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September 20, 2017

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:

The Dignity in Schools Campaign (“DSC”) submits this letter in response to the U.S. Department of Education’s (“the Department”) request for comments on the evaluation of existing regulations. DSC is a coalition of over 100 grassroots and education advocacy organizations in 29 states. Since its inception in 2006, DSC members have worked to dismantle the school-to-prison pipeline by advocating for educational environments that keep students in school and learning. We have challenged the systemic use of exclusionary discipline practices that disproportionately impact students of color, students with disabilities, and students who identify as Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ), which the Department’s most recent civil rights data and other national research verifies.¹

DSC 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, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Individuals with Disability Education Act. The Department is responsible for enforcing these federal civil rights laws, which protect individuals from discrimination based on race, color, national origin, sex, and disability. Each of these laws require clarifying regulations and guidance to ensure full

¹ U.S. Dep’t of Education, 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>. *See also*, Hilary Burdge, Adela C. Licona & Zemi T. Hyemingway, LGBTQ Youth of Color: Discipline Disparities, School Push-out, and the School-to-Prison Pipeline 2, https://gsanetwork.org/files/aboutus/LGBTQ_brief_FINAL-web.pdf (“Research shows that LGBTQ youth of color in particular face persistent and frequent harassment and bias-based bullying from peers and school staff as well as increased surveillance and policing, relatively greater incidents of harsh school discipline, and consistent blame for their own victimization.”).

protection of students' civil rights. Given that bias against children and youth of color is especially evident with regards to how our nation's schools and districts discipline students, we write to highlight the strong need for the Department's regulations and guidance enforcing Title VI of the Civil Rights Act and the disparate impact provision, in particular.

Title VI of the Civil Rights Act (Title VI) provides that no person 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."² Title VI also requires each federal agency that provides financial assistance to programs and activities to enforce this provision "by issuing rules, regulations, or orders of general applicability." The Civil Rights Act does not provide a definition for discrimination. Consequently, the Title VI regulations and related guidance have been critical in terms of providing much needed clarification. The disparate impact provision of the Department's Title VI regulations clarifies that methods "which have the effect of subjecting individuals to discrimination" are prohibited, in addition to policies and practices that intentionally discriminate.³

The Department of Justice states that social science 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."⁴ 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.⁵ Research shows that there is no evidence that students of color misbehave more than their white peers.⁶ 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.⁷

² See 42 U.S.C. § 2000d; see also, 34 C.F.R. § 100 et seq.

³ 34 C.F.R. § 100.3(b)(2).

⁴ See e.g., U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL § VII p. 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)).

⁵ U.S. DEP'T OF EDUCATION, *supra* note 1.

⁶ RUSSELL SKIBA, ET AL., NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE, THE EQUITY PROJECT AT INDIANA UNIVERSITY, 2, (Mar. 2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity_NewResearch_010915.pdf.

⁷ SKIBA, *supra* note 6, at 2.

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 of actions that constitute disparate impact, are critical in terms of addressing school discipline policies and practices that discriminate against students of color. In January 2014, the Department of Education and 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.⁸ The guidance was the first of its kind to recognize that students have been subjected to racially discriminatory practices in schools and that racial disparities in discipline data are not explained by more frequent misbehavior by students of color. The guidance also states that a school is in violation of Title VI if it implements policies that have an unfair effect and disparate impact on a certain group, 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.⁹

The Department of Education’s Title VI regulations and guidance are critical tools that can deter schools and districts from denying students educational opportunity and provide the Department with an important mechanism for addressing discrimination in its various forms. These comments apply equally to how disparate impact is treated by the Department of Education and the Department of Justice under other federal anti-discrimination laws, including Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act.

In addition, 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 the Department of Education’s regulations under Part B of the Individuals with Disability Education Act, which address issues related to significant disproportionality in the identification, placement, and discipline of students with disabilities based on race or ethnicity. 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.¹⁰ The Department of Education issued these regulations in direct response to the U.S. Government Accountability Office study showing widespread non-compliance by states with provisions of the IDEA requiring states to identify districts with significant

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

⁹ *Id.*

¹⁰ U.S. DEP’T OF EDUCATION, ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES; PRESCHOOL GRANTS FOR CHILDREN WITH DISABILITIES FINAL REGULATIONS, 34 C.F.R. Part 300, et seq., <https://www2.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-significant-disproportionality-final-regs-unofficial-copy.pdf>.

disproportionality.¹¹ According to the study, most states set such high levels for identifying districts that no districts exceeded them, and, therefore, none were identified. Additionally, states permitted school districts to suspend students of color with disabilities at much higher levels than their white peers. For example, according to the CRDC for 2013-2014, one in four Black boys with disabilities received at least one out-of-school suspension, compared to only one out of ten white boys with disabilities.¹²

It is imperative that the Department maintains all regulations and guidance implementing nondiscrimination laws to ensure robust enforcement of protections afforded to students of color and other marginalized students, including students with disabilities and students who identify as LGBTQ. Thank you for your consideration of these comments. If you have any questions or concerns, please do not hesitate to contact Natalie Chap at natalie@dignityinschools.org.

Sincerely,
The Dignity in Schools Campaign
(www.dignityinschools.org)

¹¹ 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>.

¹² U.S. DEP'T OF EDUCATION, *supra* note 1.