July 30, 2012

Maryland State Board of Education
c/o Maryland State Department of Education
200 West Baltimore Street
Baltimore, MD 21201
Via Fax: 410-333-2226 (This letter is 4 pages long)

Dear State Board of Education:

As a lawyer who used to bring civil-rights cases for a living, I am writing in opposition to the Board of Education's proposed rule on race in school discipline, COMAR 13A.08.01.21, *Reducing and Eliminating Disproportionate/Discrepant Impact*. It is contained in the July 2012 *Report of the Maryland Board of Education: School Discipline and Academic Success: Related Parts of Maryland's Education Reform*. (According to the Washington Post, the proposed rules require a state review and a 30-day period for additional public comment before they can be adopted. If this is not the appropriate place to send comments, or I am using the wrong format, or not including required information, please let me know where and how to send my comments.)

COMAR 13A.08.01.21 violates the Equal Protection Clause of the Constitution by pressuring schools to discipline students based on their race, rather than their individual conduct and the content of their character. That is at odds with court rulings like the federal appeals court ruling in *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 534 (7th Cir. 1997), which forbid both racial-balancing, and quotas, in school discipline.

Crimes and infractions are not evenly distributed among racial groups, as the Supreme Court noted in *United States v. Armstrong*, 517 U.S. 456 (1996). As that 8-to-1 Supreme Court ruling emphasized, there is no legal "presumption that people of *all* races commit *all* types of crimes" at the same rate, since such a presumption is "contradicted by" real world data. For example, "more than 90% of" convicted cocaine traffickers "were black" in 1994, while "93.4% of convicted LSD dealers were white." Crime rates are higher in some ethnic groups than others.

But the Board of Education seems to have forgotten that reality in proposing a rule that would require school systems to discipline and suspend students in numbers roughly in

proportion to their racial percentage of the student body, and require school systems that currently don't do so to implement plans to eliminate any racially "disproportionate impact" over a three-year period. Thus, it is imposing quotas in all but name.

The Board has also seemingly overlooked a federal appeals court decision that ruled that schools cannot use racial proportionality rules for school discipline, since that violates the Constitution's Equal Protection Clause. *See People Who Care v. Rockford Board of Education*, 111 F.3d 528, 534 (7th Cir. 1997). That court ruling also said that a school cannot use race to offset "disparate" or "disproportionate impact," and that doing so is not a valid kind of affirmative action.

The proposed rule, COMAR 13A.08.01.21, is found on page 25 of the *Report of the Maryland Board of Education: School Discipline and Academic Success: Related Parts of Maryland's Education Reform.* It reads as follows:

> A. The Department shall develop a method to analyze local school system data to determine whether there is a disproportionate **impact** on minority students. B. The Department may use the discrepancy model to assess the impact of discipline on special education students. C. If the Department identifies a school's discipline process as having a disproportionate **impact** on minority students or a discrepant impact on special education students, the school system shall prepare and present to the State Board a plan to reduce the **impact** within 1 year and eliminate it within 3 years. (boldface added)

Thus, the Board seeks to ban "disproportionate *impact*" – the term for something not motivated by racism that nevertheless unintentionally affects or weeds out more minorities than whites – in school discipline. But it has done so without the qualifications and limitations to that concept that apply in court. The Supreme Court has allowed minority *employees* to sue over such "disparate impact" in limited circumstances, but it has refused to allow minority *students* to sue over it. Its ruling in *Alexander v. Sandoval*, 532 U.S. 275 (2001), said that individuals could not sue under Title VI of the Civil Rights Act for "disparate impact," only intentional discrimination. Title VI is the federal law that covers racial discrimination in schools and other institutions that receive federal funds. (The Board's proposed rule is not needed to prevent racism or deliberate discrimination, since there are already several laws banning discriminatory *treatment* of anyone based on their race, as opposed to disparate *impact*, that students victimized by racial discrimination can already sue under, like 42 U.S.C. 1981, and Title VI).

The fact that there are disparities in suspension rates between different ethnic groups does NOT prove racism by school officials, or discrimination. For example, in a ruling by Justice Sandra Day O'Connor, the Supreme Court said that 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)). In an earlier ruling, Justice O'Connor noted that it is "unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." (*See Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992 (1988).)

The Constitution does not forbid "disproportionate impact" or "disparate impact." The Supreme Court made that clear in *Washington v. Davis*, 426 U.S. 229, 248 (1976), where it noted that it cannot be denied "that a whole range of tax, welfare, public service, regulatory, and licensing statutes" are "more burdensome to the poor and to the average black than to the more affluent white," yet they are still constitutional.

The fact that a higher percentage of black students are suspended than whites in most schools is not, for the most part, the product of racism by school officials, but rather reflects greater infraction rates tied to lamentable factors like poverty and single-parent households. As a scholar at the Brookings Institution notes, "children who spend time in single-parent families are more likely to misbehave, get sick, drop out of high school and be unemployed." As the National Center for Health Statistics notes, while most whites and Asians are born to two-parent families, most blacks and Hispanics are not.

Since infraction rates are typically higher among such minority groups, their discipline and suspension rates are naturally higher as well, even if that is bureaucratically defined as "disproportionate impact." This is a reflection of unpleasant realities, not school officials' racism. Preventing such discipline will only cause more disorder and violence in the schools, especially in predominantly black schools, thus harming the very disadvantaged people the Board seeks to help. Students are commonly victimized by members of their own race and peers of the same ethnicity. So watering down discipline for members of a racial group does not help that group. The fact that black students have been shortchanged by the larger society is not a reason to add insult to injury by depriving them of an orderly school environment and effective school discipline, or subjecting them to the "soft bigotry of low expectations."

Pressure to discipline minorities and whites in numbers proportional to their percentage of the student body may also lead to other forms of racial discrimination in discipline, such as needless suspensions of white and Asian students for technicalities that would result in nothing more than a warning for a black student.

Writing in the Summer 2006 edition of the Manhattan Institute's *City Journal*, educator Edmund Janko explained how informal pressure from bureaucrats to suspend students in numbers proportional to their race (what Maryland's Board now seemingly seeks) led him to engage in unfair racial discrimination against students, such as suspending white students for conduct that "would mean, in cases involving minority students," merely "a rebuke from the dean and a notation on the record or a letter home":

> More than 25 years ago, when I was dean of boys at a high school in northern Queens, we received a letter from a federal agency pointing out that we had suspended black students far out of proportion to their numbers in our student population. Though it carried no explicit or even implicit threats, the letter was enough to set the alarm bells ringing in all the first-floor administrative offices. . .
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> There never was a smoking-gun memo . . . but somehow we knew we had to get our numbers "right"—that is, we needed to suspend fewer minorities or haul more white folks into the dean's office for our ultimate punishment.What this meant in practice was an unarticulated modification of our disciplinary standards. For example, obscenities directed at a teacher would mean, in cases involving minority students, a rebuke from the dean and a notation on the record or a letter home rather than a suspension. For cases in which white students had committed infractions, it meant zero tolerance. Unofficially, we began to enforce dual systems of justice. Inevitably, where the numbers ruled, some kids would wind up punished more severely than others for the same offense.
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> I remember one case in particular. It was near the end of the day, and the early-session kids were heading toward the exits. . .The boy was a white kid, tall, with an unruly mop of blond hair. He was within 200 feet of the nearest exit and blessed freedom. But he

> couldn't wait. The nicotine fit was on him, and he lit a cigarette barely two yards from me. I pounced, and within 20 minutes he was suspended—for endangering himself and others.

Janko's article is aptly titled, *It Still Leaves a Bad Taste*, and is available at http://www.city-journal.org/html/16_3_diarist.html . His disturbing and unpleasant experience may be mild compared to what Maryland teachers and principals will experience if the proposed rule, COMAR 13A.08.01.21, is adopted in its current form. The federal agency that pressured Janko is the Education Department's Office for Civil Rights (OCR) — where I used to work as a lawyer. Its disparate-impact regulations — which are of dubious validity in banning *any* kind of disparate impact *at all*, after the Supreme Court's 2001 decision in *Alexander v. Sandoval* barring student lawsuits against practices with a disparate impact — never purported to require school systems to eliminate *all* racially "disproportionate impact," the way the Board apparently seeks to do in school discipline through the proposed rule. Its rules never reached all statistical disparities. Moreover, even if a school's policies' did have a meaningfully "disproportionate impact," the school only needed to demonstrate to OCR a "substantial legitimate justification for its practice," to keep using it. *See Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). No such common-sense exception for educational justifications is spelled out in the proposed rule. In short, Janko discriminated as he did because of bureaucratic dictates that were far less extreme than what may result from COMAR 13A.08.01.21. This appears to be far more extreme. If COMAR 13A.08.01.21 is adopted in its current form, discrimination far worse than what Janko recounts will likely occur in Maryland's schools.

Sincerely,

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