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To: State Policy, Legal Leaders, and School Board Members

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Re: ED/DOJ “Resource on Confronting Racial Discrimination in Student Discipline” State Policy Network Clear Guidance Memo

INTRODUCTION

On May 26, 2023, the US Department of Education (ED) and US Department of Justice (DOJ) released a [“Resource on Confronting Racial Discrimination in Student Discipline”](#) attached to a Dear Colleague letter. This memo is intended to answer certain frequently asked questions about that document.

This memo will address the following questions:

1. What is the ED/DOJ “Resource on Confronting Racial Discrimination in Student Discipline” published in May 2023 by the Biden administration?
2. What related actions have previous administrations taken?
3. What is the legal justification being used by the federal government to issue this guidance? Is litigation anticipated?
4. What are some possible unintended consequences of implementing this federal guidance?
5. What are the risks for school districts of *not* adopting the recommendations in the guidance?
6. Whom does this guidance apply to and what should school districts know when considering next steps?

DISCUSSION

- 1. What is the ED/DOJ “Resource on Confronting Racial Discrimination in Student Discipline” published in May 2023 by the Biden administration?**

The “Resource on Confronting Racial Discrimination in Student Discipline” is an 18-page *guidance* document that was published in May 2023 jointly by the US Department of Education (ED) and US Department of Justice (DOJ) under the Biden administration (the document will be referred to herein as the “Biden Guidance”). It

begins with a Dear Colleague letter dated May 26, 2023, which asserts that racial discrimination in public schools is a “significant concern” and that we must ensure nondiscrimination in student discipline.¹ It goes on to summarize several investigations involving student discipline policies to highlight how the guidance might be enforced.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs or activities for entities receiving federal financial assistance.² ED and DOJ enforce nondiscrimination laws such as Title VI and have authority to investigate student discipline policies or practices they believe involve racial discrimination.

The Biden Guidance relies on numerous cases where investigations appear to have been prompted primarily (or maybe even exclusively) by disparate impact rather than a specific event of intentional discrimination. Even in cases where an individual allegation of intentional discrimination was made, ED’s Office of Civil Rights (OCR) often went on to emphasize statistical disparities, because such evidence can be part of the evidence in a claim of intentional discrimination.

The danger is when disparities displace evaluation of whether discriminatory practices have occurred. Disparate impact cases often (and improperly) focus on the consequences of practices, without regard to whether the results were based on intentionally discriminatory acts. In other words, discriminatory impact is inferred where a neutral policy or practice—or sometimes just a result—affects a certain racial group more than another.

This is different than intentional discrimination, which in this context would mean that harsher punishments or higher rates of disciplinary actions were imposed because the disciplinary authority made decisions about imposing discipline and punishment based on the race of the students involved. Disparate impact can raise the possibility of intentional discrimination; it can rarely prove it.

¹ The Dear Colleague letter also mentions the Bipartisan Safer Communities Act (BSCA) of 2022 in the context of a \$1 billion grant for schools that provide support for mental health professionals in schools and a \$1 billion grant for helping schools establish safe and healthy learning environments. The Biden Guidance indicates the information about the BSCA and other federal funds is being made available “to support your schools’ efforts to confront the issue of race discrimination in student discipline effectively.”

² 42 U.S.C. § 2000d (“No 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.”). While it is undisputed that Title VI applies to all students, the Biden Guidance has chosen to discuss intersectionality and emphasize that Title VII “applies to all students, including students with disabilities and students who identify as male, female, or nonbinary and lesbian, gay, bisexual, transgender, queer, questioning, or intersex (LGBTQI+).” See “[Resource on Confronting Racial Discrimination in Student Discipline](#),” May 2023.

The Biden Guidance summarizes 14 investigations involving student discipline policies in an effort to highlight how the Department of Education Office of Civil Rights (OCR) and the DOJ Civil Rights Division have enforced Title VI in the context of student discipline. It discusses examples of remedies the Departments have previously required and also urges school districts to make changes proactively. The examples of investigations in the Biden Guidance were resolved at various stages and involved both intentional discrimination and disparate impact.

Rather than summarizing each investigation in the Biden Guidance, this memo will discuss just a few of the examples. Eleven of the 14 investigations in the Biden Guidance indicate that the reason for the investigation was alleged discrimination involving discipline of minority students “more frequently and more harshly than similarly situated white students.”³ While such situations can potentially indicate intentional discrimination, it is crucial to consider factors beyond the disparate impact or statistical evidence, such as prior disciplinary history and the nature of the offenses.

For instance, one of the examples in the Biden Guidance involved an allegation that a California school district discriminated against Latinos on the basis of race and against a mother based on national origin by not translating school information for her.⁴ This complaint triggered an investigation of the school district discipline rates. OCR found that Latino students were being disciplined disproportionately more than white students for minor infractions such as being “defiant.” OCR also found that the school resource officer was twice as likely to issue tickets to Latino students than to white students. The district entered into an agreement with OCR to address these issues, including, but not limited to, establishing oversight responsibilities, revising policies to ensure fair treatment, and regularly providing parent information sessions and staff training regarding school discipline.⁵ But whether or not the district engaged in discrimination remains an open question.

Similarly, another school district in California faced scrutiny after a black student received harsher discipline than a white student following a racially charged altercation. When the white student called the black student a racially derogatory slur, the black student hit the white student in the face and body several times. The white student did not fight back. Both students were cited for disruption. Additionally, the white student was cited with breaking the school code that prohibits the use of racial slurs, and the black student was cited with breaking a school code that prohibits physical violence. While cited with breaking two different school codes, according to school policy, both codes were “level two” codes that should have resulted in the same level of discipline.

³ https://www2.ed.gov/about/offices/list/ocr/docs/tvi-student-discipline-resource-202305.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

⁴ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141242-a.pdf>

⁵ *Id.*

Even though the two students technically committed the same level infraction, the black student received a five-day out-of-school suspension, a citation from the SRO, 45 days of social probation, a no-fighting contract, and his parent was contacted. The white student received only a three-day out-of-school suspension. OCR went on to conduct an investigation of the imposition of discipline for different racial groups.⁶ OCR determined that the district was suspending black students disproportionately more than white students for infractions like truancy, tardiness, defiance, and disruption. The district entered into an agreement with OCR⁷ to revise discipline policies, consult with experts as needed to identify root causes for racial disparities in discipline, work with a district stakeholder discipline equity committee, provide training and information on alternatives to suspensions, and more. But whether or not the differing degrees of discipline were attributable to discrimination remains unproven.

In another example, a neutral dress code in an Arizona school district prohibiting “trendy hairstyles” led to an allegation of discrimination when a black student was reprimanded for changing from braids to an afro, with strict limits on how the afro was styled and how tall it could be. OCR could find no other students, including students of any other races, for whom the district had applied its dress code in the same way. OCR issued a finding of noncompliance and the school agreed to take actions such as providing a written apology to the student and his parent, revising its dress code to include a statement of nondiscrimination and a statement that afros do not violate the dress code, and training staff regarding racial nondiscrimination.⁸

The OCR investigations described in the Biden Guidance include mostly disparate impact concerns about racial discrimination against students. This is important because it provides a strong indication of where the DOJ under the Biden administration is headed. The “remedies” in the OCR settlement agreements included implementing restorative justice practices, tracking discipline data by race, limiting subjective reasons for discipline, and removing or limiting SROs and law enforcement in schools. The Biden Guidance indicates these remedies aim to “create an inclusive and safe environment where all students can learn and succeed and educators can support them in that process.”⁹

⁶ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131314-a.pdf>

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131314-b.pdf>

⁸ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08171341-a.pdf>

⁹ https://www2.ed.gov/about/offices/list/ocr/docs/tvi-student-discipline-resource-202305.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

2. What related actions have previous administrations taken?

During President Obama’s second term, the ED voiced concerns about black students being disciplined at higher rates than their white peers and said that was evidence of racial bias.¹⁰ There were two pieces of guidance. One was through the Supportive School Discipline Initiative and the other a Dear Colleague memo.¹¹ Via that guidance, ED and DOJ under the Obama administration threatened public school districts with legal penalties in order to change their disciplinary policies.

While some scholars claimed that racial disparities in suspensions were the result of factors such as poverty, the Obama administration sought to take action to reduce any racial disparities in discipline. In 2014, the ED and DOJ jointly published a Dear Colleague letter (Obama Letter) that directed schools to “promote fair and effective disciplinary practices that will make schools safe, supportive and inclusive for all students.”¹²

The Obama Letter essentially informed schools that they could be in violation of Title VI if they did one of two things as it relates to student discipline. First, they could be found to be in violation if they intentionally discriminated on the basis of race (i.e., by disciplining students differently based on their race). Second, they could be found in violation if they pursued a facially neutral policy in such a way that it produced a disparate impact.¹³

In order to decrease student suspension rates for minority students, the Obama Letter directed schools nationwide to change their disciplinary policies, under threat of legal penalty. None of these actions went through the traditional rulemaking regulatory process and none were implemented into law through Congress. However, these threatening and illegal guidance documents were effective within a few years—the Manhattan Institute found that over 50 of the largest school districts across the country implemented discipline reforms and 27 states changed their laws to reduce the use of exclusionary discipline between 2011 and 2017.¹⁴

The OCR’s investigation and supplemental agreement with Milwaukee Public Schools (MPS) provides an example of how the Obama Letter was implemented. In 2018 OCR initiated a compliance review at MPS to investigate “whether the District discriminate[d] against black students by disciplining them more frequently and more harshly than similarly-situated white students” and “whether the District maintain[ed] disciplinary policies and procedures that affect black students in a

¹⁰ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>

¹¹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; See also <https://will-law.org/wp-content/uploads/2021/01/2017-10-10-schooldiscipline.pdf>.

¹² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>

¹³ *Id.*

¹⁴ Max Eden, “School Discipline Reform and Disorder: Evidence from New York City Public Schools, 2012–16,” Manhattan Institute, 2017.

racially disproportionate manner.” To avoid being sued by the federal government, MPS was one of many schools around the country that agreed to a federal plan to reduce disparities in discipline actions for black students.¹⁵

Beyond seeking to end racial disparities in the rates at which students are disciplined, the Obama Letter also indicated that schools should use exclusionary discipline as a last resort. Instead, schools were directed to use restorative justice practices as part of their agreements with the federal government. When using restorative justice, reconciliation between the offender and the victim is the ultimate goal. That goal is theoretically achieved by conversations about what happened.

However, a “reduction” in racial disparities has not actually occurred in the MPS district, despite restorative and alternative discipline procedures implemented to attempt to achieve racial equity in discipline. At the end of February 2024, MPS put out an update¹⁶ on its “primary goal . . . to reduce discipline disproportionately during the 2023–24 school year” in order to support “creating a positive and inclusive educational community and equitable school climate.” To do so, students were told to practice “breathing activities” and “brain breaks.”

However, the data does not support that these practices have been effective. In 2023–24, there have been *15,739 suspensions since the start of the school year*.¹⁷ Almost 80 percent of those suspensions were given to black students.¹⁸ In an interview with Wisconsin Public Radio, an MPS middle school principal recently commented, “We do recognize that behaviors are escalating, that’s just the sign of the times, but we want them in school.”¹⁹ There is no evidence that the rates of suspensions for black students in MPS were due to racial discrimination. Some believe the cause may be due to discipline based on behavior regardless of student race²⁰ and have even raised concerns about illiteracy²¹ contributing to behavioral problems.

The Obama Dear Colleague Letter was rescinded in 2018 by then-Education Secretary Betsy DeVos.²² WILL spearheaded the efforts to urge Secretary DeVos under then-President Trump to repeal the Obama Letter. Following this letter and

¹⁵ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05145003-a.pdf>

¹⁶ <https://milwaukeepublic.ic-board.com/attachments/4bb2a822-be93-4922-a966-91d6a93ba199.pdf>

¹⁷ <https://milwaukeepublic.ic-board.com/attachments/4bb2a822-be93-4922-a966-91d6a93ba199.pdf>

¹⁸ *Id.*

¹⁹ <https://www.wpr.org/news/suspensions-up-in-milwaukee-public-schools-racial-disparities-persist>

²⁰ <https://twitter.com/WillFlandersWI/status/1768284702035640816>;

<https://twitter.com/DanLennington/status/1768287531529797853>.

²¹ <https://twitter.com/MrKWisconsin/status/1768329698264695041>

²² During the Trump administration, a 2016 US Department of Education study showed that African American students were 3.8 times more likely than white students to be suspended. [Max Eden](#), “School Discipline Reform and Disorder: Evidence from New York City Public Schools, 2012–16.” [Manhattan Institute](#), 2017., [Kersten 2017](#)

national outcry, Secretary DeVos revoked the guidance in December 2018. She was able to do so without Congressional action because the Dear Colleague letter failed to follow the Administrative Procedure Act (APA) requirements. As noted above, the Biden version is not as heavy-handed as that of the Obama administration.

3. What is the legal justification being used by the federal government to issue this guidance? Is litigation anticipated?

Overall, the federal government is using Title VI as legal justification for the Biden Guidance. There is no federal law specific to discipline. Title VI prohibits discrimination on the basis of race, color, and national origin in public schools.

The Biden Guidance may not be accurately characterized as guidance at all as that term is generally understood. ED, as an example, has an entire Guidance Homepage on its website.²³ It contains a link to a portal of policies and guidance, in which guidance documents are clearly titled using the word *guidance*.²⁴ The Biden Guidance is a Dear Colleague letter followed by a resource containing several examples of prior investigations and their outcomes. Dear Colleague letters are one of the primary communication types to convey guidance. The Biden Guidance on student discipline is slightly different; it resembles a more coercive strategy. It appears to suggest that a school district should institute racial parity in school discipline outcomes or face an OCR inquiry that tarnishes the reputation of the district and consumes valuable time and resources. While lawful guidance constitutes clarification of existing law, guidance runs the risk of crossing over into illegal rulemaking when it attempts to alter the policies and practices of regulated parties without following the public notice and comment requirements set down in the Administrative Procedure Act.

The Biden Guidance is especially problematic because its approach appears to be disparate impact, but the required standard for a finding of a Title VI violation is intentional discrimination. Disparate impact, on its own, cannot be used to establish a Title VI violation. In *Alexander v. Sandoval*, the US Supreme Court held that no private right of action exists under Title VI to enforce disparate impact regulations (*Alexander v. Sandoval*, 532 U.S. 275, 2001). Justice Scalia wrote in *Alexander* that “Title VI itself directly reach[es] only instances of intentional discrimination[.]”²⁵ So individuals may bring Title VI claims of intentional discrimination to court but may not prove a Title VI violation in a lawsuit solely using disparate impact. Put differently, the right created by Title VI is the right to be free of discrimination and not the right to have one’s racial group treated proportionately.

²³ <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html>

²⁴ <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

²⁵ Quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

But even in intentional discrimination cases, the plaintiff will frequently submit evidence that the outcomes being reviewed are different for one race than for another race. So a claim for intentional discrimination will look a lot like a claim based on disparate impact from a statistical standpoint but in a claim for intentional discrimination, there must be something more. There must be something that proves that the disparate results were based on race, rather than some other factor.

While the Biden Guidance seems to recognize that disparate impact cannot be the sole evidence used to prove racial discrimination under Title VI, the facts from the investigations it discusses primarily (or solely) involve disparate impact. The Biden Guidance frequently does not make clear what other evidence (if any) it found.

Whether the Biden Guidance is as aggressive as the Obama Letter will depend largely on its implementation. Even though individuals cannot sue under Title VI for policies that have a disparate impact, there is disagreement about whether the OCR can use disparate impact as a basis for finding a Title VI violation. Some argue that OCR might be able to do this because the Supreme Court did not specifically mention executive agencies in its *Alexander v. Sandoval* decision.²⁶ But, this would not be advisable or appropriate behavior for agencies because it conflicts with Supreme Court jurisprudence about causes of action under Title VI.

States and school districts should pay attention to how OCR uses disparate impact, as it could provide opportunities for litigation. The key issue is *how* disparate impact is applied. OCR might find evidence of intentional discrimination and use it to justify further investigation. Conversely, without proof of intentional discrimination, OCR could use data showing disparate impact to pressure a district to enter into an agreement and change its policies. One potential legal argument would be if OCR based a Title VI violation solely on disparate impact data without any evidence of intentional discrimination. OCR might argue that there were no nondiscriminatory reasons for the disparity, but it is uncertain whether this would be sufficient for OCR to prevail in court.

Since the Biden Guidance was released in May 2023, only one ED investigation and three DOJ investigations have been resolved and have presumably applied the new Biden Guidance. The ED investigation looked into Winston-Salem/Forsyth County Schools in North Carolina in September 2023. OCR investigated whether the district discriminated against black students by giving them harsher punishments compared to similarly situated white students.²⁷ OCR reported that during the 2017–18 school year, 15 percent of the out of school

²⁶ Congressional Research Service, “Race Discrimination at School: Title VI and the Department of Education’s Office for Civil Rights,” July 21, 2023, <https://crsreports.congress.gov/product/pdf/IF/IF12455>.

²⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11105002-a.pdf>

suspensions were given to black students, compared to the 3 percent of white students given out of school suspensions. By 2022 the district made changes to its discipline policies, technically remedying the disparities seen in the 2017–18 numbers. These changes included adoption of an equity statement, emphasizing things like social-emotional learning and implementing culturally responsive and trauma-sensitive practices. OCR determined it would continue to monitor how well the district followed through with these changes until it was satisfied the district was in compliance.

With respect to the three DOJ investigations that have concluded since the Biden Guidance was released,²⁸ in the first, in June 2023, the DOJ announced a settlement agreement with a school district in Kentucky after reports that the district did not “consistently or reasonably” address harassment “which included racial taunts and intimidation” reinforced with “use of Confederate flags and imagery.”²⁹ During its investigation the DOJ became concerned about “racially disproportionate discipline for Black students” and “inadequate systems for recordkeeping and analysis of discipline data.” Also in June 2023, the DOJ announced a settlement agreement³⁰ with a Louisiana school district after investigating reports of the district maintaining a “dual system of racially identifiable elementary schools,” effectively racially segregating students to schools based on race. During its investigation the DOJ reported finding issues with student discipline.³¹ In that case the district agreed to a long list of remedial measures to enhance desegregation of its schools and was required to implement them under the supervision of a federal district court judge.³² Last, in October 2023 the DOJ announced a settlement agreement³³ with a district in Tennessee that also involved segregated schools. Part of the settlement agreement required the school to revise its discipline policies in accordance with a consent order approved by a federal district court judge.³⁴

Since so few investigations have concluded since the Biden Guidance was released, it remains to be seen how the Biden administration will fully enforce this Guidance, and it is not entirely clear whether the 2023 Biden Guidance was applied in these instances. However, the Biden administration is not without ample

²⁸ <https://www.justice.gov/opa/file/1319116/dl?inline>; <https://www.justice.gov/opa/pr/justice-department-secures-agreement-remedy-racial-harassment-black-and-multi-racial-students>; <https://www.justice.gov/opa/pr/justice-department-secures-consent-decree-louisiana-school-desegregation-case>.

²⁹ <https://www.justice.gov/opa/pr/justice-department-secures-agreement-remedy-racial-harassment-black-and-multi-racial-students>

³⁰ <https://www.justice.gov/opa/pr/justice-department-secures-consent-decree-louisiana-school-desegregation-case>

³¹ <https://www.justice.gov/opa/press-release/file/1587051/dl?inline>

³² *Id.*

³³ <https://www.justice.gov/opa/pr/justice-department-secures-agreement-tennessee-school-desegregation-case>

³⁴ <https://www.justice.gov/opa/file/1319116/dl?inline>

opportunity. Since Biden took office, there have been over 266 complaints opened by the OCR. This is almost 200 more than either the Obama or Trump administrations opened.³⁵

4. What are some possible unintended consequences of implementing this federal guidance?

First and foremost, the Biden Guidance is encouraging discrimination rather than preventing it. Schools that implement race-conscious policies—such as by disciplining students differently based on race—are at risk of facing their own liability under Title VI for intentional discrimination.

Disparities in data do not equal discrimination. School officials should judge each disciplinary incident on its own merits. Yet when the federal government comes knocking, it can be difficult for districts to push back. Investigations threaten and create administrative headaches, and the government tells districts they can end the investigations if they agree to adopt suggested policies/changes. Usually, school districts comply to end the investigations, regardless of student outcomes.

In terms of effect on students, efforts to try to close disparities actually lead to allowing students wider latitude for behavior that will do them more harm than good. Because school districts fear consequences for any policy that results in disparities, schools are not disciplining or removing students from class when they should. When these types of policies are adopted, the focus is taken off of student safety and success in exchange for counting how many students of a particular race are disciplined and treating them differently to achieve a certain outcome. In the Biden Guidance, it is not clear that OCR controlled for nondiscriminatory factors when evaluating disparities, such as whether one racial group actually offended at a higher rate and whether infractions may be more closely correlated to economic status or other nondiscriminatory factors, rather than race.

In 2021, WILL analyzed the relationship between rates of suspension for minority students and student-reported safety in Wisconsin.³⁶ We found that as suspension rates declined, students reported feeling *more* unsafe in schools. Because many of these schools are majority-minority, it is often other students from the same minority groups that suffer the most. These effects on safety spill over to academics. A 2018 WILL study³⁷ found that schools that implement more lenient discipline policies see declines in their academic achievement in both reading and math.³⁸ In Milwaukee, where MPS was forced to agree to reduce racial disparities years ago,

³⁵ <https://ocrcas.ed.gov/open-investigations>

³⁶ <https://will-law.org/wp-content/uploads/2021/10/SuspensionStudy.pdf>

³⁷ <https://will-law.org/wp-content/uploads/2021/01/pbis-final.pdf>

³⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221

teachers and students now face serious safety concerns.³⁹ While there has been a strong emphasis on practices involving alternatives to exclusionary discipline and restorative practices, research and review of discipline practices have found these to not be as effective as traditional discipline. For example, a WILL review⁴⁰ of student-level reporting on safety at Milwaukee Public Schools following the district’s OCR agreement found that reduced rates of suspension correlated with a higher report of feeling “unsafe” by students. In Philadelphia, after suspensions for low level offenses were banned, truancy increased and proficiency scores went down.⁴¹ Similarly, students in Florida saw negative academic outcomes after disruptive students were left in the classroom as part of restorative justice practices.⁴²

Educators are impacted as well since they are limited in their choices over how to manage their classrooms. Educators are often best positioned to identify and address disorderly conduct at school, and a prescriptive approach at the federal level does not work for all schools or classrooms. In 2022, Merrimack College and *Education Week* polled 1,324 teachers across the country to get an idea of the problems they have faced since the pandemic.⁴³ Autonomy, or control over their work environment, was a key indicator of job satisfaction. That being said, more than one-fourth of teachers said they do not have control of students’ classroom behavior. Additionally, more than 44 percent of teachers also said they were very or fairly likely to leave the profession to pursue a different occupation.

In an article for the *International Journal of Social Psychology of Education*, the most “consistent links to exhaustion as a core dimension of burnout were teacher perceptions of disruptive student behaviors, such as aggressive or disrespectful behaviors.”⁴⁴ Overall, “current literature shows that student disruptive behaviors have been considered the main social stressor that increases the demands of teaching and contributes to teacher exhaustion.”

It is also becoming apparent that policies such as those suggested in the Biden Guidance are ineffective and dangerous. Such policies put school districts on notice that they could be found in violation of the Civil Rights Act if students of different races were disciplined at different rates—even if their rules governing suspensions and expulsions were written and administered fairly. While proponents of policies

³⁹ <https://www.fox6now.com/news/milwaukee-public-schools-safety-culture-teachers-caucus>

⁴⁰ <https://thehill.com/opinion/education/4181444-the-predictable-failure-of-restorative-justice-in-schools/>

⁴¹ <https://fordhaminstitute.org/national/research/academic-and-behavioral-consequences-discipline-policy-reform>

⁴² <https://www.educationnext.org/domino-effect-2/>

⁴³ https://fs24.formsite.com/edweek/images/WP-Merrimack_College-Todays_Teachers_Are_Deeply_Disillusioned_Survey_Data_Confirms.pdf

⁴⁴ <https://link.springer.com/article/10.1007/s11218-023-09779-x>

suggested by the Biden Guidance believe adult bias can create disparities, data actually suggests that adult bias plays, at best, a minimal role in disciplinary “disproportionality.” Differences in discipline are driven largely by student behavior, and these differences are driven largely by social and economic factors.⁴⁵ Also, research indicates there is little basis for claims that “restorative” or “positive” approaches to student misbehavior work, and there is a growing cause for concern that the recent shift away from traditional discipline is doing more harm than good.⁴⁶

Perhaps most importantly, litigation against the Biden administration seeking to enjoin enforcement of the Guidance is possible because this Guidance which purports to seek to end racial discrimination is actually suggesting discrimination based on race. Additionally, the Biden administration is attempting to implement this via guidance, rather than by using the APA. This could result in a challenge to the guidance document for failure to follow administrative law requirements, provide Congress with appropriate legal oversight, or provide the public with notice and an opportunity to submit comments.

The Biden Guidance arguably pays lip services to federal nondiscrimination law but at the same time encourages racial discrimination in order to reach a certain outcome in violation of the Equal Protection Clause. Districts should not treat students differently based on race. The Biden Guidance emphasizes equality of outcome rather than equality of opportunity. President Biden has stated that *any* disparity among racial groups is simply evidence of systemic racism and white supremacy.⁴⁷ The unfortunate reality is that in our public school classrooms, policies based in equity rather than equality are causing blatant race discrimination every day. WILL has an Equality Under the Law⁴⁸ project which involves litigation to fight back against both race-based programs and race-based actions, including unlawful treatment of students based on race. Issues involving racial discrimination can be litigated more often as individual instances as opposed to challenging the entire concept of the Biden Guidance or seeking to enjoin its enforcement.

5. What are the risks for school districts of *not* adopting the recommendations in the guidance?

The Biden Guidance does not have the force of law, and schools do not need to comply with guidance that does not have the force of law. It has not specified any particular action or inaction as unlawful but rather has provided examples as

⁴⁵ Safe and Orderly Schools: Updated Guidance on School Discipline, Max Eden, March 2019, <https://media4.manhattan-institute.org/sites/default/files/R-ME-0319.pdf>.

⁴⁶ *Id.*

⁴⁷ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/>

⁴⁸ <https://will-law.org/equality/>

guidance. Even so, districts should be aware that ignoring the guidance could potentially result in an OCR investigation.

If OCR investigates an institution and determines it has failed to comply with the nondiscrimination requirements under Title VI, OCR will first attempt to secure willingness to negotiate a voluntary resolution agreement. This involves a written agreement and monitoring by OCR of implementation of its terms. Even considering the authority of OCR, there is a good chance that colorblind policies, which treat students as individuals rather than members of a certain race, would withstand any negative result of a federal investigation in court.

If a district does not agree to a voluntary resolution or does not comply with the terms of an agreement, then OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant continued federal financial assistance, or it may refer the matter to the DOJ for litigation. Ultimately, if an institution violates nondiscrimination requirements with regard to student discipline, it could—in a worst-case scenario—lose federal funding. This threat is almost invariably enough to compel a school district to agree with the terms set forth by OCR and an adverse ruling is essentially never reached. If the federal government via OCR opens an investigation, schools are often pressured to agree to adopt the policies suggested by OCR in order to end the investigation.

There is also a significant risk that the Biden Guidance will be implemented without oversight and transparency at the local level. For example, the Obama administration investigated and implemented an agreement with Milwaukee Public Schools administration without board approval or knowledge of the investigation.⁴⁹

6. Whom does this guidance apply to and what should school districts know when considering next steps?

Since the Biden Guidance cites Title VI as its purported authority, the Guidance applies to programs or activities receiving federal financial assistance. The responsibility of a district not to discriminate against students on the basis of race, color, or national origin applies to any program or activity of the district, directly or through contractual or other arrangements.⁵⁰ This duty extends to individuals such as lunch or recess monitors, substitute teachers, bus drivers, and private security contractors or other contractors, to the extent these individuals are acting in their official capacity as employees or contractors of the district.

⁴⁹ Annysa Johnson, “Federal Investigation Found 100-plus Examples of Racial Disparities in MPS Suspensions,” March 29, 2018, <https://www.jsonline.com/story/news/education/2018/03/29/federal-probe-found-100-plus-examples-racial-disparities-mps-suspensions/463464002/>.

⁵⁰ See, e.g., 34 C.F.R. § 100.3(b)(1).

In the case of a district being investigated because of disparate impact, or an individual allegation giving rise to a systemic investigation, school districts should be prepared to make the argument that this is not how Title VI is intended to be applied. Districts should raise this question about disparate impact when they face investigations by OCR because there is a chance that investigations might get dropped instead of the government stepping in in an effort to change the policies or practices of the district.⁵¹

School districts should be aware of a critical difference between the Obama Letter and the Biden Guidance. With regard to the suggestion that school districts track disciplinary actions based on race and analyze how policies impact different groups, there is no mandatory language. The Obama Letter used language like schools “must” comply and that ED and DOJ “will” investigate, and that language is not included in the Biden Guidance. The Biden Guidance does not directly state that school districts will be held responsible if they do not adopt this suggestion, but it strongly implies the possibility. While the OCR cannot force school districts to allocate their administrative decisions in order to reach a certain outcome, the pressure of the legal authority of the federal government can be motivational for districts. As such, districts must rely on their understanding of what federal law does and does not require. For example, if OCR attempts to force actions related to student discipline in order to reach a certain outcome based on race, school districts may have a legal claim that OCR is exceeding its authority. Often after investigations, the OCR or DOJ will come to an agreement with the school to change certain practices.

School district administrators, school boards, and staff of public schools should know that they must treat every student fairly, regardless of race, and strive to equip *all* students for success. School boards should also consider implementing a policy to ensure that all administrators and staff are appropriately trained with regard to applicable nondiscrimination laws such as Title VI. WILL has drafted model school board policies on topics such as student discipline, racial nondiscrimination, and district personnel evaluation and training.⁵² WILL offers these model policies and more as a public resource with the goals of optimizing student academic achievement and improving school governance. Schools can create environments that are in compliance with Title VI requirements and where all students have the opportunity to learn and feel safe.

CONCLUSION

Ultimately, the Biden Guidance on student discipline takes a controversial approach by focusing on disparate impact rather than intentional discrimination. Although it lacks the force of law, it pressures schools to inappropriately adopt race-

⁵¹ See *Alexander v. Sandoval*, 532 U.S. 275 (2001), quoting *Alexander v. Choate*, 469 U.S. 287, 293, (1985): “Title VI itself directly reach[es] only instances of intentional discrimination.”

⁵² www.SchoolBoardPolicies.org

conscious policies that themselves could be a violation of Title VI. This guidance risks undermining the principle of equal treatment by encouraging differential discipline based on race. School districts should prioritize fair and uniform treatment for all students, ensuring staff are trained in nondiscrimination laws to create a safe and effective learning environment.

This memo should not be construed as legal advice to any specific person or entity. The Wisconsin Institute for Law & Liberty (WILL) is a 501(c)(3) nonprofit organization that is providing this memo as a general explanation of the law.