March 11, 2011

**Via Email to lostrowsky@usccr.gov**

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. Each year, over 100,000 U.S. public school students are expelled and over 3,000,000 are suspended from school at least once. 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.”

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. 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. Research shows that a first-time arrest doubles the odds a student will drop out. Indeed, a 2003 study by Robert Balfanz found that school suspension is a top predictor for those students incarcerated by ninth grade. 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.

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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

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\(^10\) Id.


\(^12\) Id.


\(^14\) 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. 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. 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.


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.


19 Matthew Cregor, Kent Smith, and Milaney Leverson, 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
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
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