

June 23, 2021

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202
Via <https://www.federalregister.gov>

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Docket ID ED-2021-OCR-0068

Dear Secretary Cardona:

This letter presents comments on the “Request for Information Regarding the Nondiscriminatory Administration of School Discipline” published by your department in the *Federal Register* (86 *Fed. Reg.* 30449, June 8, 2021; Document Number: 2021-11990). This *Federal Register* announcement offers an incomplete analysis of student discipline data, arguing that students from minority ethnicities receive “substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.”

Research indicates that in fact students from disadvantaged backgrounds, including those residing in neighborhoods with higher crime levels, self-report more activities that require discipline.¹ Furthermore, the 2014 Dear Colleague Letter (2014 DCL) from the U.S. Department of Education and Department of Justice to K–12 school systems around the U.S. resulted in

¹Hans von Spakovsky and Jonathan Butcher, “Misusing ‘Disparate Impact’ to Discriminate Against Students in School Discipline,” Heritage Foundation *Legal Memorandum* No. 271, September 29, 2020, <https://www.heritage.org/civil-rights/report/misusing-disparate-impact-discriminate-against-students-school-discipline>.

schools maintaining quotas of students disciplined according to race, and a federal court ruling in 1997 said such quotas “place race at war with justice.”²

Federal policies like the 2014 DCL that micromanage local school discipline procedures discriminate against students based on race and unlawfully expand federal authority in state and local education activities. As the 2018 Federal Commission on School Safety resolved after surveying K–12 school policies around the country, “Local approaches and priorities are most important. Because teachers, in partnership with principals and other school leaders, know their schools, students, and classrooms best, they should be able to make decisions about school discipline without unnecessary worry about undue federal repercussions.”³

Disparate impact theory and statistical disparities in school disciplinary policies cannot be used to demonstrate a violation of federal law. As Heritage Foundation experts have explained, trying to determine if an entirely neutral policy that was implemented with no intent to discriminate, and which disciplines students similarly for the same misbehavior regardless of their race, is discriminatory because it may or may not have a disparate impact lands teachers and administrators in “an extremely murky and confusing legal morass.”⁴

In fact, the federal government should not recommend that school officials use a disparate impact standard in local school discipline policies. Such policies allow school leaders to discipline students based on race according to ratios, not according to student behavior, which directly contradicts federal civil rights mandates. The U.S. Supreme Court has ruled that section 601 of the Civil Rights Act prohibits “intentional discrimination.” Disparate impact policies assume that measurable differences in student outcomes (such as receiving suspension or expulsion) are the result of educator bias—sometimes even unconscious bias. The research below demonstrates that, in fact, different student behaviors can explain different student outcomes.⁵

Again, as one of the authors of this letter has written in a Heritage Foundation *Legal Memorandum*,

The end result of the disparate impact rule that was forced on schools over their discipline policies leads directly to schools imposing prohibited racial quotas.

²*People Who Care v. Rockford Board of Education*, 111 F.3d 528, 538 (7th Cir. 1997). When evaluating the Rockford, Illinois, school disciplinary decree, the court noted, “The decree forbids the school district to refer a higher percentage of minority students than of white students for discipline unless the district purges all ‘subjective’ criteria from its disciplinary code. The decree requires this even though important disciplinary criteria (such as disrupting classes) are unavoidably judgmental and hence ‘subjective’ within the sense of the decree.... This provision cannot stand.... Racial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty.” *Id.* (citations omitted).

³U.S. Department of Education, U.S. Department of Justice, U.S. Department of Homeland Security, and U.S. Department of Health and Human Services, *Final Report of the Federal Commission on School Safety*, December 18, 2018, <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf> (accessed June 21, 2021).

⁴Von Spakovsky and Butcher, “Misusing ‘Disparate Impact,’” p. 7.

⁵*Alexander v. Sandoval*, 532 U.S. 280.

Obviously, the only way to avoid a cutoff of federal funds under the disparate-impact standard imposed by the Obama Administration was to ensure that the number of students of different races and ethnic backgrounds being disciplined exactly matched the proportion of students of the same race and ethnicity in the general student population, regardless of the facts and circumstances of their actual, individual behaviors.

That could only be accomplished by applying different standards to students—differential treatment—for the same misbehavior based on the students’ race and ethnicity. This amounts to nothing less than a racial quota system that punishes some student and benefits others—depending on race.⁶

Students from different backgrounds report different levels of behavior requiring discipline for the safety of their peers, and report different perceptions of safe environments at school. According to the U.S. Department of Education’s “Indicators of School Crime and Safety: 2019,” 24 percent of black students reported being in a fight anywhere, including on school property, compared to 17 percent of white students.⁷ The share of black students who reported being in a fight on school property is more than double the share of white students reporting the same (14 percent v. 6 percent).

The percent of black students reporting that they were “afraid of attack or harm” at school was 7 percent, nearly double the same figure for white students (4 percent).⁸ Nearly 17 percent of black students reported gang activity at school, compared to 5 percent of white students and 12 percent of Hispanic students.⁹

As Heritage Foundation research reported in 2020, students of different races are not evenly distributed across the country.¹⁰ Fifty-eight percent of black students and 60 percent of Hispanic students attend schools in which 75 percent or more of student enrollment is comprised of minority students.¹¹

Just 6 percent of white students attend such schools. With a higher percentage of black and Hispanic students living in single-parent homes and/or in poverty concentrated together in majority–minority schools, policymakers must evaluate the figures on student fights, gang activity, and other safety indicators with respect to student backgrounds, school assignment, and the lack of high-quality learning options available to these students.¹²

⁶Von Spakovsky and Butcher, “Misusing ‘Disparate Impact.’”

⁷U.S. Department of Education, “Indicators of School Crime and Safety: 2019,” p. 168, <https://nces.ed.gov/pubs2020/2020063.pdf> (accessed June 21, 2021).

⁸*Ibid*, p. 88.

⁹*Ibid*, p. 151.

¹⁰Von Spakovsky and Butcher, “Misusing ‘Disparate Impact.’”

¹¹National Center for Education Statistics, “Racial/Ethnic Enrollment in Public Schools,” The Condition of Education, May 2020, https://nces.ed.gov/programs/coe/indicator_cge.asp (accessed June 21, 2021).

¹²For student poverty and family structure data, see The Annie E. Casey Foundation, “Kids Count Data Center: Children in Poverty by Race and Ethnicity in the United States,” September 2019, <https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/324,323> (accessed June 21, 2021), and “Children in Single-Parent Families by Race in the United States,” January 2020, <https://datacenter.kidscount.org/data/tables/10-7-children-in-single-parent-families-by-race#detailed/1/any/>

In a 2018 study in the *Journal of Criminal Justice*, researchers wrote, “The inclusion of a measure of prior problem behavior reduced to statistical insignificance the odds differentials in suspensions between black and white youth.”¹³ In fact, U.S. Commission on Civil Rights member Gail Heriot and her co-author Alison Somin wrote for the University of San Diego School of Law that once researchers take into account “prior misbehavior,” “the racial differences in severity of discipline melt away.”¹⁴

Again, a Heritage Foundation study has documented research that finds correlations between student behaviors and socioeconomic factors.¹⁵ A study of Chicago children attributes different student actions to neighborhood characteristics and the system of K–12 school assignment according to ZIP code. The authors of that study wrote, “Because residential segregation leads schools in Chicago to be very segregated by race, differences in suspension rates across schools lead to differences in suspension rates by race” and “the concentration of many low-achieving students from high-poverty neighborhoods...seems to increase the likelihood that a school will have high suspension rates.”¹⁶

Researchers from the University of Pennsylvania have also found a relationship between school attendance policies that assign students from violent neighborhoods to public schools and higher rates of discipline in those schools.¹⁷

Research does not establish that educator bias against minorities is responsible for differences in discipline rates. According to a study in the *Urban Review* from 2002, “In and of itself, disproportionate representation in school discipline is not sufficient to prove bias.”¹⁸ Yet the authors of the 2014 DCL used other findings from this report to substantiate their claim that disparate impact policies were necessary for student discipline. In the *Journal of Law and Criminology*, researchers wrote in 2011, “We can only speculate about the reasons for

[false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/432,431](https://doi.org/10.1016/j.jcrimjus.2014.01.001) (accessed June 21, 2021).

¹³John Paul Wright et al., “Prior Problem Behavior Accounts for the Racial Gap in School Suspensions,” *Journal of Criminal Justice*, Vol. 42, No. 3 (May–June 2014), <http://dx.doi.org/10.1016/j.jcrimjus.2014.01.001> (accessed June 21, 2021).

¹⁴Gail Heriot and Alison Somin, “The Department of Education’s Obama-Era Initiative on School Discipline: Wrong for Students and Teachers, Wrong for the Law,” University of San Diego School of Law Legal Studies Research Paper Series, No. 18–321, 2018, p. 507, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221 (accessed June 21, 2021).

¹⁵Von Spakovsky and Butcher, “Misusing ‘Disparate Impact.’”

¹⁶Lauren Sartain et al., *Suspending Chicago’s Students: Differences in Discipline Practices Across Schools*, The University of Chicago Consortium on Chicago School Research, September 2015, <https://consortium.uchicago.edu/sites/default/files/2018-10/Suspending%20Chicagos%20Students.pdf> (accessed June 21, 2021).

¹⁷Education Next, “What Does the Research Say About School Discipline Policies?” Podcast, Ep. 56 (October 12, 2016), <https://itunes.apple.com/us/podcast/ep-56-oct-12-2016-what-does-research-say-about-school/id1063838014?i=1000376510799&mt=2> (accessed June 21, 2021). See also Matthew Steinberg and Johanna Lacoe, “What Do We Know About School Discipline Reform? Assessing the Alternatives to Suspensions and Expulsions,” *Education Next*, Vol. 17, No. 1 (Winter 2017), <https://www.educationnext.org/what-do-we-know-about-school-discipline-reform-suspensions-expulsions/> (accessed June 21, 2021).

¹⁸Russell J. Skiba et al., “The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment,” *The Urban Review*, Vol. 34, No. 4, p. 333, <https://link.springer.com/article/10.1023/A:1021320817372> (accessed June 21, 2021).

disproportionate punishment of African Americans in school.”¹⁹ Yet the 2014 DCL also cited this study while still concluding that educators should consider a child’s ethnicity when enforcing discipline policies.

So-called “disparate impact” policies such as those cited in the 2014 DCL are unlawful because they prohibitively rely on the immutable characteristics of race to determine school safety procedures and student sanctions. Such policies are also ineffective at protecting students because school safety policies based on disparate impact result in educators allowing disruptive or even dangerous students to remain in classrooms, creating a risk that other students will be harmed. Federal officials should not recommend that local school leaders maintain school disciplinary quotas based on race, but rather require that local education agencies implement school disciplinary measures without regard to race or ethnicity.

Finally, in other areas of federal law, such as the Individuals with Disabilities Education Act (IDEA), federal officials should remove policies that use disparate impact to determine the treatment of children. Court rulings and other policies that uphold rules allowing school officials to discipline children with special needs differently based on those special needs rather than on the child’s behavior are a disservice to students. Children with special needs who are seeking a quality learning experience can have their education interrupted and even their physical well-being threatened when administrators require teachers to leave disruptive or violent children in a classroom.

Sincerely,

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¹⁹Michael Roque and Raymond Paternoster, “Understanding the Antecedents of the ‘School-to-Jail’ Link: The Relationship Between Race and School Discipline,” *Journal of Law and Criminology*, Vol. 101, Issue 2, Article 7 (Spring 2011), p. 662, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7398&context=jclc> (accessed June 21, 2021).

