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Hilary Malawer
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U.S. Department of Education
400 Maryland Avenue SW
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Re: Request for withdrawal and replacement of 34 C.F.R. § 300.647(a) in response to "Evaluation of Existing Regulations: Request for Comments," 82 FR 28431 (June 22, 2017), FR Doc. # 2017-13157

Dear Assistant General Counsel Malawer:

Please rescind the definition of "significant disproportionality" in 34 C.F.R. § 300.647, and adopt a definition that is less onerous for local education agencies. The current onerous definition places pressure on them to adopt veiled racial quotas in special education services, which violates the Constitution and federal and state civil-rights laws.

The definition, and related burdens on local education agencies, come from the Obama administration's December 19, 2016 rule dealing with grants and assistance under Part B of the Individuals with Disabilities Education Act (IDEA) governing the Assistance to States for the Education of Children with Disabilities program and the Preschool Grants for Children with Disabilities program. *See* Department of Education, Office of Special Education and Rehabilitative Services, *Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities*, 81 Fed. Reg. 92376 (Dec. 19, 2016).

I. The Rule's Interpretation of "Significant Disproportionality" Encourages Constitutional Violations

The rule, now found at 34 C.F.R. § 300.646 & 300.647, is problematic, because the rule will pressure school districts to violate the Fourteenth Amendment's equal-protection clause through its definition of "significant disproportionality," which focuses on statistical group outcomes, rather than the accuracy of identification or evaluation. See 34 C.F.R. § 300.647 (interpreting 20 U.S.C. § 1418(d)(1)'s reference to "significant disproportionality based on race and ethnicity"); 34 C.F.R. 300.647(a)(1)&(a)(6) (defining disproportionality in terms of comparisons between "one racial or ethnic group" and "all other racial and ethnic groups" in terms of group "outcome").

The notice containing the final version of the rule ignored the agency's duty to interpret statutes so as to avoid potential constitutional problems. There seems to have been a plausible alternative interpretation of "significant disproportionality" that did not raise any potential constitutional problem (an interpretation properly focusing on skewed *process*, rather than improperly focusing on group *outcome* -- such as whether economic, cultural, or linguistic barriers to appropriate identification or placement skewed the *process* for a particular minority group by disproportionately resulting in inaccurate classification of its members as disabled, etc.).

So there was no excuse for adopting the interpretation contained in the rule, which punishes regulated entities for not achieving a racial quota in identification of children as disabled. If regulated entities do not achieve "significant disproportionality" in group outcome, even for reasons beyond their control, 15% of their funds are diverted to coordinated, early intervening services. *See* 34 C.F.R. § 300.647(d)&(e).

Such racial-balance requirements for special education enrollment or identification are unconstitutional, as a federal appeals court has made clear. *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 538 (7th Cir. 1997) (overturning provision in court "decree" that "limits minority enrollment in compensatory education (that is, remedial) programs to the percentage of minority students in the school as a whole. These programs are designed largely although not entirely for minority students, because they have on average more educational deficits. To forbid these students access to these programs on the ground that it would foster unfavorable stereotypes is the kind of 'benign discrimination' thinking ...that the courts have long rejected").

So it was unwise for the rule to financially penalize school districts for not achieving such racial balance. Doing so ignored settled canons of statutory construction. Statutes should not be interpreted as mandating or pressuring regulated entities to use race unless there is no plausible alternative reading of the statute. *See Miller v. Johnson*, 515 U. S. 900, 923 (1995) ("Although we have deferred to the [Justice] Department's interpretation in certain statutory cases . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. . . When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question . . . and should not receive deference"). Penalizing an entity for not meeting "racial targets or quotas" by definition raises "difficult constitutional questions," even when the entity has previously been found guilty of discrimination (which is not the case for the regulated entities subject to this rule). *See Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2524 (2015).

It is improper to pressure a regulated entity to use race, even when the use of race is not strictly required, but merely incentivized. *Lutheran Church-Missouri Synod v. FCC*, 144 F.3d 344 (D.C. Cir. 1998) (invalidating regulation pressuring employer to either meet race-based hiring goals, or show other good-faith efforts to promote diversity). The ban on pressure to use race goes beyond formal requirements to use a quota, to other forms of pressure to use race, and penalties for not using race or trying to meet race-based targets. *Id.; see also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). As the D.C. Circuit Court of Appeals has explained, "we do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical targets." *Lutheran Church,* 141 F.3d at 351.

The rule conceded that significant disproportionality, as it defined it, could be due *not* to racism, but rather due to the completely innocent fact that one racial group contains more disabled or emotionally

disturbed students than other racial groups do. As the notice containing the rule conceded, "The overrepresentation of African American students could be due to…the LEA appropriately identifying all students in the LEA who have an emotional disturbance but underlying variations in the prevalence of those disabilities across racial and ethnic groups results in an overrepresentation of African American students." 81 Fed. Reg. at 92381. Yet the rule penalizes local governments by diverting 15% of their funds when they cannot avoid such "significant disproportionality" for such perfectly legitimate reasons. *See* 34 C.F.R. § 300.647(d)&(e).

The rule was adopted even though commenters pointed out that state policies modeled on the proposed regulation had resulted in quota systems that harmed minority students. *See, e.g., Comments of Ohio Department of Education* in FR Doc. #2016-03938 (comment ID # ED-2015-OSERS-1032-0283), May 16, 2016, at 2 ("State staff received complaints and comments that districts were delaying or refusing to evaluate students for possible identification" due to informal quotas limiting identification of minorities); Comment ID # ED-2015-OSERS-0132-0258 (May 16, 2016) at 14 ("For example, one state reported that in the first year after it implemented LEA-level identification of significant disproportionality, it started with criteria somewhat like that currently proposed by the proposed rule, although a minimum cell size of 10 was applied to both numerator and denominator. After identifying approximately 30 LEAs for identification alone, state staff heard of districts telling parents that there now were quotas for identification, and no more minorities could be identified.").

The rule was wrongly adopted even though there was an alternative interpretation of "significant disproportionality" that would not cause these problems, but rather avoid them. "A statute is to be construed where fairly possible so as to avoid substantial constitutional questions" even when that means rejecting "the most natural grammatical reading" of a statute and adopting instead a reading that regulates less. *United States v. X-Citement Video*, 513 U.S. 64, 68-69 (1994).

The rule interprets "significant disproportionality" as being based on a crude comparison of the number of minorities versus number of whites with a particular outcome or classification – rather than whether the outcome or classification was more accurate for members of one race rather than another due to disproportionate failure to evaluate or identify members of a particular race correctly. The rule compares the "outcome for children in one racial or ethnic group" not with the correct outcome, but with the "outcome for children in all other racial or ethnic groups." *See* 34 C.F.R. § 300.647(a)(1)&(a)(6).

In short, the rule focuses on the "bottom line" result, rather than the reliability of the process for identifying students as disabled. See Christina Samuels, *Final Rule Released on Identifying Racial Bias in Special Education, Education Week*, December 12, 2016 (regulation compares enrollment of "minority students in special education compared to their peers of other races"), available at http://blogs.edweek.org/edweek/speced/2016/12/disproportionality_final_rule.html.

There is no valid constitutional reason for demanding such racial proportionality in overall outcomes. *See, e.g., Police Association of New Orleans v. City of New Orleans*, 100 F.3d 1159, 1169 (5th Cir. 1996) (city could not promote blacks based on race "to give a better reflection of the racial composition of the city," or "remedy racial imbalances in the police department," absent "specific evidence of past discrimination" by the city).

While interpreting "significant disproportionality" this way may be "grammatically possible," *X-Citement Video*, 513 U.S. at 68-69, it is far from the only possible interpretation of the statute. Indeed, it seems unreasonable to interpret it this way, especially since there seems to be an alternative interpretation of

the statute that would not unconstitutionally pressure schools to have racial quotas in identification of disabled students, but rather would encourage them to identify such students correctly. Such an alternative interpretation is consistent with Supreme Court decisions defining what disproportionalities are significant enough to constitute discrimination in violation of federal workplace discrimination law.

Those Supreme Court decisions reject the "bottom line" approach taken by the Education Department's December 2016 rule, in favor of a focus on an institution's selection *process*, and whether it undermines selection based on merit or qualifications, as revealed through a "gross" disparity between those selected and those who statistics suggest should have been selected – not the ratio of different ethnic groups in the general population. *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n.13 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination," but the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market," not the racial composition of the labor force as a whole; "When special qualifications are required…comparisons to the general population" have "little probative value"); *see also Mister v. Illinois C.G.R. Co.*, 832 F.2d 1427, 1435 (7th Cir. 1987) (what is most relevant is the disparity in how the employer treats actual applicants in the hiring process, not how its workforce compares to the general population in terms of racial percentages); *Hester v. Southern R. Co.,* 497 F.2d 1374, 1379 (5th Cir. 1974) (meaningful comparison would require analysis of statistics concerning the applicant pool and its racial composition, to indicate whether bias affected the selection process).

Even in the Supreme Court's disparate-impact decisions, which do not require a showing of discriminatory intent, *some* flaw in the *process* still must generally be shown, even if the flaw does not have to be rooted in racism. Those disparate-impact decisions state that one "does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the workforce." Rather, one "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989). That means showing that the disparity was the institution's "fault" in the sense of being caused by its flawed decisionmaking process, rather than being caused by external factors, such as a "dearth" of "qualified" minority applicants. *Wards Cove*, 490 U.S. at 660. Under this process-based approach, challengers are "responsible for isolating and identifying the specific employment practices…responsible for any observed statistical disparities," rather than just pointing to different overall outcomes by race. *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). (Arguably, such practices could include failure to take into account the "economic, cultural, or linguistic barriers to appropriate identification or placement in particular educational settings," which could artificially inflate or reduce the number of minority children labeled as disabled. *Cf.* 34 C.F.R. § 300.647(d)(ii) (discussing such barriers as potential causes of disproportionality)).

But if a disparity is not caused by something in the institution's selection *process*, then the institution is not guilty of intentional discrimination, or even, generally speaking, disparate impact. *See Elston v. Talladega Cnty Bd. of Educ.*, 997 F.2d 1394, 1412-1413 (11th Cir. 1993) ("racial imbalance" in enrollment "in the public schools" would not be actionable disparate impact if it resulted from "factors, such as residential housing patterns, which are beyond the control of state officials," *citing Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

The Department conceded that racial quotas would undermine IDEA's mandate to "make a free appropriate public education available to all eligible children with disabilities" 81 Fed. Reg. at 92381.

Indeed, it conceded that other provisions of federal education law forbid the "use of racial or ethnic quotas limiting a child's access to special education and related services," and adopting a quota "would almost certainly conflict with their obligations to comply with other Federal statutes, including civil rights laws governing equal access to education." *Id.* at 92381.

But it concluded that rather than withdrawing its proposed rule financially penalizing schools for not meeting a quota, it would just include in the final rule a meaningless disclaimer of any intent to violate those other laws through this rule. *Id.* at 92381; 34 CFR § 300.646(f) ("Rule of construction. Nothing in this section authorizes a State or an LEA to develop or implement policies, practices, or procedures that result in actions that violate the requirements of this part, including requirements related to child find and ensuring that a free appropriate public education is available to all eligible children with disabilities.").

That doesn't change the unconstitutionality of the rule. A rule penalizing a regulated entity for not using race is invalid, even when the rule does not purport to relieve regulated entities of any conflicting legal duties. *Compare Lutheran Church—Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (invaliding FCC's diversity rule for hiring by regulatory broadcasters, as unconstitutionally discriminatory against white males, even though the rule did not purport to repeal civil-rights laws such as Title VII that have been interpreted by some courts as prohibiting the same sort of diversity policies, *see, e.g., Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997) (Title VII forbade race-based diversity hiring); *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) (Title VII forbade race-based layoff to preserve diversity)).

Rather than focusing on the racial bottom line of how many members of one race are identified as disabled versus members of another race, the Department should have focused on the process used to identify children as disabled, and whether there was something faulty in that process that disproportionately harmed members of a particular race. Such an interpretation avoids the serious constitutional issues created by the regulation in its current form.

Statutory provisions such as the "significant disproportionality" provision should be interpreted so as to avoid forcing regulated entities to even potentially use race. *See, e.g., Miller*, 515 U. S. at 923 (Civil Rights Division interpretation that "compels race-based districting…by definition raises a serious constitutional question . . . and should not receive deference"); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (construing statutory language in federal labor laws extremely narrowly not to cover religious schools to avoid potential constitutional issue – even though doing so effectively created an unwritten exemption to the law for religious schools); *Northwest Austin Municipal Utility District No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009) (construing Voting Rights Act's reach narrowly to avoid possible constitutional federalism problems).

Even when an agency would otherwise receive great deference in interpreting a statute, it will not receive any deference from the courts where its interpretation would raise potential constitutional problems. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 574-575 (1988) (construing National Labor Relations Act narrowly to avoid potential free-speech problems, despite the broad deference that the NLRB's interpretation usually receives).

So if a court is confronted by a challenge to this disproportionality regulation, it could be struck down, given that it unconstitutionally pressures regulated entities to make race-based selections. That is made clear by the *People Who Care* and *Lutheran Church* decisions. *See People Who Care v. Rockford Board of Education*, 111 F.3d 528, 538 (7th Cir. 1997) (overturning as unconstitutional quota a provision in a court

"decree" that "limits minority enrollment in compensatory education (that is, remedial) programs to the percentage of minority students in the school as a whole"); *Lutheran Church—Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (invaliding FCC's diversity rule for hiring by regulatory broadcasters, even though there were alternative ways of avoiding penalties under it other than meeting a race-based hiring goal, because it incentivized compliance with such goals).

II. 'SIGNIFICANT DISPROPORTIONALITY' SHOULD BE REDEFINED TO FOCUS ON DEVIATIONS FROM CORRECT OUTCOMES, NOT MERE RACIAL PROPORTIONALITY

Accordingly, "significant disproportionality" in the rule should be redefined to change 34 CFR § 300.647(a) so that it compares the "outcome for children in one racial or ethnic group" with the correct outcome for that group, not just the "outcome for children in all other racial or ethnic groups," as 34 C.F.R. 300.647(a)(1)&(a)(6) currently do. Only if the outcome is disproportionately likely to be erroneous for one group than for another, to an extent that significantly overclassifies members of that group as disabled, should a "significant disproportionality" be found. (A finding of "significant disproportionality" should also require showing of both statistical and practical significance. *Cf. People Who Care*, 111 F.3d at 537-38 (that minority achievement gap was no "greater than in school districts around the country that have not been held to have discriminated against minority students" weighed against finding it significant))

For example, if black children are wrongly classified as disabled at a higher rate than other children are wrongly classified as disabled, to a degree that reflects both statistical and practical significance, that could be a basis for finding "significant disproportionality."

But if black children are correctly classified as disabled, then there is no "significant disproportionality" even if the number of blacks *classified* as disabled is greater than the number of students of other races due to the fact that more black children actually *are* disabled in the relevant education agency. As the Supreme Court has observed, it is "completely unrealistic" to argue that minorities should be represented in each field or activity "in lockstep proportion to their representation in the local population." (*See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)).

CONCLUSION

I request that the Department rescind the definition of "significant disproportionality" in 34 C.F.R. § 300.647, and adopt instead a definition that does not improperly penalize local education agencies for not achieving *de facto* racial quotas in special education services. At a minimum, the Department needs to change provisions such as 34 C.F.R. 300.647(a)(1)&(a)(6) (defining disproportionality in terms of comparisons between "one racial or ethnic group" and "all other racial and ethnic groups").

Sincerely,

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