

Panel 3 – U.S. Department of Education Official and School Administrators

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**STATEMENT OF
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**BEFORE THE
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Introduction:

Thank you for inviting the Department of Education's Office for Civil Rights (OCR) to the U.S. Commission on Civil Rights' briefing on school discipline and disparate impact. I am Ricardo Soto, the Principal Deputy Assistant Secretary in OCR. I am pleased to be able to share with you the work that my office, under the leadership of Assistant Secretary Russlynn Ali, is doing to enforce the civil rights laws and to support schools in meeting their obligations to create and maintain the safe and orderly educational environments that are necessary for our nation's students to learn and thrive.

I understand the challenges that educators and administrators face when they are administering student discipline; because before coming to OCR, I dealt with them too. Prior to my work at OCR, I represented school districts on education issues which included providing advice regarding discipline policies and procedures, including the review of recommendations for suspension and expulsion by school administrators. I also served as the Assistant Secretary and Legal Counsel in the Office of the Secretary of Education of California where I advised the Secretary of Education and the Governor's Office on legal and policy issues related to elementary, secondary and higher education, including school discipline. Furthermore, I have served as in-house counsel for the San Diego Unified School District where I represented the Superintendent, Board and senior staff on education matters. All of these experiences have given me a hands-on perspective on the difficulties encountered when administering fair student discipline and I am excited to be working for OCR as we work towards finding solutions to this complicated issue.

I. Overview of OCR

Let me first provide an overview of my office and the work that we do. OCR's mission is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights. OCR enforces civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, age, and disability. Most relevant to today's briefing is OCR's enforcement of Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin. Title VI's protections extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive federal funding from the U.S. Department of Education.

As you know, a critical part of OCR's job is to investigate and resolve discrimination complaints. These complaints may be filed by anyone, on behalf of an individual or group that may have faced discrimination in education. Additionally, agency-initiated investigations - typically called compliance reviews- permit OCR to concentrate our efforts and resources on problems that are particularly acute or widespread. OCR also issues policy guidance and provides technical assistance to help schools, universities, parents, and community members understand their rights and responsibilities, and to promote voluntary compliance with the civil rights laws that we enforce.

OCR has a headquarters office and twelve regional offices around the country, with more than 600 attorneys, investigators and other staff working on investigating complaints, conducting compliance reviews, developing policy guidance, and providing technical assistance. As I have learned since joining OCR, our attorneys and investigators have a great deal of experience investigating and resolving Title VI complaints and compliance reviews involving allegations of discrimination in the administration of student discipline. In March of 2010, Secretary Duncan delivered remarks commemorating the 45th anniversary of "Bloody Sunday" — a pivotal moment in civil rights history — while highlighting key civil rights issues facing the nation today. In that speech, he announced a reinvigorated OCR that will "strive to make Dr. King's dream of a colorblind society a reality."

II. Discipline Disparities

Let me now turn to our work on issues relating to student discipline. From data gathered through the Department's Civil Rights Data Collection, OCR estimates that in the 2005-2006 school year, almost 250,000 more students nationwide received out-of-school suspensions than just four years earlier, and that the number of students who were expelled increased by fifteen percent. (Compare the Department's Civil Rights Data Collection for 2002 and 2006). OCR is concerned by the rising discipline rates and by the deep disparities in discipline in our nation's schools. Both - have been linked to increased likelihood of dropping out of school; decreased academic achievement; increased involvement with the juvenile-justice system; and impairment of future college and employment opportunities. And those are just a few of the harms to students. OCR is also concerned that significant disparities in the application of discipline policies, practices, and procedures nationwide may suggest that

discrimination is occurring that violates the federal anti-discrimination laws enforced by OCR. As Secretary Duncan said, "civil rights laws require vigorous enforcement not just because they are the law of the land, but because the data paint a stark picture of educational inequality."

III. Legal Theories

To maintain the integrity of our enforcement activities, OCR has a long-standing policy against releasing information about pending investigations. So today I will not be discussing open cases. But I will explain the legal theories that govern our enforcement efforts based on statutes, regulations, and case law that OCR would employ, when the facts and circumstances suggest they would be appropriate, to determine whether a school has violated Title VI. Although my remarks will focus on discrimination based on race in the administration of student discipline, when the facts and circumstances suggest they would be appropriate, OCR would apply the same legal theories in our investigations of possible race, color, or national origin discrimination in educational contexts.

Title VI requires that a school's disciplinary policies, practices and procedures must be applied consistently to similarly situated students, regardless of their race. The Department's Title VI regulations prohibit discrimination, therefore, both when it is the product of different treatment - intentional discrimination based on race, color, or national origin- and when it results from facially race-neutral policies, practices, or procedures that have a disparate impact on the basis of race, color or national origin. OCR's Title VI regulations can be found at 34 C.F.R. § 100.

Unlike cases involving different treatment, cases involving disparate-impact theory do not require that a school had the intent to discriminate. Rather, under the disparate-impact theory, 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.

Statistical disproportionality in the administration of student discipline by race, color, or national origin, standing alone, will not generally establish a Title VI violation. Although data and statistical information are important indicators for OCR's work, they are but one category of evidence that OCR collects in its investigative process. OCR attorneys and investigators conduct interviews and collect a variety of information concerning a school's written and unwritten disciplinary policies, practices, and procedures. As stated above, schools can provide an educational justification for any data that suggests a statistical disproportionality.

Disparate-impact discrimination has been prohibited by the Title VI regulations since the Title VI regulations were written in 1964. These regulations have been used for decades by

all federal agencies, including OCR, that enforce Title VI in federally assisted programs. As President Kennedy said when he first proposed the legislation that ultimately became Title VI, "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in a fashion which encourages, subsidizes, or results in racial discrimination." "Indirect discrimination," President Kennedy said, was "just as invidious" as direct discrimination.

The Department brought administrative proceedings, *In the Matter of Dillon County School District No. 1*, Docket No. 84-VI-16 and *In the Matter of Maywood School District #89*, Docket No. S-125, which were ultimately resolved in 1987 and 1990, respectively, under the Title VI disparate-impact theory.

In 1994, on the 30th Anniversary of the passage of Title VI, the Attorney General of the United States reminded federal agencies that, "administrative regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect." (1994 Letter from the Attorney General on the Use of Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964.) The Attorney General instructed all federal agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs."

Seven years later, in a 2001 memorandum following the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Department of Justice instructed federal agencies that while *Sandoval* held that there is no private right of action to enforce Title VI's disparate-impact regulations, the Supreme Court did not address the validity of Title VI regulations themselves or call into question the government's authority and obligation to enforce them. (2001 Memorandum from the Assistant Attorney General on Executive Order 13166). The following year, the Department of Justice issued guidance and made clear that through this memorandum, the Assistant Attorney General had clarified that, "*Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities--the Executive Order remains in force." As you may recall, Executive Order 13166 requires federal agencies to examine the services they provide and develop and implement a system by which Limited English Proficient persons can meaningfully access those services. Additionally, the 2002 guidance stated that *Sandoval* did not "otherwise limit the authority and responsibility of Federal grant agencies to enforce their own implementing regulations." (2002 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons).

Most recently, in a 2009 memorandum on the 45th anniversary of the passage of Title VI, the Department of Justice, urged federal agencies "to remember that [we] serve an especially critical role in enforcing Title VI disparate impact regulations ... [Because] [v]ictims can only turn to the administrative complaint process, ... agencies must be particularly vigilant in ensuring strong enforcement in this area." (2009 Memorandum from the Acting Assistant

Attorney General on Strengthening of Enforcement of Title VI of the Civil Rights Act of 1964).

Thus, the disparate-impact theory has been and remains a critical enforcement tool for OCR. Where OCR finds a violation of Title VI in the administration of student discipline, we will seek the school's voluntary agreement to take specific measures to remedy that violation. And indeed, wherever OCR finds evidence of a civil rights violation, most schools enter into voluntary resolution agreements which set forth what actions the school must take to remedy the situation and prevent future discrimination. These agreements, which OCR monitors closely, have resulted in significant changes benefitting students in schools throughout the nation.

IV. Case Example

Now, I would like to provide an example of a case where OCR found a violation of Title VI in the administration of student discipline. Because the case remains in the monitoring phase, I cannot provide identifying details. In this case, the complaint, filed by a teacher, alleged that a district discriminated against seventh- and eighth-grade African-American students by disciplining those students more harshly (*i.e.* differently) than white students. An analysis revealed that a statistically significant difference among the races existed in the school's application of its discipline policy, with African-American students receiving greater disciplinary sanctions for all four categories of misconduct examined. The District was unable to provide a legitimate, nondiscriminatory, non-pretextual explanation for this difference in treatment based on race. Through interviews and extensive document reviews, OCR confirmed that African-American students were punished more harshly than their white counterparts for the same or similar conduct. For example, OCR's review of teacher slips referring students for disciplinary actions revealed that the slips on white students also included positive teacher comments such as "wonderful student;" while no similar comments were included for African-American students. OCR also learned that most white students were allowed to exhaust informal and less harsh disciplinary sanctions before being referred for formal discipline, whereas similarly situated African-American students were not allowed to exhaust informal disciplinary sanctions.

Under such circumstances, an OCR agreement would normally include remedies such as: revising existing disciplinary policies and procedures to ensure uniform application of disciplinary consequences; training staff on the application of disciplinary policies and procedures; and prospective monitoring of disciplinary sanctions.

Conclusion:

The answer to unequal, unfair, or ineffective student discipline, of course, is not to abandon discipline policies, practices, and procedures. For many parents and teachers, disruptive and disorderly schools are serious problems because children cannot learn in classrooms that are not well managed. And, the Department of Education recognizes that disciplinary policies, practices, and procedures differ from school to school. There is no universal, one-size-fits-all approach to discipline that will be right for every school or all students. However, each

school has a responsibility not only to create a safe and orderly learning environment, but also to ensure that its disciplinary policies, practices, and procedures are administered in a nondiscriminatory manner. To help support schools in meeting the challenge to adopt effective and appropriate disciplinary policies, practices, and procedures that do not violate a student's civil rights, OCR is using all the tools at our disposal.

As I explained earlier, these include not just enforcement through complaint resolution and compliance reviews, but also policy guidance and technical assistance to schools on the administration of student discipline. For example, OCR, in partnership with Civil Rights Division of the Department of Justice, convened conferences last fall in Washington, DC and San Francisco on "Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunity." Through these conferences, OCR, the Department of Justice, and education experts shared their knowledge about effective partnerships and best practices in the administration of student discipline. As I noted at the first conference, OCR is developing guidance, in the form of a Dear Colleague Letter, that will inform states and districts about their responsibilities in avoiding discrimination based on race in the administration of student discipline.

OCR also recognizes that we needed better data on disparate discipline, because better data will both help community members understand the problem and improve OCR's enforcement efforts. We have therefore begun collecting more detailed and accurate data to identify districts that are really struggling with discipline. In particular, OCR has expanded this year's Civil Rights Data Collection to cover more than 7,000 school districts, including all districts with more than 3,000 students. In its revised collection, OCR is collecting data on school discipline that includes data on corporal punishment, suspensions, tracking in-school and multiple suspensions, referrals to law enforcement, school-related arrests, and zero tolerance policies.

Thank you again for the opportunity to share OCR's work in this important area with the Commission. Secretary Duncan has repeatedly stated that education is the civil rights issue of our time. OCR is deeply committed to ensuring that every child receives the best education possible. Increasingly, the number of students losing educational instructional time due to disciplinary sanctions, such as out-of-school suspensions, expulsions, or referrals to law enforcement authorities, and alternative educational placements, has dramatically increased. All too often such consequences for student misconduct, especially from more subjective disciplinary offenses where judgments are inherently more discretionary, are not imposed in a fair and equitable manner. Moving forward, OCR is committed to using all the tools at our disposal to address this critical issue. I am happy to answer any questions the Commissioners have.
