WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
1139 E. Knapp Street, Milwaukee, WI 53202-2828
414-727-WILL
Fax 414-727-6385
www.will-law.org

The Honorable Betsy DeVos
Secretary of Education
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

June 12, 2018

Re: Legality of the "Dear Colleague" letter on K-12 school suspension policies

Dear Madame Secretary:

We understand you are in the process of reviewing policies adopted during the Obama Administration and assessing their impact on the states. One such policy is the "Dear Colleague" letter warning school districts against disparate outcomes in the implementation of their school discipline policies. As you know, the Department of Education is still implementing this policy. For example, the Department reportedly pressured Milwaukee Public Schools to enter into a resolution agreement with the Department. According to MPS, it had "no choice" but to agree to count by race when it comes to ensuring that students are able to learn in a safe and orderly environment.

As attorneys in the conservative movement, we believe that the suspension "Dear Colleague" letter is not only poor public policy – studies have shown it has a negative impact on academic performance – but also an illegal exercise of federal administrative power and an unjustified intrusion into state and local matters. We are writing to explain why it is a violation of the law and urge you to immediately rescind the Dear Colleague Letter.

Under the Obama Administration, on January 8, 2014, the U.S. Department of Education and the U.S. Department of Justice jointly issued a "Dear Colleague" letter purporting "to assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or national origin."[1] The letter correctly observes that "intentionally disciplining students differently based on race" violates federal law, specifically Title IV and Title VI of the Civil Rights Act of 1964.[2] But it goes further, asserting that (1) even if a school's discipline policy does not discuss race and (2) even if that policy is applied to students without regard to their race (i.e, there is no intentional discrimination), the policy might still violate federal law if it has a "*disparate impact, i.e.*, a disproportionate and unjustified *effect* on students of a particular race."[3]

---

[1] Dep't of Educ. & Dep't of Justice, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* 1 (2014) [hereinafter *Dear Colleague Letter*].
[2] *Id.* at 7.
[3] *Id.*

The Departments made clear in the Dear Colleague letter that they plan to enforce disparate-impact rules by "initiating compliance reviews nationwide," and, if violations are found, by "attempt[ing] to secure the school's voluntary agreement to take specific steps to remedy the identified violation before seeking redress in court or through an administrative hearing."[4]

This was no idle threat: a few months later, on June 30, 2014, the Department of Education's Office for Civil Rights ("OCR") initiated a compliance review of the Milwaukee Public Schools District ("MPS") to investigate whether MPS "discriminates against black students on the basis of race by disciplining them more frequently and more harshly than similarly-situated white students."[5] This review culminated late last year in a "resolution agreement" between OCR and MPS in which MPS agreed to an overhaul of its discipline policies and extensive reporting requirements, among other obligations.[6] Although OCR has styled MPS's entry into the agreement as "voluntar[y],"[7] OCR's ability to inflict considerable pain on entities like MPS by seeking the cessation of federal funding demonstrates the absence of a genuine choice.[8]

The Dear Colleague letter is simply wrong on the law. Title VI does not prohibit nondiscriminatory actions because they have a "disparate impact" on different racial groups and, therefore, does not authorize the Department of Education to mandate racially balanced outcomes. The two central statutory sources of the Department of Education's authority in this matter are §§ 601 and 602 of Title VI of the Civil Rights Act of 1964. Section 601 provides that "[n]o person in the United States 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."[9] Section 602 instructs "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . to effectuate the provisions of [§ 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability."[10]

But as the Supreme Court of the United States made clear in *Alexander v. Sandoval*, it is "beyond dispute" that Section 601 of Title VI – the provision of Title VI that Congress tasked the Department of Education with enforcing[11] – "prohibits only intentional discrimination."[12] The

[4] *Id.* at 21.
[5] *See* Letter from Adele Rapport, Reg'l Dir., U.S. Dep't of Educ., Office for Civil Rights, to Dr. Darienne Driver, Superintendent, Milwaukee Pub. Sch. Dist. 1 (Jan. 31, 2018).
[6] Resolution Agreement #05-14-5003 between Milwaukee Pub. Sch. Dist. And U.S. Dep't of Educ., Office for Civil Rights (Dec. 28, 2017).
[7] Letter from Adele Rapport, *supra* note 5, at 2.
[8] *See* Annysa Johnson, *MPS agrees to settle U.S. civil rights complaint over discipline of black students*, Milwaukee Journal Sentinel, Jan. 17, 2018, https://www.jsonline.com/story/news/education/2018/01/17/mps-enters-into-agreement-feds-settle-civil-rights-complaint-over-alleged-discrimination-against-bla/1039370001/ ("Superintendent [of Milwaukee Public Schools] Darienne Driver said she is confident MPS can reduce the racial disparities in discipline in the district . . . . 'We have to. It's not optional,' Driver said after [a] meeting of the school board's Committee on Student Achievement and School Innovation, where she briefed members on the agreement.").
[9] 42 U.S.C. § 2000d.
[10] 42 U.S.C. § 2000d-1.
[11] 42 U.S.C. § 2000d to d-1.
[12] *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Dear Colleague letter relied on 34 C.F.R. § 100.3(b)(2)[13] which prohibits federal funding recipients under certain circumstances from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."[14]

The Department of Education apparently believes that, by using this regulation to prohibit schools from "evenhandedly implement[ing] facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race,"[15] it is merely "effectuat[ing] the provisions of" § 601.[16] It is not. As the Sandoval Court recognized "disparate-impact regulations . . . forbid conduct that § 601 permits."[17] The Supreme Court of the United States has unequivocally declared that "Title VI itself directly reach[es] only instances of intentional discrimination," as opposed to discrimination based on the disparate impact of a particular policy.[18] Federal regulation cannot create authority that does not exist in the authorizing federal law.

So while it is true that the Supreme Court has not yet held that disparate-impact regulations promulgated under § 602 are unlawful, *Sandoval* makes clear that, if challenged, the Court would not hesitate to strike down such regulations as unauthorized by Congress. For example, the Court characterized as "strange" the suggestion that disparate-impact regulations are "'inspired by, at the service of, and inseparably intertwined with' § 601," and quoted language from a prior case observing that if "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."[19] The rights and duties the Department of Education purported to establish in the Dear Colleague letter are built on sand.

The baseless demands of the Dear Colleague letter are having real world consequences throughout the nation. Milwaukee is a case in point. The Resolution Agreement requires MPS to "assess whether [it] is implementing its student discipline policies, practices and procedures in a non-discriminatory manner" by collecting "data regarding referrals for student discipline and the imposition of disciplinary sanctions at all District schools" and evaluating, among other things, "whether black students are receiving more removals, referrals or discipline than students of other races," "whether black students are receiving more expulsions than students of other races," "whether certain teachers and administrators refer disproportionately high numbers of students of a particular race for discipline," and "whether black students are disproportionately referred for offenses in which subjective judgment is exercised."[20] MPS must provide these evaluations to

---

[13] *Dear Colleague Letter, supra* note 1, at 11 n.21.
[14] 34 C.F.R. § 100.3(b)(2).
[15] *Dear Colleague Letter, supra* note 1, at 11.
[16] 42 U.S.C. § 2000d-1.
[17] *Sandoval*, 532 U.S. at 285.
[18] *Id.* at 281 (alteration in original) (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).
[19] *Id.* at 286 n.6 (first quoting *id.* at 307 (Stevens, J., dissenting), then quoting *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in the judgment)).
[20] Resolution Agreement, *supra* note 6, at 7.

OCR along with "a description of actions it proposes to take in response to these evaluations."[21] If the data "suggests . . . disproportion," in other words, MPS must "explore possible causes for the disproportion and consider steps that can be taken to eliminate the disproportion to the maximum extent possible."[22]

Thus, OCR is putting immense pressure on officials, teachers, and administrators to do precisely what Title VI forbids: discriminate on the basis of race by ensuring that students of all races receive punishments of the same type, frequency, and severity, regardless of what the actual circumstances in the classroom dictate. The Department of Education's emphasis on the collection and monitoring of racial statistics and its demand that something be done if the numbers come out the wrong way is tantamount to setting impermissible race quotas for disciplinary outcomes.[23] Not only is it not authorized by the law, it may itself lead to a violation of Title VI by causing school districts like MPS to adopt race-based discipline policies that would constitute intentional discrimination.

As you know, Wisconsin has long been at the forefront of the school choice and academic freedom movement. But these challenges and concerns are not unique to our state. That's why the Wisconsin Institute for Law & Liberty, a nonprofit pro bono litigation center in Milwaukee, is joining other reformers across the country in urging you to rescind this Obama Administration Dear Colleague letter. Thank for your consideration, and for your willingness to reconsider a policy that is harming students and undermining the quality of education across America.

Sincerely,

Rick Esenberg
President & General Counsel
Wisconsin Institute for Law & Liberty (WILL)

George Liebmann
Executive Director
Calvert Institute for Policy Research

Roger Clegg
President & General Counsel
Center for Equal Opportunity

Donald Bryson
President
Civitas Institute

---

[21] *Id.*
[22] *Id.* at 8.
[23] *See, e.g.*, *People Who Care v. Rockford Bd. Of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 538 (7th Cir. 1997) ("Racial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty. They place race at war with justice. They teach schoolchildren an unedifying lesson of racial entitlements. And they incidentally are inconsistent with another provision of the [remedial] decree [under review] that discipline be administered without regard to race or ethnicity.").

Rob Roper
President
Ethan Allen Institute

Victor Riches
President & CEO
Goldwater Institute

Brett Healy
President
The John K. MacIver Institute for Public Policy

Dave Trabert
President
Kansas Policy Institute

Joseph Lehman
President
Mackinac Center for Public Policy

Jon L. Pritchett
CEO
Mississippi Center for Public Policy

John Tsarpalas
President
Nevada Policy Research Institute

Paul Gessing
President
Rio Grande Foundation