

As a result of analyzing our discipline data and the disproportionalities which exist, our schools have implemented a number of strategies in the site's Integrated Improvement Plans and the Site in Need of Improvement Plans to decrease the number of referrals for our black and brown students. The implementation of these strategies has resulted in a decrease of 363 suspensions and expulsions from 2007-2008 to 2009-2010 school years. Additionally, our district's involvement in the Urban Special Education Leadership Collaborative (USELC) provided us with the opportunity to participate in national trainings, such as Positive Behavior Intervention Support (PBIS) model. With the full implementation of the PBIS model, the schools have the following in place: behavior expectations shared with students and staff; referral process; identification of major and minor infractions; consequences; recognition programs; and resources for parents.

Additionally, our data indicated that with the implementation of the PBIS system, discipline referrals have been decreased. However, when the suspension data was disaggregated, the black and brown students were disciplined disproportionately. Since the inception of PBIS, each building has developed an intentional plan to address these disparities in discipline and to decrease the number of referrals to the office.

In order to track the data, the district utilizes the following data bases: Skyward, the School-Wide Information System (SWIS), Student Plans, and the Disciplinary Incident Reporting System (DIRS). Here is a description of these data bases:

1. Skyward is a Student Information System. This fully integrated district-wide data base is designed specifically for K-12 schools and is all inclusive for state reporting. The current program includes the complete student management solution which includes student information, attendance, discipline, gradebook and email message center.
2. School-Wide Information System (SWIS) is used to collect, track, manage and analyze discipline data, specifically to support the implementation of the Positive Behavior Intervention Systems (PBIS). SWIS is a web-based information system for data entry and report generation. School personnel have the capability to analyze data on an individual student, groups of students, according to specific settings, as well as specific times of day. This data is discussed and disaggregated by our Site Equity Leadership Teams (SELT) and the District's Equity Leadership Team (DELT) to drive our decisions.
3. Student Plans is used as the on-line due process reporting system for special education. It generates and stores student Individual Educational Plans, Evaluations, Functional Behavioral Assessments, Behavior Intervention Plans, Team Meeting Notices, and Progress Reports. It allows our school district to store information, run reports, and cross check data for child count purposes. Student Plans receives data from Skyward, which is imported on a nightly basis. It is housed

and supported by Central Minnesota Educational Research and Development Council, located in Shoreview, Minnesota.

4. Disciplinary Incident Reporting System (DIRS) is a state reporting system for schools to enter suspension and expulsion data.

Over the last three years, the district has provided training to administrators and teachers in the following areas to ensure our staff and students are treated equitably with dignity and respect and to ensure that each building has a safe and welcoming environment where all students can flourish, grow, to ensure that we are in compliance with federal law:

- Equity
- Efficacy for staff and parents
- Courageous Conversations about Race
- Positive Behavior Intervention Support (PBIS)
- Life Space Crisis Intervention (LSCI)
- Efficacy Coaches
- Collaborative Learning Teams
- Instructional Coaching

At the administrative level, both at the central office and school sites, the lack of diversity clearly impedes the development of new ways of thinking and limits the district's ability to make use of fresh viewpoints to challenge existing beliefs and practices. When discipline is not applied fairly and consistently, the culture of diversity is undermined.

Singling out misbehaving students for humiliation or excluding them from classroom sometimes starts with a referral to the principal's office and sometimes escalates to the removal from school through suspension. These strategies effectively deny these students access to instruction and the opportunity to learn and do little to enable students to learn from their mistakes and develop a sense of responsibility for their behavior.

I firmly believe that all students must be turned on to learning and must have equal access to educational opportunities, including a college preparatory curriculum, advanced courses, STEM or science, technology, engineering and mathematics courses so that they are prepared to compete internationally. Turning students on to learning can help to reduce the likelihood that they will be targeted for repeated punishments.

We hope we have provided you a snapshot of our efforts in Rochester Public Schools to provide an equitable, safe, nurturing and supportive environment for all our students.

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Douglas Wright

Statement of Douglas Wright, Ph.D.

San Juan School District (SJSD) lies at the heart of some of the world's most spectacular vistas and boasts a rich cultural tradition that includes American Indian, Hispanic, and Pioneer (Caucasian) heritages. The District encompasses approximately 8,000 square miles, an area roughly the size of Connecticut and Rhode Island combined, and is located in southeastern corner of Utah forming the north western corner of the Four-Corners. The population density is less than two people per square mile. The District contains the Utah portion of the Navajo Nation and also a portion of the Ute Mountain Ute Reservation, creating a situation where the District answers to three separate sovereign nations. SJSD serves approximately 2900 students in 12 small schools, 6 elementary, 1 middle, and 5 high schools. SJSD student ethnicity is 48% American Indian, 48% Caucasian, 3% Hispanic, and 1% Other.

Attachment A: School Demographics

In addressing discipline issues within our schools, SJSD has attempted to put into effect policies and practices that serve to address the behavior in the least oppressive manner possible to assure that students are protected and able to experience an effective learning environment. Our experience shows that suspending and expelling students virtually assures their failure to obtain an education and to be prepared for the lives they will face. With this fact in mind, we have attempted to implement preventative programs to avoid the need for disciplinary measures.

One program we use is POSITIVE BEHAVIOR SUPPORT (PBS): Because prevention and positive behavior support is more effective and leads to greater student success than punitive disciplinary action, SJSD has placed great emphasis on putting preventative measures in place. PBS is an evidence-based, data-driven approach proven to reduce disciplinary incidents, increase a school's sense of safety, improve attendance rates and support improved academic outcomes. PBS is based on the premise that continual teaching, modeling, recognizing and rewarding of positive student behavior will reduce unnecessary discipline and promote a climate of greater productivity, safety and learning. PBS schools apply a multi-tiered approach to prevention, using disciplinary data and principles of behavior analysis to develop school-wide, targeted and individualized interventions and supports to improve school climate. Implementing PBS has been shown to improve school climate and helps keep students and teachers in safe and productive classrooms. Some of our schools have adopted the Utah Behavior Initiative (UBI) program which uses the Positive Behavior Support (PBS) model as a proactive framework for creating and sustaining safe and effective schools. Other district schools plan to join this program as UBI allows other schools to become involved.

Information on the PBS Model is found on the US Department of Education website:
http://www.pbis.org/school/what_is_swpbs.aspx

Research showing the effectiveness of the PBS program:

<http://www.pbis.org/research/default.aspx> then click on Download Word Document

Also, this year we are in the process of implementing the Olweus Bullying Prevention Program (Olweus) in all our schools. Olweus is a schoolwide program designed to prevent or reduce bullying throughout the school setting. The multi-component approach involves individuals, classrooms, entire schools, as well as parents and communities, to successfully address bullying in schools. Research has shown that the program can help school significantly reduce the incidents of students being bullied and bullying others. It also can lead to significant reductions in student reports of general antisocial behavior such as school bullying, vandalism, school violence, fighting, theft, and truancy. Improvements in the classroom social climate as reflected in students' reports of improved order and discipline, more positive social relationships, and more positive attitudes toward schoolwork and school are results that will we seek and will assist us in preventing the types of behaviors that lead to disciplinary action being necessary.

Information on Olweus is found at the following website:

http://www.olweus.org/public/bullying_research.page?menuheader=3

COMPREHENSIVE GUIDANCE COUNSELING: Guidance counselors play a key role in helping to assure PBS and similar programs are implemented properly and are successful. Recognizing that early training and support is essential, SJSJSD wrote and received a grant allowing us to hire four counselors to serve in our elementary schools. This grant is ending this year and we are searching for funds to be able to retain the positions. In the past, the grant was renewable, but the Department of Education has changed that practice and we are now not eligible to rewrite, even though we has seen much success.

Attachment B: Elementary School Counseling Demonstration Program-External Evaluation Report

Within our secondary schools, we have attempted to restructure the job duties of the counselors to come in line with the Comprehensive Guidance model which is also designed to be proactive in meeting students various needs and addressing concerns before students make negative choices. The counselors play a key role in establishing and reinforcing proper behavior and preventing behavior which would require disciplinary action. The counselors also assist with parental outreach and communication assuring that the school and parents work together in the best interest of the child.

SAFE SCHOOLS POLICY REVISION: We acknowledge that despite our best efforts at prevention, there are times when discipline is required. SJSJSD has a practice of reviewing its policy and procedures on a regular basis to assure that we stay current with best practices and in compliance with changing law and regulations. Our Safe Schools Student Discipline policies were extensively revised in April of 2008 and other smaller revisions have been enacted since then. A key component of the major revision was to create a discipline procedure that establishes a hierarchy of expectations for proper disciplinary actions depending on the nature of the incident requiring discipline. The policy outlines the serious

offenses which require a recommendation for suspension or expulsion based on existing laws, but also notes other types of negative behaviors for which less severe disciplinary action is warranted. While zero tolerance of certain behaviors is required to be in compliance with the Safe and Drug-Free Schools and Communities Act of 1994 (SDFSCA), SJSD is aware of evidence that shows that “zero tolerance” policies may be counterproductive to meeting the goal of safer schools. We desire that our practices use the lowest level of discipline necessary to mold behavior and to provide a safe learning environment for all students.

In 2002, the Navajo Nation Police Department wrote and received a Department of Justice COPS grant. The grant began a cooperative arrangement between the District and the Navajo Nation to provide School Resource Officers in our schools located on the Navajo nation. San Juan County Sheriffs’ Office and the Monticello City Police have also provided SROs on a limited basis in our schools. While the officers have proven to be helpful, we have seen instances when their involvement may have raised the discipline to a higher level than was prudent given the circumstances of the incident.

Schools within the SJSD have been provided some discretion in establishing rules and procedures based upon community values and standards. This practice has been shown to create some areas of concern and SJSD is looking carefully at the possible need to reduce the level of discretion allowed. These rules and procedures are reviewed and approved by the School Board to assure compliance with Board policy and state and federal statute and to attempt to provide a consistency across the schools.

TRAINING PROVIDED TO ADMINISTRATION, FACULTY, AND STAFF: SJSD provides a variety of required trainings and in-services to assure that employees are aware of and follow policy and procedure. In addition, professional development opportunities are provided that can enhance an employee’s knowledge and understanding of issues associated with the students we serve. Upon hire, all employees are provided with three days of training which includes a policy and procedure review. Cultural training known as Respecting Ethnic and Cultural Heritage (REACH) is also provided to all employees to help them come to a greater understanding of the need to respect and honor the cultural diversity which exists within the SJSD. In addition, SJSD sponsors an annual Heritage Language Conference in which we provide additional cultural awareness training as well as help teachers enhance their skills and abilities in working with Native American students. In addition to the cultural training, other in-service is provided on important areas such as preventing bullying and harassment, PBS practices as described above, learning styles, and child development. These trainings may be provided by SJSD employees or by consultants and other experts brought in to assist in this effort.

FUTURE PLANS: In May of this year, SJSD was notified of its selection by the United States Department of Education Office of Civil Rights (OCR) for a compliance review under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. OCR is examining whether SJSD “discriminates against female students by disciplining them more frequently and more harshly than similarly-situated male students. The review will include issues such as whether female students are referred for discipline more frequently than male students or

for less egregious conduct than male students, and whether discipline consequences are assigned differently based on the sex of the student.” The process of responding to this review has provided SJSJSD the opportunity to look carefully at its disciplinary records and to study what is happening within our schools. The OCR review along with this request from the U.S. Commission on Civil Rights will also allow us to continue to looking at our practices for areas of different treatment and/or disparate impact and to take appropriate steps should we find areas of concern.

SJSJSD is dedicated to constant improvement. And we are dedicated to providing quality education to all of our students. We appreciate the opportunity to examine our practices and enhance them to better meet student needs. We trust that the information provided in here will be helpful in your efforts to improve educational experiences for students.

Summary of Law and Background Materials

OCR Jurisdiction under the Civil Rights Act of 1964 and regulations promulgated pursuant to the Act

In the Commission's briefing, Mr. Soto of the Office for Civil Rights in the U.S. Department of Education testified that his office pursues school discipline cases under the authority of both disparate treatment and disparate impact regulations. OCR's disparate impact regulations provide generally that a recipient of federal education funds (meaning, for example, a public school) may not either directly or indirectly use criteria or methods of administration that have the effect of subjecting individuals to discrimination because of race, color or national origin, or have the effect of defeating or substantially impairing the objectives of a program based on race, color or national origin.¹⁶

The disparate impact regulations were promulgated in the same year as the passage of the Civil Rights Act of 1964, under the authority of Sections 601 and 602 of the Act, and since amended only in minor part.¹⁷ Section 601 provides that no person shall be excluded from participation in or subjected to discrimination under any program receiving federal funding; Section 602 authorizes federal agencies to effectuate the provisions of Section 601 by issuing regulations. The statute itself contains no language addressing disparate impact.

Although in *Alexander v. Sandoval* the U.S. Supreme Court questioned in dicta the authority of agencies to promulgate disparate impact regulations under Title VI, over nearly 50 years of their existence the Supreme Court has not squarely addressed the issue.¹⁸ At issue in *Sandoval* was whether Title VI authorized a private right of action to enforce disparate impact regulations against English-only policies. The Court concluded that it did not.¹⁹ It specifically reserved the question of whether regulations "promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601," further noting that "§ 601 permits the very behavior that the regulations forbid."²⁰

The Department's Office for Civil Rights in its written submission cited continuing Justice Department support for the use of disparate impact regulations, including a DOJ guidance memorandum reinforcing their use, and noting the absence of Court precedent that would require OCR to enforce only those of its regulations that treat intentional discrimination.²¹ OCR also cited two Department of Education administrative decisions supporting its disparate impact regulations, the first dated 1987 and styled *In the Matter of Dillon County*

¹⁶ See 34 C.F.R. § 100.3; 34 C.F.R. §100.3 (b) (2).

¹⁷ Civil Rights Act of 1964, 42 U.S.C. §2000d; Non-discrimination in Federally Assisted Programs of HEW, 29 F.R. 16298 (Dec. 4, 1964).

¹⁸ *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

¹⁹ *Id.*

²⁰ *Id.* at 286, ft. 6.

²¹ See written statement of Mr. Ricardo Soto, U.S. Department of Education Office for Civil Rights at 55-56 above.

*School District No. 1*²² (hereafter *Dillon*); the second styled *In the Matter of Maywood School District #89* (hereafter *Maywood*), dated 1990.²³

In *Dillon*, OCR claimed that the school district's practice of assigning students to fixed groups on the basis of ability resulted in racial disproportionality and had no educational justification. The administrative law judge (ALJ) did not address the relation of disparate impact regulations to the authorizing statute. He found the district's grouping practice pretextual in the face of what he viewed as a sound alternative causing less disproportionality, which was to assign students on the basis of mathematics and reading test scores for placement in related classes only. The administrative appeals body (Civil Rights Reviewing Authority) upheld the ALJ's order against the District.

The 1990 *Maywood* decision involved a suburban Cook County, Illinois school district whose 11 schools included two with largely majority-white populations that OCR alleged were the result of facially neutral but effectively discriminatory school assignment practices. The *Maywood* ALJ rejected the District's assertion that it was not in violation of Title VI because it had not intentionally discriminated in assignments. The Civil Rights Reviewing Authority upheld the use of disparate impact, relying on the fractured *Guardians Association v. Civil Service Commission*²⁴ as did the Secretary of Education in the final appeal, although he reversed on other grounds.²⁵ Both *Dillon* and *Maywood* were decided before *Alexander v. Sandoval*, as was *Guardians*.

Scholarly Articles

In considering school discipline and racial disproportionality, Commissioners and staff consulted several scholarly articles from two prominent authors in the field, Russell Skiba and Richard Arum. Russell Skiba is Professor in Counseling and Educational Psychology at Indiana University and also Director of the Equity Project. Along with co-authors he has written, among other things, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment"²⁶ (hereafter *Color of Discipline*) and "Safety without Suspensions."²⁷ Richard Arum is Professor of Sociology and Education at New York

²² *In the Matter of Dillon County School District No. 1, Lake View, South Carolina, and South Carolina State Department of Education*, Docket No. 84-VI-16, April 17, 1987, Administrative Proceeding in the U.S. Department of Education (Provided as Exhibit F by OCR on the day of the briefing).

²³ *In the Matter of Maywood School District #89 and Illinois State Board of Education*, Docket No. S-125, Administrative Proceeding in the U.S. Department of Education and National Science Foundation, May 22, 1990 (Provided as Exhibit G by OCR on the day of the briefing).

²⁴ *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). The appeals board also cited *Alexander v. Choate*, 469 U.S. 287 (1985) (concerning Section 504 of the Rehabilitation Act of 1973) as additional support for this ruling.

²⁵ The Secretary of Education ruled that the school district had not been given the opportunity to make rebuttal arguments or to supply supporting evidence. *In the Matter of Maywood School District #89* at 11.

²⁶ Skiba et al., 34 *Urban Review* 317 (No. 4, December 2002). See also his publication list at <http://education.indiana.edu/ProfilePlaceHolder/tabid/6210/Default.aspx?u=skiba#publications>. (accessed Sept. 20, 2011).

²⁷ Skiba, R and Sprague, J., 66 *The Positive Classroom* at 38-43 (Vol. 66, No. 1, Sept. 2008).

University. He has written, among other things, “Law and Disorder in the Classroom”²⁸ (hereafter *Law and Disorder*) and “Class and Racial Differences in U.S. School Disciplinary Environments” (hereafter *Class and Racial Differences*).²⁹

In *Safety without Suspensions* Professor Skiba examined exclusion policies, including what are commonly termed “zero-tolerance” policies that generally require fixed disciplinary sanctions for enumerated violations of school codes that cannot be altered by school authorities. Exclusion policies have apparently resulted in a considerable increase in out-of-school suspensions and expulsions that are racially disproportionate and that he asserts are not due to higher rates of misbehavior by black students. He recommends use of a program called “School-wide Positive Behavior Support;” (PBS, or PBIS) an approach supported by many of the briefing’s speakers. PBS has three components that include prevention, positive reinforcement from many sources inside the school (such as reward coupons), and reliance on data instead of ad hoc imposition or creation of discipline policies. Professor Skiba views evidence gained from participating schools as thoroughly supporting the effectiveness of PBS in reducing disciplinary referrals, although it apparently has not eliminated racial disproportionality.

Professor Skiba in *Color of Discipline* looked at one year’s data from an urban middle school that showed disproportionality and discussed possible explanatory hypotheses. One hypothesis that controlled for socio-economic status did not eliminate disparities. This led him to hypothesize that African-American students were treated differently at the classroom level for subjectively-determined infractions of rules, although the data did not allow firm conclusions. He stated that he was unaware of studies using direct observation of student behaviors that could establish that African-American students misbehave at a significantly higher rate. His study also found that once students of any race were referred to an administrative office, from that point there were virtually no disproportionalities in discipline. Rather, the disproportion stemmed from more classroom referrals for what a reader might view as largely disruptive behavior (disrespect, excessive noise, threat and loitering) compared to other violations that were destructive, self-destructive or offensive such as smoking, truancy, obscene language and vandalism that might occur more out of class or disrupt class somewhat less. Professor Skiba found no other explanations for large and consistent racial disparities in discipline and concluded that bias could not be ruled out.³⁰

Professor Arum in *Law and Disorder* surveyed the legal landscape over the last 40 years, and credits the considerable increase in parental litigiousness for the heavy reliance of schools on school security guards, uniformed police, technical surveillance and zero-tolerance policies at the expense of the judgment of school administrators and teachers. He views reliance on authoritarian zero-tolerance mandates as ill-suited to support the moral authority of teachers and administrators in the socialization of young people.³¹

²⁸ Arum, R. and Preiss, D., *Education Next*, p. 68, Fall 2009; *See also* <http://sociology.fas.nyu.edu/object/richardarum.html> for a list of publications.

²⁹ Chapter in *Improving Learning Environments in Schools: Lessons from Abroad*. (Forthcoming: Palo Alto, Stanford University Press).

³⁰ Skiba et al. at 338.

³¹ Arum and Preiss at 65.

In *Class and Racial Differences*, Professor Arum observed that administrators' and teachers' maintenance of school order and appropriate student behaviors and norms contribute to the overall disciplinary climates. He reviews academic racial gaps and also management and organizational difficulties shown by studies of high levels of heterogeneity in class, race, ethnicity, language and religion in schools. For example, he notes that in one recent school year, "85 percent of public schools monitored or locked doors during school hours."³² His study compares racial gaps in cognitive performance with differences in discipline and violence and finds that economically disadvantaged schools are strongly associated with lower test score performance and dysfunctional disciplinary climate. He also finds that there are more disciplinary rules in schools with a high concentration of African-American students and more severe punishment.³³

Professor Arum, unlike Professor Skiba, examines variation in cognitive outcomes as either a predictor or a result of school discipline climate, using several databases. Other predictors he finds are variation in school resources, teacher expectations, peer composition, summer learning, family composition and social psychological factors associated with the test process. None, in his view, account fully for the test score gap between African Americans and others. Other researchers have found smaller test gaps in schools with orderly discipline climates. Discipline gaps have grown overall, according to researchers cited in Professor Arum's work. Results from data indicate to him that African-American students attain lower test scores in economically disadvantaged schools with dysfunctional discipline, although these are correlational, not causal findings. His models suggest that black students perform better in schools with greater discipline.³⁴

Professor Arum states, in consonance with Professor Skiba, that race is more predictive than class status in analyzing school disciplinary climates. He finds that African-American students receive higher levels of disciplinary sanctions, but states that this may be caused by greater exposure to schools with higher disorder, violence and safety problems, and ineffective discipline.³⁵ An interesting finding is that in those schools studied having high levels of discipline, racial test gaps did not exist, although the reasons were not clear.³⁶ He recommends that school administrators ensure that discipline imposed is perceived as fair in order to enhance their moral authority that is at the core of effective school discipline.

³² Arum and Velez at 17.

³³ *Id.* at 27.

³⁴ *Id.* at 33.

³⁵ Various State Advisory Committee reports have documented the disproportionate rate of discipline for minority students, and its asserted relation to later incarceration. See Michigan, Florida, Kentucky and Tennessee SAC reports available from the U.S. Commission on Civil Rights, Robert S. Rankin Memorial Library. See <http://www.usccr.gov/pubs/KY-report-2011.pdf>; <http://www.usccr.gov/pubs/TN-report-2011.pdf>.

³⁶ *Id.* at 36.

Public Comments

The Leadership Conference on Civil and Human Rights (Conference) submitted a public comment that endorsed the use of disparate impact analysis to enforce civil rights law in cases of disciplinary disparities. The Conference regards actions under intentional treatment analysis alone as inadequate to reach disturbing and harmful increases in disciplinary differentials between racial groups. The Conference's letter, along with CEO/ACRI's letter described below, is included in this report in the Appendix under the heading "Public Comment Letters."

The Conference praises behavior management programs such as School-Wide Positive Behavior Supports (SWPBS) as effectively reducing disparities while maintaining school safety and good academic outcomes. The Conference considers that exclusionary discipline is harmful to the perpetrators of minor violence, whose behavior could be controlled in ways that would not lead to later violations of law and incarceration as adults.

The Center for Equal Opportunity (CEO) and the American Civil Rights Institute (ACRI) submitted a copy of a letter to the Civil Rights Division of the U.S. Department of Justice dated February 14, 2002.

The CEO/ACRI letter asserts that DOJ does not have the authority under Title VI to employ a disparate impact approach in enforcing the prohibition against national origin discrimination as applied to limited English proficiency persons (LEP). In support of this assertion, the letter quotes the Department's policy guidance that acknowledges that Title VI on its face prohibits only intentional discrimination, a view supported in dicta by *Sandoval*.³⁷ The letter distinguishes *Alexander v. Choate*,³⁸ which involved the Rehabilitation Act of 1973, and *Lau v. Nichols*³⁹ (whose interpretation of Section 601 as reaching beyond intentional discrimination was rejected in *Sandoval*⁴⁰) as inapplicable, and concludes that the only guidance that can be drawn from the Supreme Court's discussion of disparate impact regulations under Title VI in *Sandoval* makes it clear that at least five justices view the validity of disparate impact regulations as resting on dubious authority.

³⁷ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³⁸ *Alexander v. Choate*, 469 U.S. 287 (1985).

³⁹ *Lau v. Nichols*, 414 U.S. 563 (1974).

⁴⁰ *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) ("it is similarly beyond dispute – and no party disagrees – that § 601 prohibits only intentional discrimination.").

Summary of School District Response Letters

Seventeen school districts responded to the Commission's letter requesting information on discipline and disparate impact. One declined to supply information (Charleston County schools, Charleston, SC). The letters are reprinted in the Appendix.

Responding school districts include Anderson County in Clinton, TN; Hamilton County in Chattanooga, TN; Berkeley County in Moncks Corner, SC; Dorchester schools in Summerville, SC; Charles County in La Plata, MD; Baltimore City schools in Baltimore, MD; Cook County School District 65 in Evanston, IL; Lansing schools in Lansing, MI; Ypsilanti schools in Ypsilanti, MI; Winner schools in Winner, SD; Nash-Rocky schools in Nashville, NC; Winston-Salem/Forsyth schools in Winston-Salem, NC; Rochester schools in Rochester, MN; San Juan schools in Blanding, UT; Tucson schools in Tucson, AZ; San Diego schools in San Diego, CA; and Jefferson County schools in Louisville, KY.

Nine of the 17 schools reported using a program praised also by Commission briefing speakers, Positive Behavior Intervention Support (PBIS), in addition to varied supplemental measures developed by the schools.⁴¹ Two schools reported also using the Olweus Bullying Prevention Program.⁴² Most schools reported using or developing a detailed school conduct code, some including teacher conduct expectations. The Rochester, MN schools, for example, report using the Self-Directed Improvement System (SDIS)⁴³ in addition to PBIS. Ypsilanti, MI schools report initiating a practice of randomly choosing schools to check for possible disciplinary irregularities. La Plata, MD schools report using cultural competence courses to train teachers in classroom management. The San Juan schools in Blanding, UT include comprehensive guidance counseling in addition to other programs. As a result of a recent mandate from the state legislature, the Winston-Salem/Forsyth County schools have reduced out of school suspensions to 5 days, and require schools to use positive behavior intervention strategies. The district had already eliminated out-of-school suspensions for truancy and consideration of prior disciplinary sanctions for unrelated infractions in assigning punishment. They also allow for mitigating factors. Early reports indicate that the new policies have markedly reduced disparities.

A program started in the Tucson, AZ schools is targeted to African American male students transitioning from middle to upper school. Aside from its focus on African Americans, this concept is not unlike that of one of the Commission's briefing panelists, Mr. Edward Gonzalez, who began a program called Men's Alliance, an intervention class targeted to at-risk male students of any race that he stated has shown promise in reducing infractions. The Evanston, IL school district 65, (K-8) offers sensitivity training and classes in cultural diversity in addition to PBIS to help teachers better understand their students.

⁴¹ See <http://www.pbis.org/> (accessed September 23, 2011).

⁴² See <http://www.olweus.org/public/index.page> (accessed September 23, 2011).

⁴³ Website apparently unavailable.

Commissioner Statements

Statement of Chairman Martin R. Castro And Commissioners Roberta Achtenberg And Michael Yaki

School administrators and teachers face tough choices when it comes to maintaining a positive school climate. Schools find themselves having to balance their duty of providing students with a safe learning environment with their responsibility to provide equal educational opportunities for all students. Disruptive students can negatively affect a classroom's climate and raise concerns for both parents and school personnel. In response to these concerns, almost 90% of U.S. public schools have established and implemented some sort of zero-tolerance policy¹ according to the U.S. Department of Education. The enforcement of these policies has resulted in a substantial increase in the number of expulsions² and out-of-school suspensions³ currently being imposed by schools, especially against students of color.⁴

Concern over this substantial increase recently led to the establishment of a federal initiative that examines differences in discipline outcomes between students of color and other similarly situated students. This initiative aims to identify whether the application of exclusionary⁵ discipline policies is having a disparate impact on students of color. The use of the disparate impact-based enforcement by the U.S. Department of Education, Office of Civil Rights (DOE OCR) has raised concerns among our conservative colleagues over whether this enforcement will impose a very heavy burden on schools. The belief that education civil rights enforcement does not require a disparate impact theory, due to the fact that schools and OCR have access to data, fails to take into consideration that using a disparate-impact analysis provides everyone with the ability to look beyond the numbers. This analysis holds schools accountable for the disciplinary policies that disproportionately exclude students of color from the school environment. It also provides school districts with the opportunity to identify alternative disciplinary practices that are designed to address and improve the school climate.

¹ A zero tolerance policy assigns explicit, predetermined punishments to specific violations of school rules, regardless of the situation or context of the behavior.

² Expulsion refers to a procedural removal of a student, for a longer period of time, typically involving a decision by the superintendent and school board. Schools sometimes expel students for a semester, a year, or longer.

³ Suspension refers to a short-term removal of a student from school for a disciplinary infraction.

⁴ Daniel J. Losen & Russell J. Skiba, *Suspended Education: Urban Middle Schools in Crisis, Civil Rights Project* (Los Angeles, CA: The Civil Rights Project, September 2010), 2.

⁵ These policies are called exclusionary because they remove students from the learning environment without access to any educational content.

School suspensions have risen steadily since the 1970s and have recently reached an all time high. According to the U.S. DOE 2006 Civil Rights Data Collection,⁶ more than 2.34 million students were estimated to have been suspended at least once. The same 2006 survey estimated that 102,077 students were expelled at least once. These numbers are almost double the rate reported in the early 1970s, with racial minorities experiencing the greatest increase. According to the DOE data, the gap between the Black and White students more than tripled between the 1970s and 2006, rising from 3 percentage points to 10 percentage points.⁷ Many view the rise in suspension rates as a necessary response to the increasing school violence, as well as, a teacher's need to maintain order and safety. However, current data contradicts this belief. According to data reported by the National Center from Education Statistics (NCES), from 1992 to 2008 the rate of nonfatal⁸ incidents of crime against students 12 to 18 years of age at school declined by 67 percent.⁹ Further inquiry by the American Psychological Association (APA) has determined that zero tolerance policies fail to make schools safer.¹⁰ Yet, schools continue to enforce these draconian practices. Nationwide, case studies¹¹ completed on school suspension indicate that the majority of suspensions are for offenses that are nonviolent, subjective or discretionary in nature and, at times, trivial.¹² This finding was supported by the briefing testimony of Mr. Ricardo Soto, Principal Deputy Assistant Secretary for OCR, Suzanne Maxey, Principal at T.C. Williams High School, and Joseph Oliveri, former principal for the Austin Independent School District (AISD). All three panelists indicated that a high number of suspensions were for minor infractions. In addition, Mr. Soto indicated that he views the increasing numbers of disciplinary sanctions for subjective offenses as an indication that rules are not imposed

⁶ Since 1968, DOE has been collecting data on out-of-school suspension and expulsions. A biennial survey is administered by OCR, which typically includes one-third to one-half of all U.S. public schools and districts. Under this survey, schools are instructed to count each suspended student only once, regardless of how many suspensions a student received throughout the year. This, coupled with the fact that the data does not capture the length of the suspensions, yields a conservative estimate of the amount of time that students spend out of school.

⁷ Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice* (Boulder, CO: National Education Policy Center, October, 2011), 5.

⁸ Nonfatal crime includes theft and all violent crime; violent crime includes serious violent crime (rape, sexual assault, robbery, and aggravated assault) and simple assault.

⁹ In 1992, the rate of student-reported nonfatal crimes against students between the ages of 12 and 18 years old was 144 per 1,000 students. By 2008, the rate had fallen to 47 per 1,000 students. Simone Robers, Jijun Zhang, Jennifer Truman, and Thomas D. Snyder, *Indicators of School Crime and Safety: 2010*, NCES 2011 – 2012/NCJ 230812 (Washington, DC: National Center for Education Statistics, U.S. Department of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, 2010).

¹⁰ Russell Skiba et al., "Are Zero Tolerance Policies Effective in the Schools? A Report by the American Psychological Association Task Force," *American Psychologist* 63, no. 9 (December 2008): 852-862.

¹¹ Research of a large urban school district found that attendance issues, insubordination and classroom disruption were leading causes of suspension; An analysis of suspensions across one Midwestern state indicated that weapons and drug offenses made up only 5 percent of suspensions. See, Child Trends (2011). *Multiple Responses, Promising Results: Evidence-Based Non Punitive Alternatives to Zero Tolerance*. Retrieved from http://www.childtrends.org/Files/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf

¹² Schools have suspended or expelled students of all ages for possession of "weapons" such as paper clips, nail files, and a toy ax used in a Halloween costume by a Kindergarten student; drugs, including aspirin, Midol, and white-out; and, general behavior such as humming and tapping on a desk, classified as "defiance of authority." See, Adira Siman, "Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color," *Cornell Journal of Law and Public Policy* 14, no. 327, (Summer 2005) 4.

fairly.¹³ Among the investigations that have been conducted by OCR, OCR has found disparate impact in the imposition of discipline for lesser, or discretionary violations.¹⁴ Mr. Soto's statement supports what researchers and advocacy organizations alike have already documented, that the use of zero-tolerance policies has skyrocketed for minor incidents. Supporters of zero tolerance policies believe that the policies' "one size fits all" approach removes the effects that a multitude of background variables can have on punishment assignment. In other words, they believe the policies result in fair treatment of all students. However, available statistics strongly suggest that these policies are disproportionately impacting male, African American, and Latino students. A recent analysis of nationwide data showed that students from African American families were 2.19 (elementary) to 3.78 (middle school) times as likely to be referred to the office for disciplinary problems as their white peers.¹⁵ In addition, the results also indicated that students from African American and Latino families were more likely than their white peers to receive expulsion or out-of-school suspension as consequences for the same or similar problem behavior. In a recent longitudinal study of all Texas students conducted by the Council of State Governments Justice Center, African American students were found to be disproportionately removed from their classrooms for disciplinary reasons.¹⁶ The study conducted a multivariate analysis which controlled for 83 different variables in isolating the effect of race alone on disciplinary actions. The study found that African American students had a 31 percent higher likelihood to receive a disciplinary action in comparison to similarly situated white and Hispanic students.¹⁷

Our Southern Region State Advisory Committees (SACs)¹⁸ recently examined the issue of school discipline in their particular states. Their studies set out to systematically examine the effectiveness of the local school systems' exclusionary practices to ensure that such policies were providing a safe school environment while not unnecessarily pushing students out of the educational system. The results of their studies indicate that African American students are being disproportionately disciplined in comparison to their white peers. In Tennessee, the SAC study found that during the 2008-2009 school year African American students made up 33 percent of the total student population in the Hamilton County School District but received nearly 60 percent of all out-of-school discipline referrals, a discipline rate that is almost twice that of their proportion of the total student population.¹⁹ Similar to Tennessee,

¹³ USCCR, "Briefing on Disparate Impact In School Discipline," transcript of business meeting and briefing, Feb. 11, 2011, testimony of Mr. Ricardo Soto, Principal Deputy Assistant Secretary in the Office for Civil Rights, p. 139.

¹⁴ USCCR, Soto, 160.

¹⁵ R. J. Skiba, R.H. Horner, C. Chung, M.K. Rausch, S.L. May and T. Tobin, "Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline," *School Psychology Review*, 40 no. 1, (2011): 85-107.

¹⁶ Fabelo, T., Thompson, M.D., Plotkin, M., Carmichael, D., Marchbanks, M.P. III, & Booth, E.A., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (New York: Council of State Governments Justice Center, 2011).

¹⁷ Ibid.

¹⁸ The U.S. Commission on Civil Rights maintains 51 State Advisory Committees (SACs), one for each state and the District of Columbia. The Southern Regional Office (SRO) is composed of Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee.

¹⁹ Tennessee Advisory Committee to the U.S. Commission on Civil Rights, "School Discipline: Are School Discipline Practices Pushing Too Many African American Children out of School?" June 2011 at 12.

African American students in Kentucky's Jefferson County School District made up 36 percent of the total student body during the 2008-2009 school year and received 61 percent of all district discipline referrals.²⁰ In Florida, African American students in the Duval County Public School system received disciplinary referrals at a rate that was 202 percent of their total enrollment during the 2008-2009 school year. In comparison, white students had a referral rate that was 80 percent of their total enrollment.²¹ Although the African American and white student population was found to be statistically equal,²² 72 percent of African American students received out-of-school suspensions in comparison to 20 percent of white students in Duval County.²³ These numbers strongly suggest that zero tolerance policies are significantly impacting students of color. Yet, they do not explain causation nor do they measure the consequences that these policies have on students.

During our briefing, some panelists indicated that race and socio-economic status contribute to the disproportionate amount of disciplinary problems that exist in schools, with African American students exhibiting the greatest disciplinary problems due to their socio-economic background and home life. Current research contradicts this belief. In a 2010 study African American students were found to be more likely to be sent to the office for disciplinary reasons, even when teacher ratings of student misbehavior were controlled.²⁴ This racial disparity is especially evident when it comes to suspension referrals for subjective offenses, such as disrespect or excessive noise. Studies have shown that African American students are referred more often for these behaviors than their white peers, who tend to be referred for behaviors that are objective, such as smoking, vandalism, and using obscene language.²⁵ Researchers have concluded that there is no evidence that racial disparities in school discipline can be explained by more serious patterns of rule-breaking among African American students. Although poverty has been found to correlate with an increased risk for suspension, studies have also shown that even when socio-economic status is controlled, race continues to make a significant and independent contribution.²⁶

In spite of the research, few school districts have taken steps to curtail or reverse the continuous and escalating implementation of these policies and to minimize the disparate results associated with them. In fact, these policies have led school administrators to relinquish their authority over disciplinary infractions to law enforcement, including School

²⁰ Kentucky Advisory Committee to the U.S. Commission on Civil Rights, "School Discipline in Kentucky: An Examination of School Discipline in the Jefferson County Public School District," June 2011 at 11.

²¹ Florida Advisory Committee to the U.S. Commission on Civil Rights, "School Discipline in Florida: Discipline Practices Leave Many Behind," December 2010 at 10.

²² The white and African American populations are essentially equal with 42 percent and 43 percent respectively.

²³ Florida Advisory Committee at 6.

²⁴ Data from 6,988 children in 381 classrooms at 21 elementary schools was used to conduct an analysis. The analysis indicated that even after controlling for the student's level of teacher-rated behavior problems, teacher ethnicity, and other classroom factors, Black students were significantly more likely than White students to receive disciplinary referrals to the office. See C.P. Bradshaw, M.M. Mitchell, L.M. O'Brennan, & P.J. Leaf, "Multilevel Exploration of Factors Contributing To the Overrepresentation of Black Students in Office Disciplinary Referrals." *Journal of Educational Psychology*, 102 no. 2, (2010): 508-520.

²⁵ R.J. Skiba, R.S. Michael, A.C. Nardo & R.L. Peterson, "The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment," *Urban Review*, 34 (2010): 317-342.

²⁶ Skiba supra 17 at 86.

Resource Officers (SROs), found patrolling local schools nationwide. This has resulted in students being arrested for disorderly conduct, including at least one for swearing.²⁷ Under these policies a student can now conceivably be arrested and charged with “disruption of a school activity” for burping in class.²⁸ Doodling on a school desk has recently resulted in an arrest rather than internal discipline methods such as having the Principal order the student to remove the doodle with cleaning detergent.²⁹

Nationally, our law enforcement and juvenile justice systems currently lack the ability to centrally track the number of students that are arrested or referred to the juvenile justice system directly from schools. This also impedes the ability to identify whether students of color are being disproportionately arrested by SROs. However, juvenile justice data does show that youth of color are disproportionately arrested when compared to their white peers.³⁰ At the state level, data does show that students of color are being disproportionately referred to law enforcement by schools. In South Carolina, approximately 90% of disorderly conduct charges were referred to law enforcement by schools during the 2000-2001 school year. Black students represented 75% of the students charged and referred to law enforcement even though they represented approximately 42% of the student enrollment during that year.³¹ In Florida, during the 2008 – 2009 school year Black male and female students accounted for almost half (49%) of all school related juvenile justice referrals, while only representing 22% of the youth age 10-17 in Florida.³²

The negative outcomes associated with the zero tolerance policies extend far beyond the individual students and into the schools themselves. Research indicates that a negative relationship exists between the use of exclusionary discipline practices and school wide academic achievement, even when socioeconomic status is controlled for.³³ In fact, higher suspension rates have been found to be correlated to lower school-wide academic achievement and standardized test scores.³⁴ The widespread reliance on zero-tolerance policies has also served to widen the achievement gap that currently exists in our public schools. Nationwide, 28 percent of African American male middle school students and 16 percent of Hispanic male middle school students are currently being suspended each year,

²⁷ In Wake County, NC a 16-yr old student was arrested and charged with disorderly conduct when she verbally argued with other students and used profanity in the hallway. WRAL News, “Cary Teen Taken to Jail For Swearing,” October 13, 2011. www.wral.com/news/local/story/1055548/.

²⁸ Fox News, “Lawsuit Filed After New Mexico Teen Arrested for Burping in Class,” December 1, 2011. <http://www.foxnews.com/us/2011/12/01/lawsuit-filed-after-new-mexico-teen-arrested-for-burping-in-class/>

²⁹ CNN, “Girl’s Arrest for Doodling Raises Concerns about Zero Tolerance,” February 18, 2010 . http://articles.cnn.com/2010-02-18/justice/new.york.doodle.arrest_1_zero-tolerance-schools-police-precinct?_s=PM:CRIME.

³⁰ National Council of Crime and Delinquency, *And Justice for Some* (Washington, DC: National Council on Crime and Delinquency, 2007).

³¹ South Carolina Public Schools, *School Crime Incident Report*, School Year 2000-2001.

³² Florida Department of Juvenile Justice. *Delinquency in Florida’s Schools: A Five-Year Study (2004-05 to 2008-09)*.

³³ American Psychological Association Zero Tolerance Task Force, “Are Zero Tolerance Policies Effective in the Schools? – An Evidentiary Review and Recommendations,” *American Psychologist*, 63 no. 9 (December 2008), p. 852 – 862, 854.

³⁴ R. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* (Bloomington, IN: Education Policy Center Indiana University, 2000).

compared to 10 percent of White male students. Studies have shown that students suspended in 6th grade are far more likely to be suspended again³⁵ and research indicates that suspensions and expulsions are, in turn, correlated to an increased risk of dropping out.³⁶ A research study has also shown that students who are suspended three or more times by the end of their sophomore year of high school are five times more likely to drop out or graduate later than students who had never been suspended.³⁷

It is apparent that the enforcement of harsh disciplinary practices requires an immediate and substantive response from both OCR and the school districts themselves. For some school districts, change has already been implemented. Nationwide, some schools have adopted alternatives to exclusionary practices, which have not only improved school climate and increased student engagement but have also resulted in fewer suspensions and expulsions. During the briefing Dr. Murphy, Dr. Wright and Dr. Martin spoke about building an area of support within the schools, to not only reduce discipline concerns, but to also increase student academic success. According to some panelists, positive, preventative techniques such as Positive Behavior/Intervention Supports (PBIS), restorative justice, conflict resolution and peer mediation, have improved school climate, reduced suspensions and expulsions for subjective offenses, and have resulted in keeping students in school and engaged. In addition, the public statement submitted by the Leadership Conference on Civil and Human Rights on behalf of a coalition of diverse education and civil rights groups and advocates, indicates that “some schools are blending evidence-based practices like School-Wide Positive Behavior Supports (SWPBS) with focused efforts to address racial bias and improve culturally relevant pedagogy.”³⁸ In states such as Illinois and Indiana, implementation of these practices has resulted in a reduction in out-of-school suspension rates and a narrowing of the disparities between discipline and achievement.³⁹

It is our hope that the new initiative implemented by the U.S. DOE Office of Civil Rights will delve deeper into why disparities exist and whether the use of exclusionary policies are even justifiable. Mr. Soto assured the Commission that school districts will be able to offer alternatives to remedies suggested by OCR during enforcement proceedings. Schools will also be allowed flexibility, during the early stages of the investigation, to provide input before OCR invokes a more formal disciplinary process. This level of cooperation and communication will play an important role in enhancing the legitimacy and efficacy of any resolution agreement that is adopted. In addition, this approach will provide school districts with an opportunity to analyze whether there are more effective, productive and less discriminatory discipline practices that can be implemented that will ensure continued safety, along with, equal educational opportunities for all students.

³⁵ Daniel J. Losen, *School Discipline – What the Research Tells Us: Myths and Facts*, National Education Policy Center Resource Sheet.

³⁶ The Massachusetts Department of Education published a report which highlights the high risk for dropouts and the need for earlier interventions, citing “numerous suspensions” as among the leading indicators. See Losen, *supra* note 7, at 11.

³⁷ National Center for Education Statistics. (June 1, 2006). *The Conditions of Education 2006*, Table 27-2. <http://nces.ed.gov/pubs2006/2006071.pdf>.

³⁸ Leadership Conference on Civil and Human Rights (LCCHR) record letter, March 11, 2011, p. 4.

³⁹ Matt Cregor & Damon Hewitt, Dismantling the School-to-Prison Pipeline: A Survey from the Field,” *Poverty & Race*, 20 no. 1, January/February 2011.

We commend OCR for trying to reinvigorate their efforts to make Dr. King's dream of a colorblind society a reality.⁴⁰ It is our understanding that as part of their efforts, OCR will be expanding their civil rights data collection set which will now include, for the first time, zero-tolerance expulsions, referrals to law enforcement, and school-related arrests.⁴¹ All of the data will be disaggregated by race, ethnicity, sex, disability and limited English proficient status. The new data will be made available to the public in Fall 2011.⁴² This expanded data will serve to highlight what DOE believes to be the most important civil rights issue facing schools today, student discipline disparities.⁴³ It will also serve to expand OCR's ability to effectively implement a disparate impact analysis to school discipline.

In light of *Sandoval*, it is important for OCR to become more strategic in their complaint investigation process. Under the new initiative, OCR should not only provide schools with the necessary guidance to implement any required changes under a corrective action plan, they should also actively monitor each school district's progress throughout the implementation of the plan. Requiring a corrective action plan without post-implementation monitoring serves no purpose and diminishes any positive impact that can be achieved through the enforcement process.

One thing is painfully clear about the disparate state of school discipline imposed on students of color: it creates a highway from the schoolhouse to the jailhouse. When a student is the recipient of disproportionate discipline, he is more likely to drop out of school. Students who drop out of school are more likely to become involved with the juvenile or criminal justice system.⁴⁴ Once they are part of the criminal justice system, those same former students of color find they are victims of disproportionate punishment⁴⁵ (but that is a topic for another day).

It is apparent that the continuous removal of students of color for minor offenses represents a violation of civil rights protections that were developed as a result of *Brown v. Board of Education*. It is therefore time to make certain that these protections are consistently applied for the sake of all of our children and their educational and economic future.

⁴⁰ USCCR, "Briefing on Disparate Impact In School Discipline," transcript of business meeting and briefing, Feb. 11, 2011, testimony of Mr. Ricardo Soto, Principal Deputy Assistant Secretary in the Office for Civil Rights, p. 134.

⁴¹ US DOE Civil Rights Data Collection, *Questions and Answers Regarding the CRDC* at <http://ocrdata.ed.gov/faq.aspx>.

⁴² US DOE Civil Rights Data Collection at http://ocrdata.ed.gov/Whats_New.aspx.

⁴³ US DOE Press Release issued June 30, 2011 at <http://www.ed.gov/news/press-releases/new-data-us-department-education-2009-10-civil-rights-data-collection-show-conti>.

⁴⁴ Robert Belfanz et al., "High Poverty Secondary Schools and the Juvenile Justice System," *Deconstructing the School-to-Prison Pipeline* (San Francisco: Jossey-Bass, 2003), 77-78.

⁴⁵ Moeller, Margaret, "Reauthorizing the Juvenile Justice and Delinquency Prevention Act: the Impact on Latino Youth," National Council of La Raza White Paper, Feb. 2011, p. 1.

Statement of Vice Chair Abigail Thernstrom

In a joint news release of July 21, 2011 Attorney General Eric Holder and Secretary of Education Arne Duncan announced a new initiative to address what they called the “school-to-prison pipeline.” The initiative, they said, would support “good discipline policies and practices that “foster safe and productive learning environments in every classroom.”

To that end, they promised to bring together government, law enforcement, academic, and community leaders to make sure “school discipline policies are enforced fairly and do not become obstacles to future growth, progress, and achievement.”

The federal government is much practiced in the art of making empty educational promises. In 1965 when the Elementary and Secondary Education Act (ESEA) was passed President Lyndon B. Johnson said the act would provide the one sure “passport” to a better life for children in poverty – their means of escape. It was not a civil rights measure per se, but it disproportionately affected black children, half of whom lived in poverty in 1965. As the Education Department itself admitted in the waning days of the Clinton administration, the statute has not made a significant difference in the lives of children whose futures seemed bleak. Head Start was also launched in 1965 and promised to put children growing up in poverty “on an even footing with their classmates.” It was another feel-good idea that was hugely expensive and hugely unsuccessful.

Subsequent federal educational initiatives have fared no better, and it is a very safe bet that the latest fantasy of ensuring that the educational system become “a doorway to opportunity – and not a point of entry to our criminal justice system” – is little more than appealing rhetoric. Attorney General Holder and Secretary Duncan describe that aim as “a critical and achievable goal.” “Critical,” okay, but “achievable” . . . surely they do not believe that in schools across the nation in every demographic setting (in the entire “educational system”) they can magically transform the current school discipline picture.

We can all agree that, proportionate to their school population, black children are much more likely than their white or Asian peers to be disciplined for behavior the schools find intolerable. I hope we can also acknowledge that whites are twice as likely to be disciplined as Asians. We *should* also be able to agree that disciplinary actions are taken in response to real discipline problems. But can we come to a consensus on a solution? The clear answer is, no.

Indeed, the likelihood of a constructive response to the problem of school discipline policies that have a disparate impact on non-Asian minority group members is probably diminished by framing the issue in civil rights terms. Labeling an issue one that involves civil rights usually implies a problem of bigotry – racial animus. But racial animus cannot account for the magnitude in disparity that we see in looking at group differences in school discipline. That same disparity shows up in school systems run by black superintendents, schools in which the principal is black, and classrooms in which the teacher is black.

In her concept paper urging a study of disparate impact and discipline, Commissioner Heriot notes that “students from one-parent families are disproportionately likely to misbehave in school, and that African-American students disproportionately come from one parent families.” Much evidence supports her point. But where does it lead us? What public policy can solve the problem of the collapse of the black family in the last four-to-five decades?

Statement and Rebuttal of Commissioner Todd Gaziano

The Department of Education's policy that threatens to sanction schools whose disciplinary policies unintentionally have a greater impact on students of certain races than others is flawed both as a matter of law and policy.

The Education Department's Legal Errors

Title VI of the Civil Rights Act of 1964 at Section 601 provides that no person shall, "*on the ground of race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphasis added). Simply put, section 601 prohibits intentional discrimination by school officials on the basis of race, color, or national origin. That's what it means to act "*on the ground of race, color, or national origin*."

Yet, the Department of Education's regulations go much further, prohibiting recipients from using "criteria or methods of administration which *have the effect of* subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3 (emphasis added). As Deputy Assistant Secretary of Education for Civil Rights Ricardo Soto explained in his statement to the Commission, the Department's regulations prohibit "race-neutral policies, practices, or procedures that have a disparate impact on the basis of race, color or national origin."

Although this phrasing has been part of the executive branch's lexicon for some time, it is still worth pausing a moment on the Orwellian doublespeak of anything having a "disparate impact on [a] basis" to show how hard the Department must strain to use some of the words of the statute in service of the opposite of what they provide. Because a disparate impact is usually understood as an unintended effect, and may include many unintended effects, this formulation awkwardly attempts to equate unintended "impacts" with the actual basis (or ground) for the action. Putting aside this nonsensical use of the English language, Soto's testimony accurately described the Department's disparate-impact theory and its subjective test relating to whether the Department thinks the educational reason for the action is both legitimate and substantial, and has no other reasonable alternatives:

Unlike cases involving different treatment, cases involving disparate-impact theory do not require that a school had the intent to discriminate. Rather, . . . the pertinent inquiry is whether the evidence establishes that a facially neutral discipline policy, practice, or procedure causes a significant disproportionate racial impact and lacks a substantial, legitimate educational justification. Even if there is a substantial, legitimate educational justification, a violation may still be established under disparate impact if the evidence establishes that there are equally effective alternative policies, practices, or procedures that would achieve the school's educational goals while having a less significant, adverse racial impact.

Where does this authority come from? The text of Section 601 most certainly does not prohibit unintended effects. If an action has an unintended racial effect, then the action was not taken “on the ground of race.” Section 602 authorizes regulations to enforce the prohibition in section 601, but does not authorize rules to enforce other prohibitions agency officials deem desirable.

The prohibition in Title VI contrasts with other federal civil rights laws in which Congress explicitly placed restrictions on actions or policies that have a disparate racial impact. Although some of these provisions have raised constitutional questions as applied to the states, at least there is no doubt that Congress forced the issue. For example, the 1991 amendments to Title VII explicitly authorized a “disparate impact” cause of action and set forth the burden of proof necessary to establish an “unlawful employment practice based on disparate impact.” 42 U.S.C. § 2000e-2(k)(1)(A).

Under Section 2 of the Voting Rights Act (VRA), one circumstance which may be considered in determining whether political processes violate the Act is the “extent to which members of a protected class have been elected to office in the State or political subdivision.” 42 U.S.C. § 1973(b). Thus, Congress put in place at least a partial effects test in which the process is judged in part by its outcome, even if the process was not intended to discriminate on the ground of race.

The Americans with Disabilities Act (ADA) prohibits “using qualification standards, employment tests or other selection criteria *that screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.” 42 U.S.C. § 12112 (emphasis added).

As the above examples show, Congress knows how to prohibit unintended policies or effects. The VRA and the ADA do not use the term “disparate impact” or even the word “effect” but they turn on the outcome of the actions at issue. There is nothing like that anywhere in Title VI. Indeed, the opposite is so. Congress prohibited actions taken “on the ground of” race, color, or national origin, and no fair reading of that clause can turn it into an outcome or effects test.

In the most recent opinion from the Supreme Court on the subject, five justices seemed to agree that the Education Department’s disparate impact regulations in Title VI were invalid, although the Court’s holding did not resolve that question. In *Alexander v. Sandoval*, the Court wrote that it is “beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.” 532 U.S. 275, 280 (2001). The Court chose to rest its opinion in *Sandoval*, however, on whether private plaintiffs could sue to enforce disparate impact regulations issued under section 602. The Court held that there was no private cause of action to enforce disparate-impact regulations, *id.* at 291, and so there was no reason to reach whether the regulations themselves were invalid. Nevertheless, the majority’s discussion of the disparate impact regulations is an unmistakable indication that five justices thought the disparate impact regulations were invalid.

The Court twice noted that section 602 only grants federal agencies authority to “effectuate the provisions of [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability.” And it repeatedly stated that section 601 only prevented intentional discrimination, see *id.* at 280-81. Section 602 does not by its terms empower agencies to issue regulations that go beyond prohibiting the intentional discrimination forbidden in Section 601. Thus, there is no textual argument that section 602 authorizes the disparate impact regulations.

The Department’s only defense is to rely on the now thoroughly discredited notion that federal agencies are empowered to enact any regulations that effectuate the broad *purposes* of the underlying statute rather than the statute’s actual terms. The Supreme Court in *Sandoval* pointed out that it has abandoned support for that approach and had begun the process of invalidating regulations that had no other basis in law. *Id.* at 287. The reason the *Sandoval* Court assumed that the disparate impact regulations were valid in deciding that case is more complicated than is worth explaining here, but the current Court often chooses a narrower ruling if that will dispose of the case, and one was available in *Sandoval*. Nevertheless, the five-justice majority’s most telling indication of what it thinks about the validity of the Title VI disparate impact regulations is contained in this passage:

We cannot help observing [in the dissent] 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*: “If, as five Members 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.”¹

Given the Supreme Court’s helpful warning, the executive branch should have shown similar restraint, reexamined the legality of its disparate impact regulations, and abandoned them since they were unauthorized. But there was no serious reexamination of the power that the federal agencies had claimed for themselves, at least there is none the Department has drawn to the Commission’s attention. Instead, there was a series of pronouncements that the Supreme Court had not expressly overturned the regulations. These statements are bereft of analysis but declare that the federal government will continue business as usual. In short, the agency officials and bureaucrats doubled down on their own claim of power. Their pronouncements regarding the precise holding of *Sandoval* are accurate, but the legal foundation for the regulations themselves after *Sandoval* is more flimsy than ever.

Intentional Discrimination in the Name “Fairness”

Even if a disparate-impact regulation is authorized by Title VI, reliance on this “theory” is bad policy. In almost any real-world setting, one cannot ensure both equality of treatment and equality of results. Trying to ensure equality of result when the underlying merit is decidedly

¹ *Alexander v. Sandoval*, 532 U.S. 275, 286 n.6 (2001) (full citations omitted; ellipsis and emphasis in the original quote).

uneven—or in this situation, the underlying misconduct is uneven—can only be achieved by engaging in intentional discrimination.

In at least some school districts, the law of averages dictates that some groups of students will merit more discipline than their proportionate share of the student population. If children from certain backgrounds (e.g., fatherless homes or neighborhoods with lots of gang members) misbehave at a higher rate and such children are not evenly distributed among all racial and ethnic groups, there is even more reason to expect differences in the level of misbehavior among different groups of students, whether that is potentially violent or just disruptive of learning. If discipline is meted out in proportion to who deserves it, a disparate impact will be found. The only way to “fix” the disparate impact is to intentionally discriminate. As Roger Clegg has written, “Under the guise of combating the problem of ‘unintended discrimination,’ the [disparate impact] theory demands deliberate discrimination.”²

Concentrating on disparate impacts in each school or district will lead, sadly but inevitably, to discriminatory treatment of similarly-situated students in violation of the law. Teachers who try to get their numbers “right” by ensuring that discipline is evenly distributed among students of all races and ethnicities will have to treat individual students unequally. The converse is also true: Teachers who are careful to treat all students the same, regardless of race, gender, or ethnicity, will inevitably observe some disparate impacts if behavior meriting discipline is not perfectly distributed among those groups. The only exception to the above is if no discipline is ever meted out.

Differences in family structure are one reason why students may misbehave at different rates. The estimated out-of-wedlock birth rates in the United States in 2010 were 17% for Asian or Pacific Islander, 29% for non-Hispanic whites, 53.3% for Hispanics, 65.6% for American Indians or Alaska Natives, and 72.5% for non-Hispanic blacks.³ The rates of children estimated to be living in single-parent families in 2009 were 16% for Asian and Pacific Islanders, 24% for non-Hispanic whites, 40% for Hispanics, 53% for American Indians, and 67% for blacks.⁴ Growing up in single-parent families puts children at greater risk of dropping out of school and becoming a teen parent.⁵ It is associated with much higher

² Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG., NAT’L LEGAL CENTER FOR THE PUB. INT., Vol. 5, No. 12, at 11 (Dec. 2001).

³ BRADY E. HAMILTON, JOYCE A. MARTIN & STEPHANIE J. VENTURA, U.S. DEP’T OF HEALTH & HUMAN SERV., CENTERS FOR DISEASE CONTROL & PREVENTION, NAT’L CENTER FOR HEALTH STATISTICS, NAT’L VITAL STATISTICS REPORTS, VOL. 60, NO. 2, BIRTHS: PRELIMINARY DATA FOR 2010, Table 1 (Nov. 2011).

⁴ THE ANNIE E. CASEY FOUND., KIDS COUNT DATA CENTER, DATA ACROSS STATES: CHILDREN IN SINGLE-PARENT FAMILIES BY RACE (PERCENT) – 2009.

⁵ See MARK MATHER, POPULATION REFERENCE BUREAU, U.S. CHILDREN IN SINGLE-MOTHER FAMILIES (May 2010).

incidents of child neglect.⁶ As the report notes on page 75, scholars cite family composition as a predictive factor in cognitive performance.⁷ Sadly, data from Wisconsin also suggests that “the probability of incarceration for juveniles in families headed by never-married single mothers [is much] higher than for juveniles in the two-parent family.”⁸ In sum, family structure does not dictate the result for any child, but it does affect the odds of certain negative outcomes and behaviors.

When determining whether a school district may have discriminated on the basis of race, the Department examines the rates of discipline for the different races of students in the district. Briefing Transcript at 158, 160-61 (Soto Testimony). Data alone may trigger an investigation. *Id.* at 185. Given this method of triggering the investigation, it is unlikely the Department would ever detect that a district is disciplining a group too little in order to get its numbers right. The Department notices disparities; a school district with disciplinary actions equally distributed among groups will not be noticed. The incentive for school districts, principals, and teachers is to make sure there are no disparities in discipline among races of students so as to avoid an investigation by the Department, which would be costly and time consuming for the school district.

The report and the testimony of the witnesses demonstrated that administrators and teachers are very concerned about disparities in discipline. A teacher from the suburban Washington, DC area testified that her district monitors the disciplinary rates in her classes for African-American and Hispanic students relative to the other students. The district’s expectation is that there will not be disparities, and she is held to account if there are.⁹

Two school districts told the Commission they have changed their discipline policies in order to reduce racial disparities in discipline. The Winston-Salem/Forsyth County Schools in North Carolina revised its discipline policies to “address the disproportionate discipline of African-American students in the district.”¹⁰ The Tucson Unified School District outlined the “shift” in its discipline policies with the goal “to ensure . . . the reduction of disciplinary incidents” for African American students. Expected outcomes for African American students are “[r]educed discipline referrals to the office” and “[r]educed suspensions and

⁶ See DIANE DEPANFILIS, U.S. DEP’T OF HEALTH & HUMAN SERV., CHILDREN’S BUREAU, OFFICE ON CHILD ABUSE & NEGLECT, CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT AND INTERVENTION, Chapter 4 (2006) (citation omitted).

⁷ Richard Arum and Melissa Velez, *Class and Racial Differences in U.S. School Disciplinary Environments*, at 4, *chapter in* IMPROVING LEARNING ENVIRONMENTS IN SCHOOLS: LESSONS FROM ABROAD (Forthcoming: Palo Alto, Stanford University Press).

⁸ PATRICK FAGAN, HERITAGE FOUND., CONGRESS’S ROLE IN IMPROVING JUVENILE DELINQUENCY DATA (March 10, 2000).

⁹ Report at 28-29 (Written statement of Jamie Frank).

¹⁰ Letter from Donald L. Martin, Jr., Superintendent, Winston-Salem/Forsyth County Schools to Lenore Ostrowsky (Dec. 10, 2010).

expulsions.”¹¹ I do not know whether the original discipline policies were sound or not, but changing them solely to affect a racial outcome serves no educational purpose, and racial balancing for its own sake is not constitutional.

Of the 17 school districts that responded to the Commission, nine reported using the Positive Behavior Intervention Support (PBIS) program, a “systems approach to preventing and responding to classroom and school discipline problems.” One goal of the PBIS program is to “eliminate[e] the disproportional number and racial predictability of the student groups that occupy the highest and lowest achievement categories.”¹² Artificially decreasing the discipline of misbehaving students or artificially increasing the discipline for goody-two-shoes students who are the best behaved is not a sound educational or civil rights policy. For the well-behaved students, it can only breed resentment, or worse, a desire to live “down” to the lowered expectation.

The Counterproductive Effect on Minority Students

Of course, there is nothing wrong with schools implementing programs to improve student behavior, which may eventually result in less disparity in discipline among different groups. The danger is that schools will weaken disciplinary measures in order to equalize the disciplinary rates, which will only increase disruptive behavior.¹³ Such a change will harm well-behaved students the most by interfering with the productive learning environment they deserve. This may be especially harmful to minority students who, as Arum and Velez point out, “are exposed to school environments with high levels of disorder, violence and concerns over safety” and who therefore “face the disparate impact of inadequate and ineffective discipline in U.S. schools.” “Significantly,” they go on to say, “in schools with higher levels of disciplinary administration, we . . . have found that the gap between African-American and white student test performance does not exist.”¹⁴ In short, an increase in the use of disparate impact investigations is likely to cause substantial harm to minority students about whom the Department professes concern.

Rebuttal to Other Commissioner Statements

Statements by Commissioners Castro, Achtenberg and Yaki are unclear on some seemingly important points, or at least some points that seem important to them. Their joint statement begins with a condemnation of zero-tolerance policies, but the remainder of their statement is

¹¹ Letter from Augustine Romero, Director of Academic and Student Equity, and Jimmy Hart, Director of Academic Equity for African American Studies, Tucson Unified School District to Martin Dannenfelser (Dec. 13, 2010).

¹² Letter from Romain Dallemand, Superintendent, Rochester (MN) Public Schools, to Martin Dannenfelser (Nov. 30, 2010).

¹³ My own view is that the risks associated with too little discipline are greater than those with too much, and thus, any approach that lessens the proper level of discipline are worse than the converse, even if applied fairly across the board.

¹⁴ Arum and Velez at 35-36, *supra* Gaziano note 7.

much more concerned with the exercise of discretion in discipline by school administrators. There is no acknowledgement of the contradiction between these two positions. The only easy way to harmonize them is to assume the authors advocate no discipline, but that is not supported by other portions of the joint statement. It is a puzzle.

As for most zero-tolerance discipline policies, I'll register my opposition here, especially when they are used to sanction a kindergartener who makes a finger gun, grade school boys who draw pictures of soldiers, and others who bring nail clippers to school. Conservative and libertarian thinkers are the leading voices against crazy, zero-tolerance rules.¹⁵

Although Commissioners Castro, Achtenberg and Yaki bemoan the increase of zero-tolerance policies,¹⁶ one of the main drivers of this increase is the kind of accusations leveled against school administrators in the rest of their joint statement, i.e., that administrators' discretionary decisions are racially discriminatory. School administrators also may fear private litigation over their exercise of discretion, but there should be little doubt that the accusation of racial injustice from the federal government and others would be a powerful force encouraging the growth and blind application of zero-tolerance policies.

The only conclusion a careful reader might draw from such a mish-mash is the importance these commissioners attribute to getting the racial percentages right, regardless of anything else. It would be unfortunate in the extreme, however, if their racial bean-counting contributes to the entrenchment of zero-tolerance policies, especially if such policies have the counterproductive effect that my fellow commissioners attribute to them.

Turning to their central claim, Commissioners Castro, Achtenberg and Yaki are relatively clear in their assertion that the disparities among racial groups in school discipline have a significant racial explanation, i.e., that schools are unfairly disciplining blacks and Hispanics relative to whites and Asians due to their race and not because of other relevant factors. This is an extraordinary claim that calls for extraordinary, or at least very carefully documented, evidence. Yet, there appears to be very little evidence supporting that contention, certainly not the studies cited in their statements, which are either seriously flawed or easily distinguished. More scholarly study would be helpful, but it should be more rigorous and carefully designed than that relied upon by the activists who try to use simple disparities to prove something malevolent.

¹⁵ Prominent critics of zero-tolerance rules have included my colleagues at The Heritage Foundation, see, e.g., HERITAGE FOUND., CASE STUDIES: CRIMINALIZING KIDS I: TRUE TALES OF ZERO TOLERANCE OVERCRIMINALIZATION (Dec. 2003) (high school senior arrested, suspended from school, and not allowed to attend graduation ceremonies for having a kitchen knife in her car in the school parking lot); HERITAGE FOUND., CASE STUDIES: CRIMINALIZING KIDS II: MISDEMEANOR MISTAKES AND FELONY FORGETFULNESS (describing arrests of children for minor offenses pursuant to zero-tolerance policies); and *Reason* magazine, see, e.g., Charles Oliver, *No Hugging, No Learning*, REASON HIT & RUN (Nov. 10, 2011) (middle school students suspended for briefly hugging); Radley Balko, *Further Adventures in Zero Tolerance*, REASON HIT & RUN (Feb. 3, 2011); Radley Balko, *Zero Tolerance Follies*, REASON HIT & RUN (March 5, 2010).

¹⁶ In the first paragraph of their joint statement, they report that "almost 90% of U.S. public schools have established and implemented some sort of zero-tolerance policy ... result[ing] in a substantial increase in the number of expulsions and out-of-school suspensions currently being imposed by schools."

The activists are not unlike those who think that differences in the racial composition of the prison population are proof of discriminatory treatment in the criminal justice system. Simplistic analyses of the offenses charged and sentences imposed compound the problem if they do not control for other important factors, including an offender's past criminal history. Any criminology graduate student can debunk the poorly designed studies by demonstrating how the introduction of additional factors eliminates the supposed proof of discrimination. Unfortunately, the simplistic and faulty "studies" continue to fuel the myth of a racist criminal justice system. When all the relevant factors are taken into account: "[T]here is almost no reliable evidence of racial bias in the criminal justice system's handling of ordinary violent and non-violent offenses. Rather, the facts overwhelmingly show that blacks go to prison more often because blacks commit more crimes."¹⁷

As is the case with pseudo-studies of racism in the criminal justice system, so it is with poorly designed studies of school discipline. One study cited by Commissioners Castro, Achtenberg and Yaki found differences in punishment for students sent by teachers to the principal's office for committing supposedly similar offenses. Black and Hispanic students were more likely to receive suspension or expulsion relative to white students for similar offenses.¹⁸ But the study's authors admitted they did not take into account which students committed prior infractions, "a variable that might well be expected to have a significant effect on administrative decisions regarding disciplinary consequences."¹⁹ More importantly, the authors' own data showed that blacks were 2.19 times as likely to be referred for misbehavior as whites in grades K-6 and 3.79 times as likely as whites in grades 6-9,²⁰ making it much more likely that the black students were repeat offenders in any particular encounter. Since repeat offenders may rightly receive more punishment, the study cannot tell us whether administrators unfairly punished anyone.

¹⁷ AMY L. WAX, RACE, WRONGS, AND REMEDIES 91 (noting some admitted anomalies with certain drug offenses). Professor Wax continues:

As a noted criminal law scholar sympathetic to black concerns stated in an exhaustive summary of the literature, "[v]irtually every sophisticated review of social science evidence on criminal justice decision making has concluded, overall, that the apparent influence of the offender's race on official decisions concerning individual defendants is slight." With respect to arrests, "few or no reliable, systematic data are available that demonstrate systematic discrimination." Rather, "arrests can by and large be taken as reasonable reflections of the involvement in serious crime of members of different racial groups." Likewise, . . . blacks are not singled out for stricter or more frequent prosecution. Nor do they receive longer sentences once criminal history and other sentencing factors are taken into account.

Id. (citing MICHAEL TONRY, MALIGN NEGLECT 50, 71, 79).

¹⁸ See Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, SCH. PSYCHOL. REV., Vol. 40, No. 1, at 85, 95 (2011) [hereinafter Skiba, *Race is Not Neutral*].

¹⁹ *Id.* at 103.

²⁰ *Id.* at 93.

A Texas study, also cited by Castro, Achtenberg and Yaki, found that “African-American and Hispanic students were more likely than white students to experience repeated involvement with the school disciplinary system for multiple school code of conduct violations.”²¹ The paper noted that the “reader should not discount the possibility of overrepresentation of African Americans among students who are repeatedly disciplined flows from the previous finding that African-American students are disproportionately involved in the discipline system in the first place.”²²

The Texas study included a multivariate analysis in an attempt to compare students of different races who were otherwise from similar backgrounds, including socioeconomic background. But it did not isolate whether the students came from a single parent household, which is likely far more important than other socioeconomic factors. Instead, acknowledging the importance of family structure, the analysis included as a variable the percentage of families in the student’s *county* headed by a single parent.²³ This crude variable does not remotely capture the family structure of an individual student. The analysis thus classified many students as coming from similar backgrounds when they differed with regard to their family situation.

The statement of Commissioners Castro, Achtenberg, and Yaki cites a different study for the proposition that black students tend to be referred for discipline more often for “subjective offenses, such as disrespect or excessive noise,” while white students tend to be referred more often for “behaviors that are objective, such as smoking, vandalism, and using obscene language.”²⁴ An examination of the study itself reveals that black students were also more often referred for “threat” or “loitering,” while white students were more often referred for “leaving without permission.”²⁵ The subjective offenses have elsewhere been termed “defiance.”²⁶ All such offenses could be serious, but threatening behavior—even if subjective—should be viewed as more serious than skipping class.

Moreover, threats and other forms of defiance might well be more disruptive in a classroom setting than obscene language. None of these behaviors will be helpful for the student later in

²¹ TONY FABELO ET AL., *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER; PUBLIC POLICY RESEARCH INSTITUTE 42 (2011).

²² *Id.* at 42 n.80.

²³ *Id.* at 94.

²⁴ Statement at 81.

²⁵ Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, *THE URBAN REV.*, Vol. 34, No. 4, at 317, 332 (Dec. 2002).

²⁶ Skiba, *Race Is Not Neutral*, *supra* Gaziano note 18, at 101. In contrast, a 2010 study of elementary students cited by Commissioners Castro, Achtenberg, and Yaki did not find that black students were more likely than white students to receive an office disciplinary referral for defiance. See Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, *J. EDUC. PSYCHOL.*, Vol. 102, No. 2, at 508, 513 (2010) (hereinafter Bradshaw et al.).

life; teachers should try to stop them all. But teachers and principals need discretion to deal appropriately with each situation. Crude generalizations about subjective offenses (that may include threats) versus objective offenses are not helpful. They will either encourage the administrators to ignore so-called subjective offenses or to try to formulate a zero-tolerance rule that converts such subjective offenses into defined, objective offenses.

Finally, one study of elementary students was cited by Commissioners Castro, Achtenberg, and Yaki for the proposition that black students receive office disciplinary referrals at a higher than expected rate after controlling for various factors.²⁷ The study had another interesting finding, however: that black male students in classrooms with black teachers were more likely to receive office disciplinary referrals than the other students.²⁸ Perhaps all the findings in this study of 21 elementary schools were anomalous, idiosyncratic, or explained by some other factor that further review and study would reveal. Yet the authors suggest that the “findings do not suggest that a cultural or ethnic match between students and their teachers reduces the risk of [office disciplinary referrals] among Black students.”²⁹

The study suggests four possibilities to me: (1) the black teachers in the study were biased against black male students compared to other students and wanted black males punished at higher rates, (2) the black teachers in the study were biased in favor of reforming black male students as compared to other students, (3) the black teachers were more concerned about the negative effect of misbehaving black male students on others in the class, or (4) none of the above. In any event, the study does not easily support the simple message of racial hostility or indifference by a majority white establishment against minority students.

In the end, however, the biggest difference between at least four of us on the commission and Commissioners Castro, Achtenberg and Yaki is our disagreement with their predictable call for an “immediate and substantive” intervention by the federal civil rights enforcers at the U.S. Department of Education. At best, such intervention will be merely unlawful, costly, and bureaucratic. In addition, I believe it will likely be counterproductive and make matters worse for minority students in schools with the most serious discipline problems.³⁰

²⁷ Bradshaw et al. at 511, *supra* Gaziano note 26.

²⁸ *Id.* at 514.

²⁹ *Id.* at 515.

³⁰ See also “Dissent and Rebuttal Statement of Commissioners Gaziano and Kirsanow” in U.S. Commission on Civil Rights, *Peer-to-Peer Violence and Bullying: Examining the Federal Response* at 163-68 (Sept. 2011), regarding the likely counterproductive effects of greater federal involvement aimed at preventing student bullying and harassment.

Statement and Rebuttal by Commissioner Gail Heriot

On March 8, 2010, Secretary of Education Arne Duncan stood on the Edmund Pettus Bridge in Selma, Alabama. The occasion was the forty-fifth anniversary of the confrontation known as “Bloody Sunday” between peaceful civil rights demonstrators and state and local police. There he delivered an emotional address in which he declared that the previous administration had been guilty of a lack of vigilance in combating discrimination and promised that he would “reinvigorate civil rights enforcement.”

The emotion that Duncan felt was understandable in view of the site of his speech. But Duncan’s words had the ring of a general rallying his troops to fight the last war. His strategy—a frontal attack on what he evidently regards as hidden race discrimination—bears little relation to the problems schools, especially schools that primarily serve minority children, actually face. Instead of promising to cut through the layers of bloated bureaucracy that smother innovative schools and teachers at all levels, he promised to use the Department of Education’s bureaucracy to double down on schools. His Department of Education would be conducting “compliance reviews” and issuing “a series of guidance letters to school districts and postsecondary institutions that will address issues of fairness and equity.”¹ One media report later said that rather than “waiting for cases to come in the door,” Duncan’s Department of Education “plans to use data to go find [civil rights] problems.”²

Disciplinary actions will be a special concern in carrying out Secretary Duncan’s vow to root out subtle discrimination and disparate impact. He told the crowd, “African-American students without disabilities are more than three times as likely to be expelled as their white peers” and “African-American students with disabilities are over twice as likely to be expelled or suspended as their white counterparts.” The Department of Education’s plan, which had been in the works well before his speech, is to keep schools under careful surveillance: “We will review whether districts and schools are disciplining students without regard to skin color. We will collect and monitor data on equity,” he said.

The danger should be obvious: What if an important reason African-American students were being disciplined more often than white or Asian students is that more African-American students were misbehaving? And what if the cost of failing to discipline those students primarily falls on their fellow African-American students who are trying to learn amid classroom disorder? Will unleashing the Department of Education’s Office for Civil Rights and its army of lawyers cause those schools to eliminate only that portion of the discipline gap (if any) that was the result of race discrimination? Or will schools react more heavy-handedly by tolerating more classroom disorder, thus making it more difficult for students who share the classroom with unruly students to learn?

¹ Crossing the Next Bridge: Secretary Arne Duncan’s Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama (March 8, 2010), available at <http://www.ed.gov/news/speeches/crossing-next-bridge-secretary-arne-duncan’s-remarks-45th-anniversary-bloody-sunday-ed>.

² Paul Baskin, “Education Department Promises Push in Civil Rights Enforcement,” *The Chronicle of Higher Education*, March 8, 2010.

There are two sides to the “disparate impact” coin. Secretary Duncan focuses only upon the fact that, as a group, African-American students are suspended and expelled more often than other students.³ By failing to consider the other side of the coin—that African-American students may be disproportionately victimized by disorderly classrooms—his policy could easily end up doing more harm than good to the very group he is attempting to help.⁴

³ In this respect, the controversy over disparate impact in school discipline may have parallels to the controversy over the death penalty. For many years, some opponents of the death penalty argued that it should be abolished because it has a disparate impact on African-American male offenders. According to Department of Justice figures, 34.6% of all offenders executed between 1976 and 2011 were black, 6.87% were Hispanic and 56.6% were white. This constitutes an overrepresentation of blacks, who made up around 12% of the American population during that period. Such an overrepresentation may seem troubling until one learns that Department of Justice figures over that period also record that 52.2% of all homicide offenders are black. Indeed, some studies have found that if there is a problem with the death penalty, it is not that black offenders appear to be discriminated against; it is that black *victims* appear to be discriminated against. Most homicides are within race. According to Department of Justice statistics, 46.9% of all homicide victims are black, yet only 14.2% of those executed for homicide killed black victims. Some empirical studies have attempted to explain this as the result of a lack of value placed upon black lives by prosecutors. See Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 *Cornell L. Rev.* 347 (2004)(citing studies suggesting that it is black victims who are discriminated against and arguing instead that such murders may simply be more likely to take place in places dominated by voters who oppose the death penalty). Those who advocate more lenient school discipline (or just different methods of school discipline) may or may not have a point, just as those who oppose the death penalty may or may not have better arguments regarding the death penalty controversy. But insofar as they premise their argument on the supposed disparate impact of the policies they oppose, they must recognize that there is another side to the coin. Efforts to reduce the number of African-American offenders who are subject to the death penalty are likely to exacerbate the disparate impact on African-American victims, which in the view of many is just as bad if not more so. Ultimately, it is to be hoped that policy over the death penalty and over school discipline matters can be decided over considerations that transcend race, gender or ethnicity.

⁴ I agree with Commissioner Gaziano that Title VI simply does not permit the Department of Education to proceed against schools on a disparate impact theory and that the Department’s regulation nonetheless adopting that theory, 34 C.F.R. sec. 100.3, is therefore unauthorized by law. It requires actual discrimination. See Section 601 (Title VI) of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d (No person shall “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”). See also *Alexander v. Sandoval*, 532 U.S. 275 (2001). I also agree with Commissioner Gaziano that the problem with disparate impact analysis is not simply that it goes beyond what Congress authorized in Title VI; it actually contradicts Title VI. If one group receives more school discipline than another because (for whatever reason) its members violated more school rules than the other, race-conscious efforts to alter the “disparate impact” are usually themselves discriminatory.

Commissioner Yaki makes it clear that he would like to see disparate impact analysis used more widely. He calls the “revival of disparate impact analysis in [Title VI] enforcement” a “particularly commendable” development—although at least in the draft of his statement that was made available to me, he did not attempt to explain why the law permits the Department of Education to pursue such a legal strategy. Among the racial and ethnic disparities that he believes are in need of remedying are “a wide achievement gap, disparate dropout rates, and skewed placement in special education or gifted and talented programs.” Commissioner Yaki is, of course, right to be concerned with these matters, which he concedes are not necessarily the result of “conscious discriminatory intent.” I would add that discrimination, either conscious or unconscious, has very little to do with these problems or their solutions. The sooner that is recognized, the sooner the problems can be solved.

There are many theories as to why some students misbehave in schools and others do not. While both misbehaving and model students come from every walk of life, no one should be surprised to learn that students from households below the poverty line tend to present more discipline challenges than others. Since according to the U.S. Census 27.4% of blacks live below the poverty line, while 26.6% of Hispanics, 9.9% of whites and 12.1% of Asians do, one should not be astonished to find that racial groups are not disciplined at the same rates.⁵ Similarly, though probably not unrelatedly, 72% of African American and 53% of Hispanic children are now being born outside of wedlock, as opposed to 29% of white and 17% of Asian/Pacific Islander children.⁶ Given that much research has found that children born outside of wedlock or living in single-parent households are more likely to engage in anti-social behavior than other children, it would be naïve to expect rates of discipline to be equal across races.⁷ One cannot infer race discrimination from the differing discipline rates.

⁵ To the contrary, if living below the poverty line were the sole determinant of who misbehaves inside or outside of the classroom (which it is surely not), one would expect African American students to be disciplined at roughly 2 to 3 times the rate for white students—which is exactly what Secretary Duncan’s figures showed. Non-Hispanic white and Asian households also have higher median incomes than black and Hispanic households. According to the Census Bureau, in 2010 non-Hispanic white households had a median income of \$54,620 and Asian households \$64,308; black households had a median income of \$32,068 and Hispanic households \$37,759. See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage 2010*. See also Ellen Brantlinger, *Social Class Distinctions in Adolescents’ Reports of Problems and Punishments in School*, 17 *Behavioral Disorders* 36 (1991).

⁶ Child Trends Data Bank, “Births to Unmarried Women,” available at <http://www.childtrendsdatabank.org/?q=node/196>.

⁷ See, e.g., William S. Comanor & Llad Phillips, *The Impact of Income and Family Structure on Delinquency*, *J. App. Econ.* 209 (2002); Susan C. Duncan, Terry E. Duncan, Lisa A. Strycker & Nigel R. Chaumeton, *Relations Between Youth Antisocial and Prosocial Activities*, 25 *J. Behavioral Med.* 425 (2002); Lela Renee McKnight & Ann Booker Loper, *The Effects of Risk and Resilience Factors in the Prediction of Delinquency in Adolescent Girls*, 23 *School Psychology Int’l* 186 (2002); Amy L. Anderson, *Individual and Contextual Influence on Delinquency: The Role of the Single Parent Family*, 30 *J. Crim. Justice* 575 (2002); Stephen Demuth & Susan L. Brown, *Family Structure, Family Processes and Adolescent Delinquency: The Significance of Parental Absence Versus Parental Gender*, 41 *J. Res. Crime & Delinquency* 58 (2004); Todd Michael Franke, *Adolescent Violent Behavior: An Analysis Across and within Racial/Ethnic Groups*, 8 *J. Multicultural Social Work* 47 (2000); Marcia J. Carlson & Mary E. Corcoran, *Family Structure and Children’s Behavioral and Cognitive Outcomes*, 63 *J. Marriage & Family* 779 (2001). But see Mallie J. Paschall, et al., *Effects of Parenting, Father Absence, and Affiliation with Delinquent Peers on Delinquent Behavior Among African-American Male Adolescents*, 38 *Adolescence* 15 (2003)(finding no delinquency difference in a non-random sample of 260 African-American, adolescent males between those who reported living with a father or father figure and those who did not).

One of the witnesses at our briefing, teacher Patrick Walsh, made it clear that it was his opinion that the racial disparities in discipline were largely the result of poverty and family structure and not related to race per se. He stated: “It’s not the African American girls on their way to UVa or William & Mary [who disproportionately are disciplinary problems at school]; it’s not the black girls from Ghana or Sierra Leone or Ethiopia who come here to live the American dream, but it’s the black girls who are products of what Colbert King in a great article that everybody should read that was in the Post last Saturday called an inter-generational cycle of dysfunction. Girls who have no fathers in their homes, who often are born to teen mothers. They’re a small group, but the fact is they cause enormous problems in school ... and it’s the same with the boys.” Transcript at 26-27. Walsh openly acknowledged that this cycle of dysfunction likely had roots in a history of racial discrimination. He was not, however, optimistic that the disparity would disappear before “the problems of poverty and teen pregnancy and

Indeed, given that schools with African-American principals and mainly African-American teachers are just as likely as schools with white principals and mainly white teachers to have a large “discipline gap,”⁸ it is unlikely that anything other than differing rates of misbehavior contribute significantly to the differing rates of discipline. Those who claim to have demonstrated that discrimination and racism are at work are simply scandalmongering.⁹

lack of fathers can be reduced or solved.” Id. See Colbert I. King, *Celebrating Black History as the Black Family Disintegrates*, *Washington Post* (February 4, 2011)(the article to which Walsh was referring).

Efforts to suggest that the differences in the rates of discrimination between blacks and whites are anomalous (in the sense that they cannot be accounted for in large part by factors such as socio-economic class or fatherless homes) tend to fall short of the mark. Consider, for example, *Breaking Schools’ Rules: A Statewide Study on How Schools Discipline Relates to Students’ Success and Juvenile Justice Involvement*—a report issued by the Justice Center of the Council of State Governments and the Public Policy Research Institute of Texas A&M University. That study purports to find that even after 83 different variables (including a measure of economic disadvantage) are taken into account, African American students are still 31.1% more likely than white students to have been the subject of discretionary disciplinary action in the 9th grade. The implication, at least to some readers, was that perhaps some teacher reports of misbehavior by African American students were false or misleading. But the presence of both parents in the student’s home was not taken into account. And the method used to control for economic disadvantage was rudimentary. Rather than control for household income, parents’ educational attainment or other markers of socio-economic status, the study controlled only for whether the student is eligible for free or reduced-price lunch or other public assistance. A binary classification system of this type does not convey the whole picture. It treats a student whose parents earns a penny more than the eligibility cut-off the same as a student whose parents are both wealthy, well-educated professionals. Similarly, it treats a student whose parents earn the maximum allowable for reduced-price lunch benefit (\$40,793 for a family of four in 2010), because they are both attending graduate school, the same as a homeless child being shuffled from one shelter to another. It is not clear from the Texas A&M study that students of different races with truly similarly-situated family and socio-economic status will have differing rate of school discipline problems. Moreover, it is certainly not clear that the African-American students (or the students of other races) looked at by the study had not committed the infractions for which they were disciplined or that they did not deserve to be disciplined in the particular way the school authorities chose to discipline them.

⁸ Tony Fabelo, Michael D. Thompson, Martha Plotkin, Dottie Carmichael, Miner P. Marchbanks III and Eric A. Booth, *Breaking Schools’ Rules: A Statewide Study on How Schools Discipline Relates to Students’ Success and Juvenile Justice Involvement* (2011)(“Texas A&M study”). See also Catherine P. Bradshaw, Mary M. Mitchell, Lindsey M. O’ Brennan, Philip J. Leaf, *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 *J. Educ. Psych.* 508 (2010).

⁹ See, e.g., Russell Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 *School Psych. Rev.* 85 (2011)(“Skiba-Horner”). Skiba-Horner purports to find that African-American students tend to be punished more harshly for the same general categories of behavior. But the actual data behind the study do not support such a finding. The authors readily admit that, in making their comparisons, their data failed to take into consideration whether the student was in any way a repeat offender—a variable that they further admit “might well be expected to have a significant effect on administrative decisions regarding disciplinary consequences. Skiba-Horner at 103. But this is no hypothetical possibility. Elsewhere in the Skiba-Horner analysis they find that “students from African-American families are 2.19 (elementary) to 3.78 (middle) times as likely to be referred for problem behavior as their White peers.” Id. at 85. In other words, their own data point strongly in the direction that African-American students are in the aggregate much more likely to be repeat visitors to the principal’s office. This is a study at war with itself.

Skiba-Horner attempts and fails to draw support for its conclusion by citing a number of earlier studies. Consider, for example, “Student Suspension: A Critical Reappraisal,” which Skiba-Horner describes as having

found “no significant difference in [disciplinable] behavior between African-American and white students.” See Shi-Chang Wu, William Pink, Robert Crain & Oliver Moles, *Student Suspension: A Critical Reappraisal*, 14 *Urb. Rev.* 245 (1982). In that article, the authors asked both black and white students eight questions designed to determine whether their propensity for anti-social behavior such as “Would you cheat on a test (if you could get away with it)?” and do you agree or disagree or are you undecided about whether if “you want to get ahead, you can’t always be honest?” They found that among students with similar answers, black students tend to get suspended more than white students. This, of course, is not the same thing as finding “no significant differences in behavior between African American and white students.” First, there was no finding that African American and white students gave similar answers to the questions; the study did not make such a comparison and instead simply compared African American students to white students *who gave similar answers*. Second, even among students who gave similar answers, there is no reason to believe they engaged in the same level of bad behavior. If, for example, the average white student with a high number of anti-social answers had greater reason to believe he would be punished by his mother and father if he engaged in bad behavior at school and got caught than an equivalent African American student, the anti-social white student could be expected to behave better. (Indeed, one of the main problems with the Department of Education’s policy is that it deprives minority students of the opportunity to develop the discipline they need to succeed—something that white, middle-class students will often adequately learn at home.) In short, Skiba-Horner was off-base for citing this article as evidence that African-American students engage in misbehavior at the same rates as white students.

An earlier effort by the lead author in Skiba-Horner was similarly flawed. Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 *Urb. Rev.* 317 (2002)(“Skiba-Michael”). It purports to provide evidence that part of the reason that African-American students in the middle schools in the school district under study get referred for discipline a little over twice as often as white students is race discrimination on the part of teachers. It does so by demonstrating that *among students who are referred for discipline*, African-American students are proportionately more likely to be referred for “Disrespect,” “Excessive Noise,” “Threat,” and “Loitering,” while white students are proportionally more likely to be referred for “Smoking,” “Left without Permission,” “Vandalism,” and “Obscene Language.” Apparently, there were no statistically significant differences in the proportions on matters of “Fighting,” “Endangering,” “Conduct Interference,” “Throw/Propel Objects,” “Gambling,” “Sexual Acts,” “Indecent Exposure,” “Minor Offenses,” “Spit,” “Truancy,” and a few unspecified reasons for discipline referral. Skiba-Michael at 332-333, Table 5.

Note that this is emphatically not the same thing as a finding that white students actually commit or are referred for committing “Smoking,” “Left without Permission,” “Vandalism,” or “Obscene Language” more often than African-American students. Given that African-American students are referred for discipline at rates more than twice that of white students, it may well be (indeed it may be likely) that the rate of African-American referrals for these behaviors is higher than the rate of white referrals across the board. Skiba-Michael studiously avoids presenting data on that point and instead argues that because a somewhat higher percentage of the total African-American referrals are for conduct that is subjective in nature (compared to the percentage of total white referrals for that kind of conduct), teachers are likely being harsh on African-American students on account of their race.

Even if this were the most plausible explanation for the different proportions, it is unclear that it would explain more than a very small proportion of the overall differences in rates of referral. More important, however, it is not the most plausible explanation for the higher proportion of referrals for subjective misbehavior among African-American students. Given that the overall rates of referrals for misbehavior are more than twice as high for African-American students as for white students, the number of African-American students who are repeatedly referred for misbehavior is undoubtedly much higher. It is perfectly sensible for teachers to be quicker to refer students for “subjective misbehavior” if the student already has a track record of misbehavior. If the best behaved student in the class says something that could plausibly be interpreted either as a threat or as a lame joke, teachers may be inclined to give him the benefit of the doubt; if a student who attacked another student last week says the same thing, it is more than reasonable to interpret his behavior less favorably.

I strongly suspect one would find similar results if one looked at the arrest and prosecution records of adult parolees. Those who have never been arrested or convicted of a crime normally they get the benefit of the doubt

I do not purport to know the best way to maintain discipline in the nation's classrooms or to cause students to adopt the self-discipline they will need to live happy and useful adult lives.¹⁰ I strongly doubt that there is a "one size fits all" best way. That is why the Constitution does not confer upon the federal government the authority to set school discipline policy, and Congress does not even purport to confer such authority on the Department of Education. These are matters best left to individual schools and local school districts. As a nation, we are better off having a variety of approaches to school discipline in order to foster experimentation and adaptation to local needs. For the same reason, education policy in general is best left to individual schools and local school districts.¹¹

It is not, therefore, my intention to take sides in the general debate over whether suspension and expulsion rates are too high or whether more effective alternatives to current disciplinary policies can be found.¹² It may well be true, for example, as critics of current

when it comes to misconduct that requires the police officers subjective judgment; parolees are less likely to. Consequently, the proportion of parolees who get prosecuted for offenses that might be viewed as subjectively defined would likely be higher than the proportion of first-time offenders who get prosecuted for such offenses. But that would be true regardless of the offender's race. Skiba-Michael has uncovered no evidence that one would not expect to find under well-functioning school discipline policy where it happens to be the case that African-American students misbehave at higher rates than white students. The authors' conclusions to the contrary are unwarranted.

¹⁰ A sometimes spirited debate over general school discipline policy has been going on for over a century. On the one hand, there is the Progressive view mostly closely associated with John Dewey who argued that strong disciplinary methods only served "to cow the spirit, to subdue inclination" and to foster "indifference and aversion" to schools. John Dewey, *On Democracy and Education: An Introduction to the Philosophy of Education* 129 (1916). On the other, there are conservatives who argue that Progressive methods have been a disservice to students, especially those born into family environments that fail to instill self-discipline into each new generation. See, e.g., Jackson Toby, *The Schools in Crime* (James Q. Wilson and Joan Petersilia, eds. 1995). See also Gerald Grant, *The World We Created at Hamilton High* (1988). It is unnecessary for me to weigh in on that debate in order to make the points that (1) classrooms must be reasonably orderly in order for students to learn; (2) it is not the federal government's responsibility to decide what sort of discipline policy will best promote that orderliness or even what level of orderliness is to be sought; and (3) issues of race should not drive the debate.

¹¹ Indeed, one can go somewhat further: Even if one size could potentially fit all, it would be hard to know what that size is. The success of education policy, including discipline policy, is something that is hard to measure. In the short run, it is very difficult to tell what is working and what is not, and sometimes even in the long run, separating good practices from bad can be tough. As a consequence, education is prone to fads and fashions, not all of which have turned out to be in the best interests of students. A good example is the New Math. See Morris Kline, *Why Johnny Can't Add: The Failure of the New Math* (1973). Similarly, a debate raged for some time between advocates of the phonetic approach to literacy and those who favor the "sight-word" or "whole language" approach. It is doubtful that the last word has been written on this topic. Let us hope that the nation's children will be able to read it when it comes. See Rudolph Flesch, *Why Johnny Can't Read—And What You Can Do About It* (1955); Marilyn Jager Adams, *Learning to Read: Thinking and Learning About Print* (1990). In the end, the best defense against the risk created by faddishness is a decentralized system of decision-making about education. Schools that march in lockstep have been known collectively to march off a cliff.

¹² One issue I am willing to take a stand on is the gross misuse of statistics. In their draft statement provided to me, Commissioners Castro, Achtenberg and Yaki wrote, "One thing is painfully clear about the disparate state of school discipline imposed on students of color: it creates a highway from the schoolhouse to the jailhouse." In their view, a student who receives "disproportionate discipline" is "more likely to drop out of school." Statement of Chairman Martin R. Castro and Commissioners Roberta Achtenberg and Michael Yaki at 84. The

practices argue, that because suspensions take misbehaving students out of the classroom, they have the effect of putting those students further behind their peers.¹³ This is part of the price that has been paid for eliminating corporal punishment in most states and in severely limiting the use of “staying after school” as a method of dealing with student misbehavior.¹⁴ Whatever the other virtues and/or vices of these approaches to instilling discipline in children, they did not have the effect of removing them from instruction for significant periods of time.¹⁵

theory that African Americans are dropping out or turning to crime *because* they have been disciplined by schools is a fashionable one these days. Commissioners Castro, Achtenberg and Yaki appear to be committed to it. See *id.* at 6 (“Studies have shown that students suspended in 6th grade are far more likely to be suspended again and research indicates that suspensions and expulsions are, in turn, correlated to an increased risk of dropping out. A research study has also shown that students who are suspended three or more times by the end of their sophomore year of high school are five times more likely to drop out or graduate later than students who had never been suspended”)(citations omitted). But their theory runs headlong into Occam’s Razor. A far simpler theory is that students who tend to misbehave when they are younger also tend to misbehave when they are older. The only thing that is “painfully clear” is that the correlation Commissioners Castro, Achtenberg and Yaki cite does not prove causation.

¹³ Commissioner Yaki also complains that too many students are being arrested for offenses that are best dealt with outside the criminal process. Statement of Commissioner Yaki at 119. He may be well be right. See, e.g., Kathryn Solove, Student Arrested for Burping During Class, ABC News (December 2, 2011). But a large part of the reason that too many trivial incidents are being treated as criminal matters is that school districts are hiring police officers (known as school resource officers (“SROs”)) to patrol school hallways rather than relying on traditional school administrators to keep order. Problems are inevitably defined by the tools we use to deal with them. If police officers are hired to deal with school discipline issues, the issues will be viewed as criminal. In turn, the reason so many school districts hire police officers to keep order is the COPS in Schools program, which is funded through the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (1994). COPS in Schools provides up to \$125,000 per officer per year for three years to schools willing to hire such officers.

This is not a race problem. It won’t be cured by the “revival of disparate impact analysis” that Commissioner Yaki lauds. Statement of Commissioner Yaki at 119. The way to stop the problem is for Congress to terminate the COPS in Schools program and for school districts to return to relying on more traditional school administrators focusing on discipline. Of course, that may not be as easy as it sounds. Once a program and the jobs that go with it are in place, it is devilishly difficult to get rid of them. That is why government should think twice and then twice again before creating a program. I note that the Violent Crime Control and Law Enforcement Act of 1994 was the brainchild of now-Vice President Joseph Biden and was a thoroughly bipartisan effort from start to finish. These are the kinds of programs that can cause the greatest problems. Nobody on either end of the political spectrum thinks them through until it is too late. If it becomes clear that they are not working well, the solutions offered (e.g. by Commissioner Yaki) consist of yet more federal intervention. At some point, it would be helpful for federal authorities to stop thinking of themselves as the solution to every local problem and thus to stop the cycle.

¹⁴ These are not the only ways in which the art of maintaining order in the classroom and of helping students to internalize self-discipline has had to change with the times. At one point, teachers were encouraged to have one-on-one relationships with their students. These days, teachers are discouraged from being in the same room alone with a student on account of concerns over sexual harassment and sexual harassment laws.

¹⁵ Many schools apparently take the position that without parental consent they cannot keep a student after school. It is not clear to me why the state has the authority to compel a student to attend school during regular school hours, but has no authority to compel a misbehaving student to spend an hour or two after school unless the school has cleared this with the student’s parents. Of course, that authority should only be exercised in a reasonable manner. Working out a model procedure that would permit this seems to me like a more useful

Rather than try to resolve all questions of school discipline policy,¹⁶ I will stick to two points that should be obvious, but which seem to have gotten lost in this debate.

First, in general, disorderly students mean disorderly classrooms. And disorderly classrooms make learning less likely to occur—something that both teachers and students recognize.¹⁷ The problem may be significant in many places, but it is particularly acute in inner-city schools and other low-income areas.¹⁸ An article in the *San Francisco Chronicle*,

project than Secretary Duncan's effort to force the problem into a "race discrimination" paradigm. This is a surmountable problem. Student who are sent home are more likely to fall further behind in school and to get into trouble than students who are kept after school. That is true regardless of the race of the students who are suspended or expelled.

¹⁶ Commissioners Castro, Achtenberg and Yaki argue that zero-tolerance policies have contributed to the high number of suspensions and expulsions of minority students and that these policies should be reined in. By removing discretion from teachers, principals and other school authorities, such policies are designed to prevent discrimination, not promote it. Zero-tolerance policies can therefore sometimes be good policies. But no one can accuse me of being a fan of over-the-top zero-tolerance policies that are practiced in schools today. It is important, however, not to forget that many schools enacted zero tolerance policies at least in part due to federal pressure. See the Gun Free School Zones Act of 1996 (P.L. 104-208.)

When the Department of Education issued its policy declaring that school districts that don't control sexual harassment would face stiff consequences, school districts understandably adopted policies designed to remove discretion from teachers and principals. See 6-Year-Old Boy Accused of Sexual Harassment, WSPA-7-On-Your-Side (April 4, 2008); Yvonne Bynoe, Is that 4-Year-Old Really a Sex Offender?, The Washington Post (Oct. 21, 2007); Scott Michels, Boys Face Sex Trial for Slapping Girls' Posteriors, ABC News (July 24, 2007); Gitika Ahuja, First-Grader Suspended for Sexual Harassment: Boy's Mother Says He's Too Young to Even Understand the Accusation, ABC News (February 9, 2006). These incidents were not isolated. According to the Maryland Department of Education, 166 elementary school students were suspended in the 2007-2008 school year for sexual harassment, including three pre-schoolers, 16 kindergarteners and 22 first graders. In Virginia, 255 elementary students were suspended for offensive sexual touching in that same year. Juju Chang, Alisha Davis, Cole Kazdin and Olivia Sterns, First-Grader Labeled a Sexual Harasser: Has Zero-Tolerance for Sexual Harassment in Schools Gone Too Far?, ABC News (Feb. 19, 2009). And if over forty Maryland pre-schoolers, kindergarteners and first-graders have been suspended for sexual harassment, can you imagine how many middle and high school students have been suspended for antics, real or imagined, that they never should have been suspended for? Schools cannot afford to be found out of compliance by the Department of Education or liable to a private litigant (who might use the failure to discipline any sexually harassing student as evidence of indifference). I fully expect the Department of Education's new policy on bullying will result in similar zero-tolerance rules. Things are thus likely to get worse rather than better. That, of course, brings me back to Commissioners Castro, Achtenberg and Yaki. They have vigorously supported the Department of Education's new bullying policy. See U.S. Commission on Civil Rights, Peer-to-Peer Violence and Bullying: Examining the Federal Response 90, 100, 214 (2011). Their enthusiasm for the Department of Education's sexual harassment policy appears to be no less vigorous. See *id.* But their support for these policies cannot be easily squared with their concern over zero-tolerance rules. The latter is the result of those policies.

¹⁷ All of the teachers who testified before the Commission were in substantial agreement on this point. See, e.g., Statement of Louise Seng at 30; Transcript at 26 (Patrick Walsh testifying); Transcript at 115 (Principal Suzanne Mackey stating that schools slide into chaos without enough discipline).

¹⁸ Is it possible to overstate the degree to which classroom disorder is affecting middle- and high-income areas? Of course it is, and some people have. One careful scholar—New York University professor of sociology and education Richard Arum—reports that there is "little evidence supporting the contention that the level of disorder and violence in public schools has [generally] reached pandemic proportions." But, he writes, it is "indeed the case in certain urban public schools," various factors have combined "to create school environments

entitled “Students Offer Educators Easy Fixes for Combating Failure,” had this to say on the topic:

Thousands of learned men and women gathered in Sacramento this week to chew over the vexing question of why black and Latino students often do poorly in school, someone had a fresh idea: Ask the students.

So they did. Seven struggling students - black, brown and white - spent an hour Wednesday at the Sacramento Convention Center telling professional educators what works and doesn't work in their schools. It was the only one of 125 panels at the two-day Achievement Gap Summit convened by state schools chief Jack O'Connell where students had their say.

“If the room is quiet, I can work better - but it's not gonna happen,” said Nyrysha Belion, a 16-year-old junior at Mather Youth Academy in Sacramento County, a school for students referred for problems ranging from truancy to probation.

She was answering a question posed by a moderator: “What works best for you at school to help you succeed?”

Simple, elusive quiet.

Nyrysha said if she wants to hear her teacher, she has to move away from the other students. “Half our teachers don't like to talk because no one listens.”

The others agreed. “That's what made me mess up in my old school - all the distractions,” said Imani Urquhart, 17, a senior who now attends Pacific High continuation school in the North Highlands suburb of Sacramento.”¹⁹

that are particularly chaotic, if not themselves crime producing.” Unless the problem is solved, students in these schools will continue to be shortchanged in their education. See Richard Arum, *Judging School Discipline: The Crisis of Moral Authority 2* (2003). This underlines my earlier point that Secretary Duncan's efforts may disproportionately harm the very students he is attempting to help.

¹⁹ Natasha Asimov, “Students offer educators easy fixes for combating failure,” *The San Francisco Chronicle*, November 15, 2007. These students' stories match up well with complaints that students gave in response to a 1998 study, entitled “Strategies to Keep Schools Safe.” “Some of my classes are really rowdy,” a student from Seattle told the researchers, “and it's hard to concentrate.” “They just are loud and disrupting the whole class,” a student from Chicago similarly said about some of her classmates. “The teacher is not able to teach. This is the real ignorant people.” Sasha Volokh and Lisa Snell, “Strategies to Keep Schools Safe,” Policy Study No. 234, January 1998, available at <http://reason.org/files/60b57eac352e529771bfa27d7d736d3f.pdf>.

Second, viewing the issue through the prism of race and poring over school discipline data in search of disparate impact is likely to create more heat than light. School districts don't need one discipline policy for African-American and another for white students and still others for Hispanic and for Asian-American students. They need one fair and effective policy that applies to everyone, letting the chips fall where they may. If schools should be modifying their discipline policies, it should not be because there are more students of one race than of another that are misbehaving in school. It should be because they have made a sincere judgment—free from federal coercion—that it is in the best interests of their students that they do so.²⁰ Given that federal law confers no authority upon the Department of

This point was also brought home in an unusual manner at the Commission's briefing during a discussion about the effectiveness of detentions as a punishment. "The irony is that they [unruly students] *like* the detentions," teacher Allen Zollman testified. "The detentions are a haven of tranquility apart from the mayhem that's going on in the school.... I think they're behaving just badly enough to earn the detention." (Emphasis supplied.) Teacher Louise Seng also said she agreed with Zollman's remarks. Transcript at 52. Seng retired in 2006 from teaching at Harrison-Morton Middle School in Allentown, Pennsylvania, a majority-minority school where many students came from poor backgrounds. Seng testified at our briefing that she was not then aware of efforts at Harrison-Morton or other majority-minority Allentown schools to lower disparities in discipline, but that she thought that any such efforts would have a negative effect on classrooms. An article in the Allentown Morning Call published eight months after Seng gave her testimony—Steve Esack, "Teachers Say Discipline Code Giving Students Upper Hand," *The Morning Call*, October 7, 2011—indicates that Seng's concerns may have been warranted. According to the article, Allentown recently adopted a new code of conduct that makes it more difficult for teachers to suspend students. A month after the new policy went into effect, teachers told *The Morning Call* that they believed that under the new policy, "students have the upper hand." See also Steve Esack, Parent Says Behavior at Allen High Out of Control, *The Morning Call*, October 13, 2011 ("Bathrooms are unsafe and trashed, detentions get ignored, study halls are a zoo, and school was dismissed 10 minutes early, without parental notification, last Wednesday to quell a potential gang fight with bricks and bats, [parent Karen Santone] said.").

Two months later, the Morning Call reported that in the view of teachers and city residents "a culture of defiance" had set in at area schools." "Some have worried," it wrote, "that the district's staff cuts and a new discipline code, which seeks to reduce school suspensions so students don't miss class have contributed to the outpouring of incidents both on and off school grounds." Devon Lash & Steve Esack, Allentown School District Pays for Extra Police Coverage, *The Morning Call*, December 21, 2011.

These articles do not mention racial disparities as impetus for this new policy. Nor do they mention the Department of Education's new initiative. But they do mention that the new approach in Allentown is rooted in Positive Behavioral Interventions and Supports, a popular decision-making framework that many of the school districts at our briefing said that they are using to try to curb disciplinary disparities. It would not be surprising if Allentown adopted the PBIS program at least in part as a response to the Department of Education's initiative.

²⁰ It is interesting to note that last month the Department of Education released a pair of guidances—one for colleges and universities and another for elementary and secondary schools—instructing them on when and how they can give preferential treatment to minority students in admission in order to produce a racially diverse class. In those documents, the Department emphasized that the Supreme Court was willing to defer to their academic judgment that diversity is a compelling purpose. It seems odd that the Supreme Court would defer to school in a case involving actual intent to discriminate on the basis of race, while the Department of Education is unwilling to defer to the same school's academic judgment on what disciplinary policies are best. It is the former that involves actual race discrimination and hence raises serious equal protection issues, while the latter involves only racial disparate impact with no suggestion, much less proof, that any student is being treated differently on account of race.

Education's to formulate general discipline policy, it should play no role in the formulation of that policy.

Real racial discrimination—or “disparate treatment,” the rather bloodless term now in vogue—is another matter. There is no question that if a school were to administer discipline one way for misbehaving white students and another way for similarly misbehaving African-American students on account of their race, that would be a violation of Title VI, which the Department of Education has some responsibility for enforcing.²¹ Similarly, if a school were to administer discipline to misbehaving students whose victims were Hispanic differently from the way it would have administered it if the victims had been Asian, that would be a violation of the law. Of course, ordinarily school administrators and school district administrators know to take action when discrimination of that kind occurs without any prodding from the Department of Education. The country has changed a lot since Bloody Sunday. But there have been serious lapses even in recent years.²² When administrators fail to act, school boards have a responsibility to act, and when they fail, state education or civil rights authorities should do so. When these institutions default, the federal government has a responsibility to act.

But Secretary Duncan's policy has little to do with allegations of actual discrimination. His program is to sift through data looking for evidence of disparate impact. If he does so, he is almost certain to find it. Indeed, if he were to sift through data looking for disparate impact of discipline policies on boys vs. girls or Japanese Americans vs.

²¹ For public schools, such discrimination would also be a violation of the Constitution. See U.S. Const. amend. xiv.

²² See, e.g., G.W. Miller III, *Asian Students Under Assault: Seeking Refuge from School Violence*, Philadelphia Weekly (September 1, 2009)(detailing allegations that Asian students in inner city Philadelphia high schools had been subject to racially-motivated, student-initiated violence about which high school administrators did little or nothing); Asha Beh, *Attacks Against Asian Students Prompt Private Meeting*, NBC Philadelphia (December 14, 2009)(“The students—and adult advocates—claimed that staff allowed this to happen on their watch and added taunts of their own”). In this case, both the U.S. Department of Justice and the Pennsylvania Human Relations Commission eventually stepped in. See *Justice Department Reaches Settlement with Philadelphia School District on Anti-Asian Harassment*, Asian American Legal Defense and Education Fund in the News (December 15, 2010).

Not all federal investigations into allegations of actual discrimination involve incidents of equal gravity. In response to a document request from the Commission, the Department of Education turned over correspondence with school districts regarding both disparate treatment and disparate impact discipline complaints that the Department had investigated within the last few years. One such letter, for example, contained an allegation that a Chicago Public Schools teacher discriminated against a student on the basis of race by “not giving Student A a glue stick for an in-class assignment, and then punishing the student by making him stay after class when he could not complete the in-class assignment because he did not get a glue stick.” Letter from Don Ray Pollar of the Office for Civil Rights to Arne Duncan, Superintendent of the Chicago Public Schools, Re: OCR Docket 0581103 (July 15, 2008). After an investigation, the Department of Education concluded that there was insufficient evidence of discrimination to take further enforcement action. It is not clear to me that this investigation was a good use of the Department of Education's scarce resources, and it is tempting to wonder what the delegates to the 1787 Constitutional Convention in Philadelphia would have thought about the modern reach of the federal government they had created. At least one can say, however, that the Department had received an actual complaint from someone who felt the student had been discriminated against on account of his race.

Vietnamese Americans, he is almost certain to find that too. Secretary Duncan does not explain why he regards higher rates of discipline referrals for African-American over white students to be a problem and not higher rates of boys over girls or whites over Asians. Middle-school students are more likely to be disciplined for bullying (or victimized by bullying) than are elementary or high school students. But if my observations as a middle-school student from 1969 to 1971 are any guide, it is because more middle-school students are bullies, not because of age discrimination. Disparate impact is not the same as actual discrimination, and it would difficult to find any education policy or practice that has no disparate impact based on race, national origin, gender, or some other protected classification. Seating students in alphabetical order has a disparate impact on Chinese Americans, since they have a disproportionate number of surnames beginning with the letters W, X, Y and Z.

No doubt Secretary Duncan would argue that his discipline initiative will not assume that all disparate impact is a violation of Title VI. Only that part of a school district's discipline gap that cannot be explained and justified by the school district will form the basis of a finding of non-compliance with Title VI. But this reflects a lack of understanding of the nature of bureaucracy, the kinds of situations for which it is useful and the kinds of situations where it ordinarily does more harm than good.

The edicts of bureaucracies are usually devoid of nuance by the time they reach the foot soldiers on the ground (in this case, classroom teachers). "Don't do X unless you have a good reason to do X" is naturally understood by school district administrators as "Don't do X unless you are confident that you can persuade some future federal investigator whose judgment you have no reason to trust that you had good reason to do X." In turn, this is communicated to principals as "Don't do X unless you jump through the following time-consuming procedural hoops designed to document to the satisfaction of federal investigators whose judgment you have no reason to trust that you had good reason to do X." Finally, this is communicated to the teacher as simply "Don't do X; it will only get us in trouble."²³

²³ Teacher Allen Zollman testified that teachers in his school district already have to fill out a three-page form showing that they have exhausted all reasonable alternatives before finally referring a disruptive student to the principal's office:

Before the student can be removed and placed in 'time out', the teacher must prepare a disciplinary referral—what many of us used to call a 'pink slip'. This is a two-page form with space for three offenses—not just one—and a checklist of measures taken by the teacher before issuing this referral. These measures include a private conference with the student, a change of seat location, a lunch time or after-school detention, or a phone call to a parent. Sometimes the foregoing strategies are effective, but often they are not. What is important to note here is that in order to get a disciplinary referral for disruption in my school, there must be three infractions and they must be documented in writing BEFORE the student can be removed from the classroom.

All of this comes at a real cost: the need for documentation makes it harder to teachers to discipline students *at the moment of the disruption*, rather than days or weeks after the fact. Meanwhile, other students must suffer while the disruptive behavior continues:

Effectively administering school discipline is an enterprise that requires attention to the individual situation. This cannot be done well by distant bureaucracies.²⁴ It must be done by the actual principals and teachers, under the supervision of local school district administrators and school boards. And the Department of Education's policy makes their effectiveness less likely.²⁵

[F]or mere disruption, it is no simple thing to have a student removed at the time of the disruptive behavior. This means that for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom... [T]he need to build up a case to refer a misbehaving student and then wait for action at a higher level leaves me dealing with the problem myself for a while or, more often, persuades me to let things continue as they are without issuing a referral, in other words, teach through chaos. Indeed, because of behavior problems, there are times when very little teaching or learning takes place.

In such an environment, students see few meaningful consequences for their actions, so they not only continue to misbehave but the behaviors get more brazen, with more and more students joining in the fun, until even the quote-unquote 'good' kids are acting out. They often become cynical, reminding teachers that nothing will happen to them.

Jamie Frank offered a similar account of the problems with overly bureaucratic discipline in her school:

You have to contact - we have a computer form where you have to check off the same thing. Three times you have to contact the parent before you can send them to the administrator, and then once it's at the administrative level you don't know what's going to happen to that child. You refer the child and it's up to the administration to determine what's going to happen. It's most likely that that child will be back in school if they are a minority student, if they are a minority. Transcript at 50.

Ms. Frank drew the same lesson as Mr. Zollman about how bureaucracy leads to lenience, which in turn leads to disorder: lack of discipline "sends the message that nothing's really going to happen to these students." A typical student will think to herself, "If I do the same thing, if I misbehave again, nothing will really happen."

²⁴ The abundance of statistical information collected to assist federal and state authorities in setting disciplinary policy often obscures more than it illuminates, thus underlining the need for local control. For example, one much-cited report conducted by UCLA's Civil Rights Project and the University of Colorado's National Education Policy Center reports data showing African-American first-time offenders are suspended for dress code violations more often than their white counterparts. It does not appear to have taken into consideration that not all dress code violations are equal. A student who is suspended for wearing prohibited street gang colors or insignia is not the same as a student who is told to put on a sweater and given a warning for wearing a blouse that is too revealing. See Daniel J. Losen, *Discipline Policies, Successful Schools and Racial Justice* (2011). The only way to do justice is to pay close attention to the particular facts of each case. That simply cannot be done well at the federal level.

²⁵ Commissioner Kladney argues that the evidence presented at our briefing that "paperwork requirements interfered with [teachers'] ability to mete out discipline in the classrooms or would result in no disciplinary actions being taken" is merely "anecdotal." "Relying on anecdotal evidence that teachers will not discipline students, because there is paperwork involved is wrong," he wrote. Statement of Commissioner Kladney at 116.

If the local authorities had been engaging in a pattern of resistance to the Constitution or federal authority, the situation might well benefit from the intervention of federal authorities despite the lack of nuance that such an intervention would inevitably entail.²⁶ But such situations are rare. Far more common, however, are the day-to-day situations that

There are several responses to that argument. To begin with, as David Hume once observed, the level of evidence necessary to persuade a reasonable person of the truth of a claim must be proportional to the claim. Extraordinary claims require extraordinary evidence. Ordinary claims ... not so much. See David Hume, *An Enquiry Concerning Human Understanding* 114-16 (1748).

No claim can be any more ordinary than “if you place costs on a particular human activity, you will get less of it; similarly, if you reward that conduct, you will get more of it.” School disciplinary policies are themselves built on the widespread conviction that punishing bad behavior will result in students’ doing less of it. The same thing is true applied to teachers. If you make teachers jump through procedural hoops before they can impose discipline, they will be less likely to impose that discipline. Indeed, the very purpose of Secretary Duncan’s discipline initiative is to reduce the level of discipline currently administered to minority students, and the school districts that I have discussed *infra* at 111-112 have adopted that purpose. It seems strange and naïve to take the position that it will be ineffective in its aim.

But just in case someone does want more outside evidence (in addition to that provided by sworn testimony of our panel of teacher witnesses) that bureaucratic procedures slow down and ultimately reduce activity in the school discipline context, there is plenty of it. Nationwide, 70% of public middle- and high-school teachers told pollsters in 2004 that “[r]educ[ing] the paperwork & formal documentation required to take disciplinary action would either be a “very effective” or “somewhat effective” solution to the discipline and behavior problems found in the nation’s public schools. This poll was conducted by Public Agenda, an organization dedicated to research on public policy issues founded by Carter Administration Secretary of State Cyrus Vance and the well-respected pollster Daniel Yankelovich. *The Public Agenda, Teaching Interrupted: Do Discipline Policies in Today’s Public Schools Foster the Common Good?* 38 (2004). It was not the respondents’ favorite way to deal with the problem, but it garnered a very strong majority of teachers. The two favorites—garnering 94% support each— were (1) “Find ways to hold parents more accountable for their kids when they misbehave in school,” and (2) “Treat special education students who misbehave just like other students—unless their misbehavior is related to their disability.” These methods are, of course, also at odds with the Department of Education’s school discipline initiative. Sadly, given the legal environment in which schools must operate, these teachers did not seem to agree that the paperwork requirements in effect then were unnecessary. But a strong majority (57%) of those of those answering the question on these requirements said they go “beyond common sense” and “mostly exist to protect the schools for parental or legal challenges.” See also Richard Arum, *Judging School Discipline: The Crisis of Moral Authority* (2003).

An additional troubling aspect of Commissioner Kladney’s arguments is that it appears to place the burden of persuasion on the wrong side. Commissioner Kladney is defending a new policy that essentially wrests the power to control discipline from local hands and places it in federal hands. While “radical” is a much overused word, it is one that may be fairly be applied here. If the Department of Education can use its clout to require local schools to justify their discipline policies because of their disparate racial impact, then it can use that clout to require local schools to justify all their policies and decisions, since all policies have a disparate impact on some racial, national origin, gender, or disability group. See *supra* at 11 (pointing out that seating students alphabetically has a disparate impact on Chinese Americans, since a disproportionate number of Chinese surnames begin with the last four letters of the alphabet). In public policymaking, incomplete evidence is the rule, not the exception. It is part of the human condition. As a result, citizens ordinarily require the advocates of new initiatives to carry the burden of persuasion. To be adopted, an initiative should affirmatively be a good idea. It is insufficient to say, “I support this policy, because its opponents have not proven to my satisfaction that it is bad.”

²⁶ See, e.g., *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

require discretion on the part of those closest to the situation.²⁷ Outside of cases in which there is credible evidence that a student has been treated differently in a disciplinary matter on account of his race or ethnicity—which should, of course, receive attention from local authorities and (sometimes, if necessary) from state and federal authorities—Secretary Duncan’s initiative is likely to do more harm than good.²⁸

Meanwhile, there is already evidence that the Department of Education’s discipline policy may be pushing schools in a troubling direction.²⁹ Consider, for example, the Tucson

²⁷ The tragedy of such policies, of course, is that there was no reason to believe the classroom teacher’s judgment was in any way inferior to the federal investigator’s concerning when it is appropriate or inappropriate to do X. Left to her own devices, she probably would have acted in a way the Department of Education would have approved of most of the time. Indeed, given the fact that she is there on the ground and hence privy to all the facts, she is likely to get it right more often than the federal investigator. But in the overly bureaucratized world of education, her judgment is discounted. Her role is reduced.

²⁸ Dr. Richard Arum has argued that the legal movement of the late 1960s and early 1970s toward greater students’ rights (characterized by cases like *Goss v. Lopez*, 419 U.S. 565 (1975)) has had a significant and not altogether salutary effect on schools across the country.

“Educational litigation increased dramatically during the late 1960s and early 1970s, a period we will term the *student rights contestation period*. While the volume of litigation has subsequently stabilized or moderately declined, both the threat of legal challenges to school authority and the effects of litigation on school practices remain.”

Richard Arum, *Judging School Discipline: The Crisis of Moral Authority* 5 (2003).

According to Arum, “[t]oday’s schools inherit from that period a historical legacy” in which (1) “students have developed a sense of legal entitlement” that “has produced skepticism about the legitimacy of school disciplinary practices as well as a general familiarity with resorting to legal avenues to contest such practices”; and (2) schools have responded by “forms, practices, and cultures—including wide-spread normative taken-for-granted assumptions about the necessity of organizing school discipline in particular ways” that are not necessarily in the best interests of students.

I don’t know if Dr. Arum is correct. But if he is right, he has demonstrated that a small government agency can have a significant and deleterious effect on the discipline culture of schools across the country. He convincingly demonstrates that “the major institutional actor advancing legal challenges to public school disciplinary practices” during the late 1960s and early 1970s “was the Legal Services Program established by the Office of Economic Opportunity.” *Id.* at 8. “In 1967, the OEO Legal Services Program ... employed nearly 1,200 lawyers; by 1972, the program ... employed over 2,000 lawyers.” According to Arum, by 1972, these lawyers spent 7.7% of their time challenging educational practices. *Id.* at 9. Let us hope that history is not repeating itself with a federal agency—this time the Department of Education—again having a significant and deleterious effect on discipline culture. See also Gerald Grant, *The World We Created at Hamilton High* (1988)(providing evidence for Dr. Arum’s thesis at a New York high school).

²⁹ A typical school district receives eight percent of its funding from the federal government. See the U.S. Department of Education, *10 Facts About Education*, available at <http://www2.ed.gov/about/overview/fed/10facts/index.html>. In a district with many high poverty schools eligible for grants under Title I, the percentage of its budget coming from the federal government is likely to be even higher. See, e.g., Marty Strange, “Rural schools lose in funding formula,” May 21, 2010, available at <http://www.dailyonder.com/rural-school-lose-funding-formula/2010/05/10/2738> (a brief account of how the Title I funding formula works and why inner-city schools are disproportionately likely to fare well under it).

Unified School District plan under which teachers and principals are expected to “striv[e] for no ethnic/racial disparities.”³⁰ Elaborate procedures were set out requiring an “Equity Team” to ensure “social justice for all students” in discipline matters. The plan specifically sets out as its “goal” that the district “*will* reduce the disproportionate number of suspensions of African American and Hispanic students.” (Italics added.) It states that one of “the expected outcomes” of the implementation of its new procedures, which includes a requirement that all long-term suspensions be reviewed by the “Director of Student Equity,” will be a decline in out-of-school suspensions “especially with regard to African American and Hispanic students.”³¹

The Tucson Unified School District does not state why it believes that greater attention to fairness in discipline will yield a reduction in suspensions “especially with regard to African American and Hispanic students.” Perhaps it is supposed to be taken on faith. If, however, in moving towards its goal and expected outcome, the school district ends up consciously or unconsciously doing exactly what the law forbids—doling out discipline on the basis of a student’s race or ethnicity—it will be in violation of the law, not in some sort of heightened compliance with it owing to its efforts to respond to disparate impact. This policy was likely adopted at least in part as a result of the belief that the Department of Education would regard its racial disparities in discipline to be evidence of a violation of Title VI.

Dr. Hertica Martin, Executive Director for Elementary and Secondary Educations of the Rochester Public Schools in Olmstead County, Minnesota, testified both in person and in response to our inquiries by letter. She stated in her letter:

As a result of analyzing our discipline data and the disproportionalities which exist, our schools have implemented a number of strategies ... to decrease the number of referrals for our black and brown students. The implementation of these strategies has resulted in a decrease of 363 suspensions and expulsions from 2007-2008 to 2009-2010 school years.³²

The Winston-Salem/Forsyth County School District was also forthright in explaining to the Commission that its reasons for reducing discipline overall is specifically to reduce racial disproportionality in discipline:

No superintendent is eager to tell parents and teachers that she will be forced to cut her district’s budget by eight percent or more next year. The Department of Education never need come close to actually revoking federal dollars; the mere possibility that such a funding cut could befall a district is often enough to send local administrators scurrying to do the federal government’s bidding.

³⁰ Tucson Unified School District Governing Board, Post-Unitary Status Plan 25 (July 30, 2009).

³¹ Id. at 26.

³² Letter from Dr. Hertica Y. Martin to Lenore Ostrowsky of the U.S Commission on Civil Rights, January 12, 2011.

To address the disproportionate discipline of African-American students in the district [italics added], the WS/FCS [Winston-Salem/Forsyth County] discipline policies were revised this year to specifically disallow administrators from aggravating disciplinary sanctions based on prior, unrelated misconduct. Further, minor code of conduct infractions occurring in prior school years may not be considered *at all* [italics in original] when assigning disciplinary sanctions. Administrators are also able to use mitigating factors in assigning discipline, and may consider circumstances such as a student's truthful statement, a student's positive history, and a student's respectful cooperation during the discipline process.³³

Perhaps Rochester's and Winston-Salem's new, more lenient policies will work better at keeping order than the old ones did. But I am not optimistic. The fact that their administrators seem to be driven by concerns about disparities in and of themselves rather than by concerns that the old policies were generally unsatisfactory is not a good sign. Moreover, a disciplinary system like Winston-Salem's that forbids teachers and principals from considering a student's past misbehavior in determining the proper response to the student's current misbehavior is wrongheaded in the extreme.³⁴

These school districts are not alone. In Dorchester, South Carolina, school authorities write, "The superintendent has established a Discipline Task Force to examine and ensure that policies and procedures are equitable for all students and lead to reduction in racial disparities in school discipline particularly among African American males."³⁵ But it is unclear why they believe that fairness and a reduction of racial disparities in discipline are

³³ Letter from Donald Martin, Superintendent of the Winston-Salem Forsyth County Schools, to Lenore Ostrowsky of the U.S. Commission on Civil Rights, December 10, 2010, reproduced at page 248 in this report. In the same letter, Winston-Salem stated that it has also changed its policy regarding suspensions. Before, short-term suspensions could last ten days at most; now, the maximum is eight. Also, no student can now receive an out-of-school suspension for truancy. For these latter two changes, the district mentions only "fairness and consistency" as its motive, which in context might be readily interpreted to mean "fairness" to all racial and ethnic groups.

³⁴ The general intuition that repeat offenders should be punished more harshly than first offenders runs throughout federal and state sentencing law. See, e.g., U.S. Sentencing Guidelines Manual sec.4A1.1 ("The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. sec. 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of grater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence."); Cal. Pen. Code 667 et seq. (codifying what is sometimes popularly called the "three strikes law," which provides that a defendant with two or more prior felony convictions will be sentenced to life imprisonment.) A New York Times article published in 2010 states that twenty-five other states also have some version of the three strikes law. Emily Bazelon, Arguing Three Strikes, *The New York Times* (May 21, 2010).

³⁵ Memorandum to U.S. Commission on Civil Rights at 2 attached to Letter from Joseph R. Rye, Superintendent of Dorchester School District Two dated December 13, 2010.

compatible goals. They do not appear to be suggesting that, up to now, their schools have been engaging in discrimination. Rather, they appear to be assuming that fairness and a reduction in racial disparities are one and the same.

In Washington, D.C., concerns about racial disparities also led to repeals of policies that prohibited students from receiving credit for courses if they are absent from class too frequently. In the view of Jamie Frank, a teacher witness at the Commission's briefing, rescinding this policy actually disproportionately harmed minority students by taking away a previously strong incentive to attend class. Without such incentive, Ms. Frank said, too many minority students give into the temptation not to attend class and miss out on valuable learning.³⁶

No one should imagine that the reactions of these schools to the Department of Education's initiative are a victory for African-American students struggling their way through inner city schools. To the contrary, the primary beneficiaries of this ill wind will likely be the businesses and activist groups who provide computer software aimed at tracking school discipline and training programs for teachers and administrators aimed at reducing disparities as well as the additional school administrators hired to carry out the new policies.

³⁶ Statement of Jamie Frank at 28-29.

Statement of Commissioner David Kladney

Many schools and school districts face serious challenges as they carry out their responsibilities to provide all of their students a quality education in a safe and orderly environment. The U.S. Department of Education (“the Department”) has an important role in helping to ensure students have equal access to such an education. The Department has many means by which it can carry out its mission. In the context of school discipline, I believe that as a matter of policy it would be most productive for the Department to focus its resources on assisting school districts to locate and adopt discipline programs which have strong records of success. However, individual school districts should make the choice as to which program (if any) they choose to partake in.

Both the frequency of disciplinary actions and the disproportionality of their application have increased since the 1970s.¹ In addition to continued racial bias and misunderstandings, some of this rise is undoubtedly due to socio-economic factors. Increased rates of single-parent households² and households in which both parents are employed full-time (or in multiple jobs), have led to many children being raised in environments that are not conducive to good manners or conduct-control, which in turn results in more acting out in class. Many factors disadvantage children growing up in low- and lower-income neighborhoods, among them: inappropriate or negligent parenting before children enter school (and during their school years), a basic lack of socialization with other children with supervision, bad neighborhood influences (of the sort dramatically portrayed in the fact-based television program, “The Wire”), poor nutrition, a lack of a pre-school environment, and no one at home who can teach children how to study or provide a good study environment.

The U.S. Department of Education cannot address all these issues. The local school districts have to. There is wide agreement that school discipline needs to be carried out in order to allow students to have a safe and calm environment in which to learn. Should we revert to the ruler, the principal’s office and/or the belt?³ Some people will probably say, “Yes, punishment is what’s needed, along with a strong family ethic.” To some degree these people may be right—if the families and communities of today are as they were 50 years ago. But they are not.

¹ For example, in 1973, 6% of African-American students received out of school suspensions, as compared with 3.1% of white students. Students of other races had even smaller suspension rates. According to the most recent survey statistics published by the U.S. Department of Education, nation-wide, roughly 15% of African-American students and 6.8% of Latino students received out of school suspensions, as compared to 4.8% of white students and 2.7% of Asian/Pacific Islander students. See, Daniel J. Losen & Russell J. Skiba, *Suspended Education* (2010) available at http://www.spicenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

² Since the 1970s, the rate of single-parent households has increased by more 50%. See, U.S. Census Bureau 2012 Statistical Abstract, available at <http://www.census.gov/compendia/statab/2012/tables/12s1337.pdf>. As noted by the National Poverty Center, single-parent households have a substantially higher rate of poverty. See <http://www.npc.umich.edu/poverty/#4>.

³ This Commissioner remembers the wooden type bar stool in the corner of the classroom, a yardstick, swat board with holes drilled in it, among other in-class disciplinary devices, the principal’s office and the dreaded parental notification and subsequent home based discipline.

Fortunately there are new and more sophisticated methods of providing discipline in our schools. As the members of the school administrator panel testified at our briefing, there are several nationally-tested programs which thousands of schools have adopted. As the panelists noted, these schools have found the preventative approach of programs like positive behavior supports significantly reduce disparities in school discipline interventions,⁴ reduce the total number of behavioral incidents for all races and genders and, most importantly, reduces repeated behavioral incidents by the same student.

Common features of the programs⁵ discussed by the panelists include:

- Clearly defined expectations for student behavior communicated to the student
- Clearly defined consequences for good and bad behavior communicated to the student
- A preventative approach to discipline in which all students are instructed in positive behavior, as opposed to a remedial approach largely directed at students who have misbehaved
- Comprehensive and consistent school-wide discipline policies
- Support teams composed of administration and fellow faculty to assist teachers in the use of consistent and effective discipline practices
- Collection and use of enforcement data to ensure consistent and effective interventions

Some may note that the implementation of these discipline programs is not cost-free. That is undoubtedly true, but then there's a cost to be paid—by schools, students, and society at large—by the status quo in many schools and by the misapplication of disciplinary actions. As a number of the Commission's State Advisory Committees have recently noted, bad school discipline policies can result in not just bad educational outcomes, but also future entanglement in the criminal justice system.

Some may also note that a couple of members of the teachers' panel at our briefing complained that paperwork requirements interfered with their ability to mete out discipline in their classrooms or would result in no disciplinary actions being taken. There was further suggestion that attention to disproportionate disciplinary practices might further burden teachers. Relying on anecdotal evidence that teachers will not discipline students because there is paperwork involved is wrong. Such speculation is too malleable for any type of accurate or reliable decision making. This is especially true when only one or two "stories" are presented where thousands of schools and tens of thousands of students and teachers are involved. In trying to grapple with how best to improve safety and good order in schools

⁴ Obviously, the purpose of these types of approach is not to stop discipline because there is currently a disparate impact according to the numbers; rather, it is to institute discipline that has a positive impact on students so they continue with appropriate conduct in the classroom.

⁵ Most of the administrator panelists and many of the district response letters indicated that they had in place variations of School-Wide Positive Behavior Supports. Several school districts had also adopted the Olweus Bullying Prevention Program as well as programs to better train teachers to better appreciate their students' diverse racial and ethnic backgrounds.

nationwide, only a body of actual evidence with statistics lead to logical conclusions and the truth. Anything else is mere noise adding to the sound machine for purposes of feeding one's own beliefs or just plain fear-mongering.

Teachers and administrators should be expected to provide well-disciplined classes, both by their supervisors, school boards, and by parents and the public. Additionally, it is unfortunately sometimes necessary for investigations by the U.S. Department of Education. Based on the testimony of our briefing panelists, it fortunately seems however that wider adoption of well-established preventative programs can reduce both the incidence of behavioral problems in our schools and subsequent investigations by the Department.

The Department should continue to maintain its Office of Special Education Program's Technical Assistance Center on Positive Behavior Intervention & Supports.⁶ It should also examine and publicize the effectiveness and cost-effectiveness of existing commercially available training/consulting programs. By serving as a clearinghouse for such information, the Department could provide school districts additional information with which to make the school districts' own informed choices as to which programs, if any, to choose which would best meet their needs.

In order to maximize the benefits of an orderly school, it is important to ensure not only that discipline is being imposed, but it is being imposed appropriately. Schools and school districts should strive to create environments of effective discipline in which disciplinary actions take place less often—because disciplinary actions mean that misbehavior has already occurred. When disciplinary actions are taken—an inevitability given that there are tens of millions of school children—teachers, schools and school districts should strive to ensure that the actions taken against students are both appropriate in whom they are directed (i.e. that the student is being disruptive) and appropriate in the severity of the disciplinary action (i.e. that the student is not removed from class or from school unless his or her presence endangers the safety or good order of the school), and effective in that the disciplined student learns, is taught, the rules of conduct necessary for him/her to continue and flourish as a student. Schools have an obligation to try to provide an education to all of their students and to teach students appropriate conduct the school environment expects of its students and the reasons the rules are in place. Principals and teachers need to be taught the best methods to impose discipline that will result in a successful educational experience for all.

In summary, the Department of Education should continue to collect and publish disciplinary metrics it receives from schools throughout the country. The Department should provide school districts seeking information on the different types of disciplinary programs being offered throughout the country. Furthermore, Department should enter into a long term study to determine the cost effectiveness of these discipline programs regarding, among other things, attendance, graduation rates, test scores and adult success in seeking employment and higher education. School Districts must choose for themselves the type of student disciplinary programs, if any, they wish to use within their districts. School districts must also continue to encourage parents and family to become part of the solution regarding

⁶ <http://www.pbis.org/default.aspx>

discipline and study.

Before showing students the door and sending them to the scrap heap of life, schools should use the best methods available to create a safe and orderly learning environment.

Statement of Commissioner Michael Yaki

Racial and ethnic disparities are pervasive in American education, and take many forms. The disproportionate use of out-of-school suspensions and expulsions against minority students is one of several interrelatedⁱ civil rights problems that include a wide achievement gap, disparate dropout rates, and skewed placement in special education or gifted and talented programs. These disparities effectively deny many minority students an equal opportunity in education, whether or not there was conscious discriminatory intent. Worse still, these problems, particularly disparities in school discipline, put youth at risk for a host of negative, non-education outcomes that include involvement in the juvenile justice system.ⁱⁱ The so-called “school-to-jailhouse” pipeline has become a geyser, with recent school-based arrests almost tripling in states like Pennsylvania.ⁱⁱⁱ The potential of our children is being lost, devastating their future and the justice and prosperity of our entire society.

Addressing the disparate impact of school discipline must be a critical element in a comprehensive response to disparities in our education system. I strongly support renewed efforts by the Department of Education (and the Department of Justice) to use all available tools to address this problem. Although more needs to be done, Secretary Duncan and Assistant Secretary for Civil Rights Russlynn Ali have courageously brought federal technical expertise and legal enforcement techniques to bear on this complex problem, working with school districts and states to detect and redress disparities. The revival of disparate impact analysis in Title IV enforcement is particularly commendable. Obviously, racial discrimination is not the only cause of statistical disparities in school punishment, but neither can the pivotal role of race be ignored. Regression analyses show that other, non-racial explanations cannot explain away these disparities. My colleagues may rightly say that research is incomplete in this area and we don’t know all the causes underlying such racial disparity. But, the fact is, there is a failure somewhere, and whatever the cause, the impact falls squarely on minority students.

Existing^{iv} research does indicate that these racially disparate rates of expulsions and suspensions:

- Are not due to minority students causing more safety-threatening behavior—the disparities aren’t because kids of one race are simply more dangerous.^v

ⁱ See, e.g., summary of research findings in Russell Skiba, Lauren Shure, and Natasha Williams, *What Do We Know about Racial and Ethnic Disproportionality in School Suspension and Expulsion?* The Equity Project at Indiana University, at 4, (September 2011). *Draft of article available online at www.indiana.edu/~atlantic/wp.../12/CollaborativeBriefingPaper.pdf* (cited by permission).

ⁱⁱ Id. at 13.

ⁱⁱⁱ See Test, Punish, and Push Out: How “Zero Tolerance” and High Stakes Testing Funnel Youth into the School-To-Prison Pipeline, The Advancement Project, at 18 (March 2010). Available online at http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf.

^{iv} For a review of research on these points, see endnote 1, above, at 5-9.

^v Some research suggests, instead, that disparate outcomes may stem from subjective evaluations of minority students’ offensive behavior, e.g. as “defiance.” Id. at 7.

- Are not just about students' socioeconomic status—this isn't just a problem of poor kids or poor schools.^{vi}
- Are higher among elementary school children than kids in secondary school, and among black and white girls than boys.^{vii}
- Are not merely a result poor academic achievement—race is still a predictor after accounting for GPA.

Unfortunately, full, disaggregated data has not been available to researchers, creating a nearly insurmountable obstacle to a detailed understanding of the causes underlying disparate rates. The Department of Education's Office of Civil Rights (OCR) should expand its collection of disaggregated data, working with states and school districts.

Moreover, despite knowing for decades about the problem of racially and ethnically disparate school punishments—and having developed methods for improving school discipline generally—there is little evidence-based research today on how to reduce disparities.^{viii} Combining School-wide Positive Behavior Supports (SWPBS), restorative justice, and other programs with culture-specific interventions may prove to be most effective. Promising studies have been done, e.g., on incorporating Native American and Chinese cultural values into SWPBS programs.^{ix} But, the research is still too thin. More federal research funding needs to be directed specifically toward the development and diffusion of interventions to reduce racial and ethnic disparities in school discipline. The Department of Education's Office of Special Education Programs could also expand the mandate of its commendable Technical Assistance Center on Positive Behavioral Interventions and Supports^x to specifically address use of culturally responsive interventions.

In the end, progress in redressing racial and ethnic disparities in school discipline may require a fundamental restructuring of the accountability structure of schools. The pending Congressional reauthorization of the Elementary and Secondary Education Act (ESEA) provides a unique opportunity for a comprehensive review of what success in the nation's public schools means. Are standardized test scores the best measure of success when so many of the most at-risk students are being disproportionately suspended and expelled, or even arrested in our schools? Should the disciplinary practices of a school and/or their equal treatment of minority students play a greater role in assessing school performance? The problem of disparate outcomes in America's schools, whether in discipline or achievement, is undoubtedly complex, as the varied perspectives at this and other Commission briefings have shown. However, as a nation we can and must do better at ensuring that children of every race, national origin, and gender are treated equally.

^{vi} In fact, while absolute rates of suspension appear to be highest in poor urban districts, black-white student disparities are greatest in better resourced suburban districts. *Id.* at 2.

^{vii} Again, absolute rates of suspension and expulsion are higher in secondary school and among black and white boys, but not the disparities. *Id.* at 3.

^{viii} *Id.* at 16-17.

^{ix} *Id.* at 20-21.

^x For more information on the Center and its mission, visit http://www.pbis.org/about_us/default.aspx.

As policymakers focus on the next iteration of ESEA, I hope they give particular attention to improving the research, funding, mandates, and incentives necessary to change the way school discipline is being meted out. We can't wash our hands and say "not our problem." Not now. Not ever.

Speaker Biographies

Allen Zollman Biographical Statement

- Teacher of English as a Second Language (ESL), grades K-8, six years
- Instructional Technology Specialist and classroom computer teacher at a school for deaf children ages 2 – 18, 21 years
- Educational Media Specialist (media producer) at a school for mentally retarded children and adults, 4 years
- Teacher of high school French, one year
- Tutor of homebound students, grades 8 - 12, in mathematics, English, world history, world cultures, Western Civilization, and public speaking,
- First generation American
- Native speaker of English with Advanced level proficiency in French and American Sign Language

Andrea Smith Biographical Statement

Andrea Smith, Sixth Grade Teacher, joined the E.L. Haynes staff in November, 2008. She has ten years of experience teaching in Washington, D.C. public and charter schools. Prior to teaching in the classroom, she worked as a Legislative Research Assistant for the *Education Trust*, an advocacy organization committed to the high academic achievement of all students. A native of Fostoria, Ohio, Ms. Smith holds a Bachelor of Arts Degree in Political Science and History. She earned a Master's Degree in Education from Trinity College.

Jamie Frank Biographical Statement

Jamie Frank has been a secondary social studies teacher for the past eleven years. She has taught a myriad of subjects, including Advanced Placement courses in Government and Psychology, On-level and Honors courses in U.S. and World History, and a variety of elective courses. Ms. Frank has taught in three prominent school systems in the DC Metropolitan area. Currently she serves as a member of several teachers' advisory boards, including the Bill of Rights Institute and the Council for Teaching and Learning. She holds a Masters in Secondary Education from George Mason University.

Louise Vincentine Seng
Biographical Statement

TEACHER (Retired 2006)

Mrs. Seng taught eighth grade social studies at Harrison Morton Junior High/Middle School, Allentown School District, Pennsylvania for 34 years, and retired in 2006.

EDUCATION

Kutztown University (State College) Master's Degree in Education, graduated with honors.
East Stroudsburg University (State College), BA, graduated with honors.
Lehigh County Community College, Associates Degree, graduated with honors

FAMILY

Mrs. Seng has been married for 34 years to Michael J. Seng, teacher and SFC Retd. USA. She has two daughters: Staff Sgt Theresa E Seng, USMC, and Staff Sgt Ann V Seng USAF. Both of her daughters are combat veterans, and are scheduled to be redeployed.

Patrick Welsh
Biographical Statement

Patrick Welsh has taught English at T.C. Williams High School in Alexandria, Virginia since 1970. His essays on education and the youth culture have appeared in *The Washington Post*, *USA Today*, the *New York Times* and other publications. He is author of the book *Tales Out of School* (Viking/Penguin).

Suzanne Maxey
Biographical Statement

Immediately before coming to T.C. Williams High School in June 2010, Suzanne Maxey was a mentor to new and struggling middle and high school principals in Montgomery County, MD. Prior to that, she was widely credited with improving test scores, raising staff morale, and energizing students at Seneca Valley High School in Montgomery County.

Ms. Maxey began her career in 1973 as a high school social studies teacher. She first became an administrator in 1993 as vice principal of Laurel High School, and two years later was named Dean of Academic and Student Affairs. Ms. Maxey served as principal of Bowie High School in Prince Georges County from 2000–2003 before moving to Seneca Valley. She holds a Bachelor of Arts in Secondary Education from the University of Rhode Island, and a Master of Arts in Political Science from the University of Maryland.

In 2007, Ms. Maxey won the Washington Post Distinguished Educational Leadership Award for Montgomery County Public Schools. In his nomination letter for the award, Montgomery Councilmember Michael Knapp wrote, “With her innovative approach to academics and administration, Suzanne has worked hard to foster cooperation between the school and community. Fully understanding that a school should not only be a participant in the surrounding community but its hub, Suzanne launched an outreach program to educate parents about the school, and help them get involved with their students and with the Seneca Valley community.”

Ms. Maxey, her husband Bob, and Mattie, their black lab–Australian cattle dog mix, live in Alexandria City. They also have two grown sons.

**Oswaldo Piedra, Ed.D.
Biographical Statement**

Dr. Oswaldo Piedra has over twenty years of public school teaching experience in elementary, middle and high school. As an assistant principal in both the middle and high school levels, Piedra served students, parents, and teachers in grades six through twelve. As a school based administrator, Dr. Piedra devised an after school credit recovery program designed to ensure a high graduation rate by maximizing instructional time. Analyzing the school’s discipline data to determine trends in student discipline that lead to increased out of school suspensions and decreased academic performance, Piedra strategized approaches to minimize student disciplinary disruptions to increase teacher-student contact time. Working collaboratively with the school staff, Piedra has implemented new school-wide positive behavior strategies that increased teacher-student contact time. As a former elementary, middle, and high school teacher, Piedra is able to see the continuing curriculum, K-12. He has facilitated inter-grade level articulation leading to higher student academic gains. Dr. Piedra enjoys working cooperatively with parents, students, and faculty and possesses a genuine commitment to student success and highest student achievement. Oswaldo Piedra received his Doctorate degree in educational leadership from the University of South Florida.

**Joseph P. Oliveri
Retired Administrator, Austin, ISD
Biographical Statement**

Mr. Oliveri served in the Peace Corps where he taught English and helped organize a weavers’ cooperative in Peru. He earned Bachelor’s degree from Purdue University and his Masters degree in Curriculum and Instruction from Yeshiva University. He taught in an inner city school in Brooklyn, New York. He worked with the Agency for International Development and the Peace Corps in Honduras, Guatemala, and the Dominican Republic as Director of Education Programs and Acting Peace Corps Director. In Austin, Mr. Oliveri directed a Veterans’ Upward Bound Program and the Migrant Attrition Prevention Program at St. Edwards University. He was the principal of the Alternative Learning Center and

Director of Alternative Education for the Austin Independent School District, serving students in grades K-12, and co-chair of the Joint City of Austin/AISD Steering Committee on Gang Activity. He also proudly served as state president of the Texas Association for Alternative Education (2001-2003). He has been active on the Board of Big Brothers/Big Sisters and Literacy Austin, as well as on the board of his congregation.

Edward C. Gonzalez
Biographical Statement

Mr. Gonzalez is a 29-year veteran educator with extensive classroom and administrative experience in public schools. He is a five-time recipient of the *Who's Who Among America's Teachers* honor, and was chosen as the inaugural *National School Administrator of the Year* by the *School Library Journal* in 2003. Mr. Gonzalez believes that high expectations, relationship development and community interaction are essential for the academic, social, and emotional well-being of our youth. A former small school district Superintendent, Mr. Gonzalez is currently the Associate Superintendent in charge of the Department of Prevention and Intervention in Fresno Unified School District, the 4th largest school district in California.

Ricardo Soto
Deputy Assistant Secretary, Office for Civil Rights,
U.S. Department of Education
Biography

Ricardo Soto is the deputy assistant secretary for the Office of Civil Rights at the U.S. Department of Education. He has served in this position since October 2009. In his position, Soto provides senior leadership concerning enforcement, policy and operational activities at OCR.

Prior to arriving at the Department, Soto was a private attorney in San Diego where he represented school districts in education and employment issues. From 2005 to 2007, he served as assistant secretary and legal counsel in the Office of the Secretary of Education for the state of California where he advised the secretary and the governor on legal and policy issues related to elementary, secondary and postsecondary education. For eight years, Soto served as in-house counsel for the San Diego Unified School District and represented the superintendent, school board and senior staff in education and employment matters.

Soto began his legal career at California Rural legal Assistance in Oceanside, Calif., and represented migrant farmworkers in education and employment issues statewide.

Soto earned a Juris Doctor from the University of Wisconsin Law School, Madison, Wis. He earned a bachelor's degree from Marquette University, Milwaukee. Soto is a native of Chicago.

Dr. Hardy Murphy
Superintendent of Schools
Evanston/Skokie School District 65
Biographical Statement

Career

- 1999– Current - Superintendent of Schools, Evanston/Skokie CC School District 65 (K-8 district serving approximately 7,000 students) Evanston, IL
- 1979-1999 – Fort Worth Independent School District (K-12 district with 113 schools) Fort Worth, TX. During the twenty years at FWISD, served in a variety of administrative positions including Assistant and Associate Superintendent.
- Also practiced as a licensed psychologist for a number of years.

Education and Community Service

Superintendent Hardy Murphy earned his Ph.D. in Educational Psychology from the University of Texas at Austin, a Master's degree in Education from Southwest Texas State University and a Bachelor's degree in Sociology from New Mexico State University

Accomplishments

Accomplishments during my tenure with District 65 include noteworthy improvements in the areas of student achievement, staff management and leadership, fiscal responsibility, and the creation of innovative programs. Achievement demonstrates a multi-year trend of improvement in mathematics and reading for all student groups. Students who historically struggle in public education demonstrate higher levels of achievement, as do students who historically excel. Illustratively, standardized test scores have improved in reading and mathematics in all grade levels for student subgroups, e.g., African Americans, Hispanics, students with Individual Education Plans (IEP), Limited English Proficient (ELP) students, low-income students, etc. Under my leadership, the district and schools have been recognized at the state and national level for the implementation of Positive Behavioral Interventions and Supports (PBIS) as an initiative to improve student behavior and peer relationships. In this past year, an Alternative to Suspension program was successfully implemented to provide counseling for students and families to reduce student suspensions.

During Dr. Murphy's tenure, student achievement has significantly improved. The years of his Superintendency are characterized by the alignment of programs and strategies that reflect best practices in school reform with the district's planning documents. One of the recent major initiatives, a redesigned teacher appraisal system that incorporates student growth, is in its second year of implementation. This appraisal system that anticipated new directions in the field of education has been presented to groups at the local and national level. Evanston/Skokie Community Consolidated School District 65 is the first district in the state of Illinois to implement such a system.

Hertica Y. Martin
Biographical Statement

Hertica Martin received her Bachelor of Arts degree in Elementary Education from the College of the Virgin Islands, her Master of Arts in education degree from Seattle University in Curriculum & Instruction/Special Education, her principal's credentials from Pacific Lutheran University and an Ed.D degree from Fielding Graduate Institute in California.

Dr. Martin, a 1996 Milken Educator, is currently the Executive Director for Elementary and Secondary Education in Rochester Public Schools in Rochester, MN. She has been a public school educator for 30 years, serving as a regular education teacher in the Virgin Islands, a special education teacher in Tacoma Public Schools, a Principal in North Thurston Public Schools, Director of Curriculum Development and Implementation, and Director of Professional and Organization Development in Tacoma Public Schools. Under her leadership, her school received recognition for school restructuring, multicultural integration, inclusion service model for special needs students.

Dr. Martin believes that "our children are the *Diamonds of the World*; they are precious; they are durable; they are invaluable; they possess high character and outstanding qualities; they are the bonds that bind us to the next generation." Her goal as an educator is to not only attract good employees but also to motivate them to become aware that each child is indeed a diamond, precious gem, to be lifted and filled with knowledge, skills, and attitudes that the future will demand of them---true gems for us to adore and admire.

Douglas E. Wright
Biographical Statement

Dr. Douglas E. Wright is the Superintendent of Schools for the San Juan School District, Blanding, Utah. Prior to being named Superintendent in 2002, Dr Wright taught English, served as an Assistant Principal, and Director of Human Resources. He earned a BA in English from Utah State University and an MA in English from Fort Hays State. He received a Vice President's Fellowship for Research from Utah State University focusing his dissertation research on Early High School Graduation and the type of student who use it to accelerate their education. He was awarded an EdD in Curriculum and Instruction, with emphasis on Educational Leadership from Utah State University. He is endorsed in English as a Second Language and has worked at the forefront of distance education efforts within the State of Utah.

Appendix A

Summary of Public Comment

Mrs. Julie A. Worley, President of Tennesseans for Non-Violent School Discipline, forkidsake.org, and Volunteer with Parents and Teachers Against Violence in Education (PTAVE) sent multiple emails objecting to the use of corporal punishment in schools.

Public Comment Letters

The Leadership Conference
on Civil and Human Rights

1629 K Street, NW 202.466.3311 voice
10th Floor 202.466.3435 fax
Washington, DC www.civilrights.org
20006



March 11, 2011

Lenore Ostrowsky, Acting Chief, Public Affairs Unit
Office of the Staff Director
U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425

Dear Ms. Ostrowsky:

On behalf of the undersigned education and civil rights groups and advocates, we are pleased to offer the following statement to be included in the record of the U.S. Commission on Civil Rights' briefing, "Disparate Impact in School Discipline Policies," held on February 11, 2011.

Introduction

The use of exclusionary school discipline practices such as suspension, expulsion, and school-based referrals to law enforcement has reached an all-time high. And as the rate of discipline increases, racial, gender, and disability-related disparities only continue to widen. Maintaining a safe and healthy school environment is a critical responsibility of schools. Yet, relying on suspension, expulsion, and arrest has not been found to make schools safer, more orderly, or more productive. Instead, reliance on exclusionary discipline has been found to harm academic achievement and increase the likelihood that students will drop out of school. In this way, improper use of school discipline undermines the educational mission of our nation's schools.

Fortunately, there are proven and promising methods that improve academic achievement and school safety, while reducing both excessive discipline and its related disparities. Where schools have disparities and fail to implement these commonsense alternatives, they must be held accountable. Disparate impact analysis under Title VI of the Civil Rights Act of 1964 is a vital means to identifying and addressing disparities in school discipline and in other aspects of education more generally. By addressing these disparities and guiding school districts to use more effective and less discriminatory approaches, disparate impact analysis is essential to ensuring equitable opportunities for all students.



Rising School Disciplinary Rates and Widening Disciplinary Disparities

Current disciplinary rates are the highest the U.S. Department of Education has ever recorded, and are roughly double those of its first disciplinary data collections in the 1970s.¹ Each year, over 100,000 U.S. public school students are expelled and over 3,000,000 are suspended from school at least once.² This rise in exclusionary discipline correlates to the proliferation of harsher disciplinary policies whose severity has little to no educational justification. As Advancement Project notes in *Test, Punish, and Pushout*: “In Akron, Ohio, a student can be expelled for being late to class, having cigarettes, or uttering profanity. In St. Louis, Missouri, under the 2008-09 Student Code of Conduct, tardiness could result in a 10-day suspension; ‘disruption’ or ‘disrespect’ could lead to a 10-day suspension and placement in an alternative school; and the potential consequences for ‘physical displays of affection’ and dress code violations include expulsion. In Houston, Texas, district policy permits the placement of a student in an alternative school for smoking, defiance of authority, fighting, ‘disrespect,’ use of profanity, or name-calling.”³

As troubling as they may seem, these excessive examples only tell half of the story. Rising disciplinary rates and disparities are even more troubling given the wealth of research on the harms of exclusionary practices. The American Academy of Pediatrics found that suspension and expulsion jeopardize children’s health and safety and may exacerbate academic failure.⁴ The Centers for Disease Control found that out-of-school youth are more likely to be retained a grade, drop out of school, become teen parents, and engage in delinquent behavior.⁵ Research shows that a first-time arrest doubles the odds a student will drop out.⁶ Indeed, a 2003 study by Robert Balfanz found that school suspension is a top predictor for those students incarcerated by ninth grade.⁷ The American Psychological Association (APA) found that, beyond impacting those excluded, zero tolerance policies fail to make schools safer and that schools with high suspension rates score worse on standardized tests.⁸

¹ Johanna Wald & Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, in, NEW DIRECTIONS FOR YOUTH DEVELOPMENT (NO. 99; DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE) 9-15 (2003).

² U.S. Department of Education Office of Civil Rights, 2006 Data Collection (2008), at ocrdata.ed.gov/ocr2006rv30/ (charts on file with author).

³ ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSHOUT: HOW “ZERO-TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE “SCHOOL-TO-PRISON PIPELINE” 14 (2010), available at http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf

⁴ American Academy of Pediatrics Committee on School Health, *Policy Statement: Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206 (2003).

⁵ Centers for Disease Control, *Health Risk Behaviors among Adolescents Who Do and Do Not Attend School – United States, 1992*, 43 MORBIDITY AND MORTALITY WEEKLY REPORT, Mar. 4, 1994 at 129.

⁶ Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 24 JUSTICE QUARTERLY 462 (2006).

⁷ Robert Balfanz, *High Poverty Secondary Schools and the Juvenile Justice System*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE (Johanna Wald & Daniel Losen, eds., 2003).

⁸ RUSSELL SKIBA ET AL, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? A REPORT BY THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE (2006).



And as disciplinary rates rise, racial disparities in discipline only continue to widen. According to the U.S. Department of Education, nationally, African American students are nearly 3 times as likely to be suspended and 3.5 times as likely to be expelled as their white peers.⁹ Latino students are 1.5 times as likely to be suspended and twice as likely to be expelled as their white peers.¹⁰ Moreover, racial and gender disciplinary disparities may be at their worst in the middle grades. A review of the disciplinary data of all middle schools participating in the U.S. Department of Education's Civil Rights Data Collection (CRDC), found that 28.3% of African American male students and 16.3% of Latino male students were suspended at least once, compared to only 10% of white male students, in the 2005-06 school year.¹¹ And 18% of African American female middle school students and 8.5% of Latina middle school students were suspended at least once, compared to only 3.9% of white female students, that same year.¹²

Disparities in discipline encompass all of our nation's historically disenfranchised youth. The American Psychological Association found that students with disabilities are disciplined at a rate roughly twice that of their non-disabled peers.¹³ Among students with disabilities, those classified as emotionally disturbed were the most likely to receive exclusionary discipline. They are 7.5 times as likely to be suspended or expelled as other students receiving special education and 12 times as likely to be suspended or expelled as their non-disabled peers.¹⁴ In December 2010, the New York Times reported that gay and lesbian students receive harsher punishment than their straight peers in school disciplinary matters as well.¹⁵

Addressing Disciplinary Disparities through Disparate Impact Analysis under Title VI

Applying disparate impact analysis to disciplinary disparities and addressing them through Title VI is essential for securing the implementation of fair and educationally sound disciplinary policies and practices for all students. Part of the Civil Rights Act of 1964, Title VI prohibits discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance, including public schools, and allows for both intentional and disparate impact analyses of discrimination. While there are many clear examples of intentional discrimination in school discipline,¹⁶ relying on an intentional discrimination standard alone handcuffs enforcement

⁹ U.S. Department of Education Office of Civil Rights, 2006 Data Collection (2008), at ocrdata.ed.gov/ocr2006rv30/ (charts on file with author).

¹⁰ *Id.*

¹¹ DANIEL LOSEN & RUSSELL SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS*, 5 (September 2010), available at http://www.indiana.edu/~equity/docs/Losen_Skiba___Suspended_Education.pdf.

¹² *Id.*

¹³ Russell Skiba, et al, *Are Zero Tolerance Policies Effective in the Schools? A Report by the American Psychological Association Task Force*, (2006), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

¹⁴ *Id.* (citing SID COOLEY, *SUSPENSION/EXPULSION OF REGULAR AND SPECIAL EDUCATION STUDENTS IN KANSAS: A REPORT TO THE KANSAS STATE BOARD OF EDUCATION* (1995)).

¹⁵ Tara Parker-Pope, *Schools and Legal System Mistreat Gays, Study Says*, N.Y. TIMES (Dec. 6, 2010).

¹⁶ Some have suggested that racial disparities in discipline result from African American students misbehaving more often. To the contrary, the research suggests that African American students are often punished more severely for the same offenses. The U.S. Department of Education Office for Civil Rights must continue to vigorously investigate such suspected "different treatment" in discipline. See, e.g., Russell Skiba et



authorities from addressing the harmful, disturbing patterns described above. Disparate impact review of a district's policy or practice examines whether students from protected groups (race/ethnicity, gender, language minority status or disability status) are negatively impacted by the policy or practice in a substantial or significant manner. If the policy or practice in question is not educationally justifiable, or if the district has failed to pursue less discriminatory means to achieve the same educational goals, the disparities may be regarded as evidence of a violation of Title VI.

Given the academic and social harms of exclusionary discipline, it is quite difficult to find an educational justification for the frequent and disparate use of suspension, expulsion, and arrest to punish minor misbehavior. A wealth of evidence demonstrates that there are less discriminatory alternatives to over-reliance on exclusionary practices.¹⁷ Such alternatives begin with better transparency on, and accountability for, disciplinary rates and disparities, and encompass numerous commonsense, positive, preventative techniques – such as conflict resolution, teacher conferences, peer mediation, and restorative justice – that improve school climate and keep students in school.

To reduce discipline rates and disparities, some schools are blending evidence-based practices like School-Wide Positive Behavior Supports (SWPBS) with focused efforts to address racial bias and improve culturally relevant pedagogy. SWPBS is an evidence-based, data-driven framework proven to reduce disciplinary incidents, increase a school's sense of safety, and support improved academic outcomes.¹⁸ Over 9,000 U.S. schools are implementing SWPBS and saving countless instructional hours otherwise lost to school discipline. After being cited for racially disproportionate placements in special education, Eau Claire Public Schools in Wisconsin melded its SWPBS efforts with cultural diversity trainings and trainings in culturally responsive pedagogy. The district's disciplinary rates and racial disparities are down significantly.¹⁹ Similarly successful efforts are underway in Illinois and Indiana.²⁰

al, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317 (2002).

¹⁷ Some have argued that a Title VI investigation on disparate discipline would lead to the suspension of more white students. This perspective fails to appreciate that the remedy in a disparate impact challenge is to exchange an unsound or less effective policy with one that is more effective. Therefore, the replacement for a facially neutral discipline policy that was found to be too harsh in its impact on African American students could never be to suspend more white students, but rather, could include the implementation of practices like SWPBS that have been shown to reduce racial and disciplinary disparities and unnecessary disciplinary referrals, while supporting improvements in academic achievement and school safety.

¹⁸ Robert Horner et al, *A Randomized, Wait-List Controlled Effectiveness Trial Assessing School-Wide Positive Behavior Support in Elementary Schools*, JOURNAL OF POSITIVE BEHAVIOR INTERVENTIONS (forthcoming 2009); Jeffrey R. Sprague & Robert H. Horner, *School Wide Positive Behavioral Supports*, in THE HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY: FROM RESEARCH TO PRACTICE (Shane R. Jimerson & Michael J. Furlong, eds., 2007). For additional research on PBS, please visit www.pbis.org.

¹⁹ Matthew Cregor, Kent Smith, and Milaney Levenson, Bridging the Racial Discipline Gap and Schoolwide PBS. Presentation at the 2010 PBIS National Forum in Chicago, IL (October, 2010) at http://www.pbis.org/presentations/chicago_forum_10.aspx

²⁰ Alton Middle School in Illinois combined similar practices along with restorative justice training to reduce its out-of-school suspension rate and its discipline and achievement disparities are narrowing. Illinois PBIS Network, *Illinois Schools Address Inequitable Discipline Practices*, UPDATE NEWSLETTER, Dec. 2009, at 1. Indiana

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Conclusion

Our nation's skyrocketing discipline rates and ever-widening disparities are doing indelible harm to the educational futures of hundreds of thousands of male and female students of color, students with disabilities, and LGBT students. Widespread reliance on exclusionary practices can only spur a permanent achievement gap in U.S. public schools and leave our nation further behind in an increasingly global economy. Limiting liability to an intentional discrimination standard fails to capture the multitude of harms that follow from the current reliance on exclusionary discipline. Applying disparate impact analysis to school discipline Title VI investigations is essential, not only to addressing disciplinary disparities, but also to securing the implementation of educationally sound practices that improve the learning environment for all.

Thank you for your entering our statement into the briefing record and for your consideration of these issues. If you need any additional information or have any questions, you can contact Matthew Cregor at the NAACP Legal Defense and Educational Fund, Inc. (mcregor@naacpldf.org) or Deborah J. Vagins at the ACLU Washington Legislative Office (dvagins@dcaclu.org).

Sincerely,

Advancement Project
 American Association for Affirmative Action
 American Association of People with Disabilities
 American Civil Liberties Union (ACLU)
 American Association of University Women (AAUW)
 American Federation of Teachers
 Asian Pacific American Labor Alliance, AFL-CIO
 Bazelon Center for Mental Health Law
 Dignity in Schools Campaign
 Disability Rights Education and Defense Fund
 Education Rights Center at Howard University School of Law
 Gay, Lesbian and Straight Education Network
 Human Rights Campaign
 Labor Council for Latin American Advancement (LCLAA)
 Lawyers' Committee for Civil Rights Under Law
 Daniel J. Losen, Senior Education Law and Policy Associate, The Civil Rights Project at UCLA
 Mexican American Legal Defense and Educational Fund (MALDEF)
 NAACP
 NAACP Legal Defense and Educational Fund, Inc.
 National Center for Transgender Equality

University's Equity Project is piloting similar efforts toward Culturally Responsive PBIS in Indiana schools. See THE EQUITY PROJECT AT INDIANA UNIVERSITY at <http://www.indiana.edu/~equity/index.php>

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National Disability Rights Network
National Economic and Social Rights Initiative
National Organization for Women
National Women's Law Center
Gary Orfield, Co-Director, The Civil Rights Project at UCLA
Poverty & Race Research Action Council
Sikh American Legal Defense and Education Fund (SALDEF)
Southeast Asia Resource Action Center (SEARAC)
Southern Poverty Law Center
The Children's Defense Fund
The Leadership Conference on Civil and Human Rights
The Woodhull Freedom Foundation

cc: Kim Tolhurst, Delegated the Authority of the Staff Director

Public Comment Letter from the Center for Equal Opportunity

February 14, 2002

Ms. Merrily Friedlander
Chief, Coordination and Review Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Ms. Friedlander:

We are writing to submit comments on the Justice Department's republication of its policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient persons.

The guidance is principally a discussion of the four-part balancing test that is set out for determining the required scope of accommodations for limited English proficient persons in federally funded programs (especially the Justice Department's). Our comments, however, take issue with the premise that such accommodations can or ought to be required under Title VI in the first place.

The validity of our comments is buttressed by a Supreme Court decision, *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), that was handed down since the guidance first became effective on the last full day of the Clinton administration, January 19, 2001. The events of last September 11 also make this a good time to reassess the wisdom of executive-branch pronouncements that inevitably encourage the balkanization of the nation into ethnic enclaves.

Title VI of the Civil Rights Act of 1964 prohibits "discrimination under any program or activity receiving Federal financial assistance" against any person in the United States "on the ground of race, color, or national origin." The guidance acknowledges that "On its face, Title VI prohibits only intentional discrimination." *Sandoval* reaffirms the Supreme Court's earlier pronouncements that Title VI bans only disparate treatment, not actions that have only disproportionate effects on this or that racial or ethnic group.

There is obviously a problem, then, if a federal agency promulgates regulations purporting to implement Title VI but that ban not only disparate treatment (which Title VI is aimed at) but also actions with only disproportionate effects (which the Supreme Court has said that Title VI allows). The Court has long recognized that the difference between disparate treatment and disparate impact is one of kind, not just degree. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976). Since a federal agency cannot even ban intentional discrimination without statutory authority, *see NAACP v. FPC*, 425 U.S. 662 (1976), then it would certainly seem to lack authority to ban actions that are not intentionally discriminatory when they have no statutory authority to do so.