



September 20, 2017

**Submitted via Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov)**

Hilary Malawer, Deputy Assistant General Counsel  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

**RE: Comments on the Evaluation of Existing Regulations, Docket ID ED-2017-OS-0074**

Dear Deputy Assistant General Counsel:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we write in response to the Department of Education’s (“the Department”) request for comments on its evaluation of existing regulations. Founded in 1940 by Thurgood Marshall, LDF is the nation’s oldest civil rights law organization. For almost 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African-Americans and other people of color. LDF litigated and won the historic U.S. Supreme Court case *Brown v. Board of Education*, which instituted the principle of equal access to education for all students and banned racial segregation in our nation’s schools.<sup>1</sup> Since *Brown*, LDF has continued to represent students in school districts, primarily in the South, to ensure they receive quality and equitable educational opportunities.<sup>2</sup>

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> See, e.g., *Thomas, et al. v. St. Martin Parish School Dist., et al.*, Civil Action No. 6:65-cv-11314, Doc. 178 (W.D. La., Jan. 25, 2016), <http://www.naacpldf.org/update/ldf-announces-consent-decree-thomas-v-school-board-st-martin-parish> (approving a school desegregation plan designed to racially integrate St. Martin Parish School District and ensure African-American students have equal access to quality educational opportunities); see also *LDF Urges Robust Implementation of Every Student Succeeds Act (ESSA) to Close Achievement Gaps and Promote Student Success*, THE LEGAL DEFENSE FUND, <http://www.naacpldf.org/case-issue/ldf-urges-robust-implementation-every-student-succeeds-act-essa-close-achievement-gaps-an> (last visited Sept. 20, 2017); Br. for the Black Student Alliance at the University of Texas at Austin, the Black Ex-Students of Texas, Inc., and the NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae, *Fisher v. University of Texas at Austin*, 2015 WL 6690039 (Nov. 2, 2015), [http://www.naacpldf.org/files/case\\_issue/14-981%20bsac%20The%20Black%20Student%20Alliance%20at%20the%20University%20of%20Texas%20at%20Austin%20et%20al.1\\_1.pdf](http://www.naacpldf.org/files/case_issue/14-981%20bsac%20The%20Black%20Student%20Alliance%20at%20the%20University%20of%20Texas%20at%20Austin%20et%20al.1_1.pdf).



LDF urges the Department to maintain all existing regulations and guidance that protect students' civil rights, including but not limited to agency guidance and regulations enforcing Title VI of the Civil Rights Act of 1964, 34 C.F.R. § 100, Title IX of the Education Amendments of 1972, 34 C.F.R. § 106; Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. § 104; Title II of the Americans with Disabilities Act, 28 C.F.R. § 35; the Age Discrimination Act of 1975, 34 C.F.R. § 110; the Higher Education Act of 1965, as amended by the Higher Education Opportunity Act of 2008, 34 C.F.R. § 673, et al., and the Individuals with Disability Education Act, 34 C.F.R. §§ 300 and 301. The Department is responsible for enforcing these federal civil rights laws, which protect individuals from discrimination based on of race, color, national origin, sex, age, and disability. Each of these laws require clarifying regulations and guidance to ensure full protection of students' civil rights. As an organization with a long-standing history of preserving the rights of African-Americans and other people of color, we write to highlight the strong need for the Department's regulations and guidance enforcing Title VI of the Civil Rights Act of 1964 ("Title VI") and the disparate impact provision, in particular.

Congress passed the Civil Rights Act of 1964 to ban discrimination in the areas of voting, employment, public accommodations, and education after decades of activism for equal treatment under this nation's laws. Title VI 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."<sup>3</sup> President John F. Kennedy eloquently explained the need for Title VI by stating that:

[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But, indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.<sup>4</sup>

Title VI requires each federal agency that provides financial assistance to programs and activities to enforce the law "by issuing rules, regulations, or orders of general applicability."<sup>5</sup> The regulations under Title VI clarify that the law prohibits intentional discrimination as well as policies and practices that have the effect of subjecting individuals

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<sup>3</sup> 42 U.S.C. § 2000d; *see also*, 34 C.F.R. § 100 et seq.

<sup>4</sup> Civil Rights Division, U.S. Dep't of Justice, *Title VI Legal Manual* at 1 (Jan. 11, 2001), <https://www.justice.gov/crt/case-document/file/934826/download> [hereinafter *Title VI Legal Manual*].

<sup>5</sup> 42 U.S.C. § 2000d-1.

to discrimination,”<sup>6</sup> also known as disparate impact. A prima facie case of a Title VI disparate-impact violation is established if a recipient of federal funds institutes a policy or practice that disproportionately impacts students of a particular racial or ethnic group.<sup>7</sup> Once a prima facie case is established, the burden is on the respondent to demonstrate that the policy or practice is “required by educational necessity.”<sup>8</sup> To meet this burden, the recipient of federal funds must show that the challenged practice bears a manifest relationship to an objective that is “legitimate, important, and integral to [its] educational mission.”<sup>9</sup> Finally, even when a recipient of federal funds can justify a policy or practice through educational necessity, the recipient may still be held accountable under Title VI if there are alternative practices that would be equally effective in serving the recipient’s educational mission while creating less of a racially disparate impact.<sup>10</sup> Title VI causes of action are decided using the preponderance of the evidence standard.<sup>11</sup>

Twenty-six federal agencies, including the Department of Education, have longstanding regulations effectuating Title VI that prohibit both actions and policies that intentionally treat individuals differently because of their race, color or national origin, and those that have an unjustified discriminatory impact.<sup>12</sup> Protecting this nation’s residents from all forms of discrimination, intentional and unintentional, is a legal obligation of federal agencies that has been acknowledged by both Republican and Democratic Administrations for more than 50 years.<sup>13</sup>

The statute and its implementing regulations apply to academic, athletic, and extracurricular programs and activities of educational institutions that receive federal funds, and they cover students, faculty, employees and third parties. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), however, a sharply divided U.S. Supreme Court held that there is no private right of action to enforce Title VI’s disparate impact regulations. Consequently, federal agencies are the only entities that can enforce disparate impact regulations and are obligated to do so.

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<sup>6</sup> 34 C.F.R. § 100.3(b)(2).

<sup>7</sup> See *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984).

<sup>8</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412 (11th Cir. 1993).

<sup>9</sup> *Id.* at 1413.

<sup>10</sup> *Id.*

<sup>11</sup> See *Easton v. Talladega Cnty Ed. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

<sup>12</sup> *Title VI Legal Manual* at 3 n.3.

<sup>13</sup> See U.S. DEP’T OF JUSTICE, *Memorandum for Heads of Departments and Agencies, General Counsels, and Civil Rights Directors* (Oct. 26, 2001), <https://www.justice.gov/crt/federal-coordination-and-compliance-section-201>; U.S. DEP’T OF EDUC., *Dear Colleague Letter: Resource Comparability* (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

Social science research underscores the need for disparate impact regulations and for the federal government’s enforcement of these protections. According to the Department of Justice, this research “demonstrates that implicit bias against people of color remains a widespread problem. Such bias can result in discrimination that federal agencies can prevent and address through enforcement of their disparate impact regulations.”<sup>14</sup>

Disparate impact claims are often raised in agency complaints alleging racial bias in school discipline practices,<sup>15</sup> for valid reasons. Racial disparities in school discipline have been well documented for decades.<sup>16</sup> Also, according to the Civil Rights Data Collection (CRDC) for the 2013-14 school year, Black preschool children are 3.6 times as likely to receive an out-of-school suspension as their white peers, and Black K-12 students are 3.8 times as likely to receive an out-of-school suspension as white students.<sup>17</sup> Research shows that there is no evidence that students of color misbehave more than their white peers.<sup>18</sup> However, students of color are often disproportionately disciplined for minor, subjective offenses such as disobedience and disruptive behavior, which are left up to the discretion of school staff, administrators, and school police who may be more likely to negatively interpret the behavior of certain racial and ethnic groups based on their own conscious or unconscious bias.<sup>19</sup>

The disparate impact provisions of the Title VI regulations issued by the Department of Education and the Department of Justice, as well as guidance providing further clarification are critical to addressing school discipline policies and practices that discriminate against students of color. In January 2014, the Department of Education and

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<sup>14</sup> See, e.g., *Title VI Legal Manual* at 2 n.1, <https://www.justice.gov/crt/case-document/file/934826/download> (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954–59 (2006); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489(2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–9 (2006)).

<sup>15</sup> See, e.g., Letter from Damon T. Hewitt, NAACP Legal Def. & Educ. Fund, Inc., et al. to Dall. Office, Office for Civil Rights, U.S. Dep’t of Educ. (Feb. 20, 2013), [http://www.naacpldf.org/files/case\\_issue/Bryan%20ISD%20OCR%20Complaint.pdf](http://www.naacpldf.org/files/case_issue/Bryan%20ISD%20OCR%20Complaint.pdf); see also CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, *Resolution Letter to Lodi Unified School District* (Aug. 24, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131314-a.pdf>

<sup>16</sup> RUSSELL SKIBA, ET AL., *NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE* at 2 (Mar. 2014), [http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity\\_NewResearch\\_010915.pdf](http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity_NewResearch_010915.pdf).

<sup>17</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *2013-2014 Civil Rights Data Collection: A First Look* (June 7, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

<sup>18</sup> SKIBA, *supra* note 16, at 2.

<sup>19</sup> *Id.*

the Department of Justice issued the “Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline,” clarifying school districts’ civil rights obligations to discipline without discriminating on the basis of race, color, or national origin.<sup>20</sup> The guidance was the first of its kind to recognize that students have been subjected to racially discriminatory practices in schools and that a school is in violation of Title VI if it implements policies that have a disparate impact on a certain group. It provides valuable information to schools and districts to determine whether policies result in different treatment or have a disparate impact and provides examples of situations in which schools may be in violation of federal civil rights laws.<sup>21</sup>

The Department of Education’s Title VI regulations and guidance, such as the joint Dear Colleague Letter, are critical tools that can deter schools and districts from denying students of color equal educational opportunity and provide the Department with a mechanism for addressing this prevalent form of discrimination.

Similarly, the Individuals with Disabilities Education Act (IDEA) and the related regulations address disproportionality based on race and ethnicity in the areas of identification, placement in restrictive settings, and discipline. Given that children and youth of color are overrepresented in special education and that students of color with disabilities are frequently disciplined at dramatically disproportionate rates, we also strongly support these regulations. The regulations set a common standard for identifying significant disproportionality and are intended to ensure that school districts review policies and practices to determine the root causes of these disparities and whether changes are needed.<sup>22</sup>

The strong need for these regulations was revealed by a U.S. Government Accountability Office study, which found widespread non-compliance by states with provisions of the IDEA requiring states to identify school districts with significant disproportionality in areas related to special education: identification; restrictive placement; and discipline.<sup>23</sup> According to the study, most states set such high levels for identifying districts with significant disproportionality that no district has ever exceeded them, and, therefore, none were identified. Additionally, states permitted school districts to suspend

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<sup>20</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *Joint “Dear Colleague” Letter* (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html#ftn21>

<sup>21</sup> *Id.*

<sup>22</sup> U.S. DEP’T OF EDUC., ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES; PRESCHOOL GRANTS FOR CHILDREN WITH DISABILITIES FINAL REGULATIONS, 34 C.F.R. § 300, et seq., <https://www2.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-significant-disproportionality-final-regs-unofficial-copy.pdf>.

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION (2013), <https://www.gao.gov/assets/660/652437.pdf>.

students of color with disabilities at much higher levels than their white peers. For example, according to the Department's Civil Rights Data Collection for 2013-2014, one in four Black boys with disabilities received at least one out-of-school suspension, compared to only one in ten white boys with disabilities.<sup>24</sup>

With this continued problem of racial disparities in the discipline of students, including those with disabilities, now is not the time to modify or repeal regulations or guidance developed to protect them.

It is imperative that the Department maintains all regulations implementing nondiscrimination laws to ensure robust enforcement of protections afforded to students of color, including students with disabilities. The Title VI regulations and the associated guidance, in particular, were issued pursuant to and consistent with the implementing statutes, as well as legal precedents. As such, they are critical civil rights law enforcement tools, as well as compliance touchstones for our nation's educational institutions.

Thank you for considering this request. If you have any questions, please contact us at 202-682-1300.

Sincerely yours,

A handwritten signature in blue ink, reading "Todd A. Cox". The signature is fluid and cursive, with a large initial "T" and "C".

Todd A. Cox  
Director of Policy

Monique L. Dixon  
Deputy Director of Policy

Elizabeth Olsson  
Senior Policy Associate

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<sup>24</sup> U.S. DEP'T OF EDUC., *supra* note 17.