI, 86 Fed. Reg. at 30451 (“CRDC data revealed that that in 2017-18, Black students represented only 15 percent of the total student enrollment but accounted for 29 percent of all students referred to law enforcement—almost twice their share of overall student enrollment. White students, on the other hand, accounted for 47 percent of total student enrollment in 2017-18, but only 38 percent of referrals to law enforcement.”); *id.* (citing U.S. Government Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, 12 (March 2018), <https://www.gao.gov/products/gao-18-258> (“GAO Report”) (concluding only that some student demographics were overrepresented in “disciplinary action” in proportion to their percentage “of all public students”)).

¹³ GAO Report, *supra*, at 12 n.28 (“We used the term ‘disproportionate’ to describe instances in which a student group was overrepresented among those disciplined compared to their representation in the overall student population. For example, boys accounted for 51.4 percent of all K-12 public school students, but represented 73.6 percent of students expelled in 2013-14.”).

rates for Asian Americans and Pacific Islanders, even though “in nearly every year for which data were collected” disciplinary rates for Asian American students “were lower than white rates,” and disciplinary rates for Pacific Islander students were higher than disciplinary rates for African American students.¹⁴ If one accepts OCR’s assertion that student misconduct is evenly distributed across all racial demographics and that disparate disciplinary outcomes are therefore the result of racial discrimination by teachers and principals, then the disparity between Asian American students and Pacific Islander students “would require one to take it on faith that the country is not just deeply racist, but arbitrarily racist: One minority group, the 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.”¹⁵ OCR has not addressed these statistics or attempted to explain why, if its own premise is to be believed, “teachers would be so pro-Asian and so anti-Pacific Islander if there is really no difference in their behavior.”¹⁶ It would be especially inappropriate for OCR to announce nationwide, one-size-fits-all guidance without even attempting to grapple with these statistics and many similar complexities presented by school discipline figures.

Second, even if OCR’s statistical analyses were accurate, there is no reason to believe that any individual school district is violating the Constitution or federal law. Mere statistical disparities are not alone evidence of unlawful discrimination. Such statistical disparities cannot support claims under the Fourteenth Amendment’s Equal Protection Clause or Title VI of the Civil Rights Act. Both require proof of *intentional* discrimination.¹⁷ These basic principles of constitutional and statutory law apply with equal force to public education institutions. In short, “numerical disparity, standing alone, does not indicate discrimination” in the school discipline context.¹⁸

Contrary to these foundational principles, OCR’s 2014 Dear Colleague letter inaccurately claimed that “[s]chools violate [Title VI] when they evenhandedly implement facially neutral policies and practices,” even though the policies were “*not*

¹⁴ Heriot, *supra*, at 180.

¹⁵ *Id.* at 184.

¹⁶ *Id.* at 193.

¹⁷ *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *see also Manley v. Texas S. Univ.*, 107 F. Supp. 3d 712, 724 (S.D. Tex. 2015) (“To state a claim for Title VI discrimination, a plaintiff must, among other things, plead facts in support of *intentional* discrimination.”) (emphasis original); *Nat’l Ass’n of Gov’t Emps. v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 714-15 (5th Cir. 1994) (“To prove a cause of action under section 1983 based on a violation of equal protection, Plaintiffs are required, as under section 1981, to demonstrate intentional discrimination; mere disparate impact will not suffice.” (citing *Washington v. Davis*, 426 U.S. 229, 238-40 (1976))).

¹⁸ *Reed v. Rhodes*, 1 F. Supp. 2d 705, 725 (N.D. Ohio 1998); *see also Hoots v. Pennsylvania*, 118 F. Supp. 2d 577, 611 (W.D. Pa. 2000).

*adopted with the intent to discriminate.*¹⁹ The letter also outlined several examples of how school districts' disciplinary practices could purportedly violate Title VI despite “no finding of intentional discrimination.”²⁰ That is contrary to the plain text of Title VI, which “extends no further than the Fourteenth Amendment.”²¹ Reinstating the 2014 Dear Colleague letter’s guidance regarding disparate impact claims would not only resurrect bad policy; it could also violate the Administrative Procedure Act by going well beyond Title VI.²²

Finally, imposing top-down solutions on diverse school districts across the country runs the risk of pressuring local officials to violate the Fourteenth Amendment by imposing disciplinary quotas based on race. Such “[r]acial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty.”²³ And “[t]hey place race at war with justice.”²⁴ Simply put, if OCR is concerned about discrimination in discipline, more discrimination is not the solution.

The 2014 Dear Colleague guidance, however, contained a thinly veiled threat of federal enforcement action against any school district that, regardless of circumstances, did not eliminate any racial disparities in disciplinary outcomes.²⁵ Reinstating that guidance will create perverse incentives for school officials to avoid onerous and costly enforcement actions launched by the federal government by—paradoxically—making disciplinary decisions *based on race*. OCR is inviting school officials to do exactly what it (erroneously) fears they are doing now: adopt disciplinary policies that discriminate against students on the basis of race, regardless of individual circumstances.²⁶

Based on the foregoing, PDE urges OCR to keep the 2018 Dear Colleague guidance in place and defer to teachers and local school officials, who are best situated to address the individual needs of their students and communities.

¹⁹ 2014 Dear Colleague Letter at 11 (emphasis added).

²⁰ *Id.* at 17 (emphasis added).

²¹ *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (“The reach of Title VI’s protection extends no further than the Fourteenth Amendment.”); *see also Guardians Ass’n v. Civil Service Comm’n of City of New York*, 463 U.S. 582, 613 (1983) (O’Connor, J., concurring in judgment) (noting *Bakke* Court concluded that “purpose of Title VI is to proscribe *only* purposeful discrimination,” not “discriminatory *effect[s]*” alone).

²² *See* 5 U.S.C. § 706(2).

²³ *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 538 (7th Cir. 1997).

²⁴ *Id.*

²⁵ 2014 Dear Colleague Letter at 2.

²⁶ *See* 2014 Dear Colleague Letter, Appendix at 7-8 (advising school districts to enact policies “requiring the regular review of discipline reports containing information necessary to assess whether students with different personal characteristics ... are disproportionately disciplined and adopt “plan[s] of action” to “ameliorate ... disparities”).

Respectfully submitted,

/s/ Nicole Neily _____

Nicole Neily

President

Parents Defending Education