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HOMELAND SECURITY & PUBLIC SAFETY, CHAIR
CORRECTIONS
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FILE# **ML-49043-21**
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The Honorable Ken Paxton, Attorney General
Office of the Attorney General
ATTN: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Paxton,

I write to request an opinion from the Attorney General on a series of related questions affecting the public interest.

I. Requests for Opinion:

Specifically, I seek an Attorney General Opinion clarifying:

- Whether, consistent with their obligations under Texas law (including Texas Education Code Sec. 1.002(a) and Art. I, Sec. 3a of the Texas Constitution (in its current form, the "Texas Equal Rights Amendment")), any (a) public school, (b) independent school district, (c) open-enrollment charter school, or (d) employee of any: (i) public school, (ii) independent school district, or (iii) open-enrollment charter school operating within the State of Texas (together, the "Educators" and each an "Educator") may, because of the race, ethnicity, sex, or gender of any student, choose what disciplinary action to impose on any student or alter any student-disciplinary decision or action?

- Whether, consistent with the Educators' obligations under Texas law (including the Texas Equal Rights Amendment and the previously cited provision of the Texas Education Code), the answer to the prior question would change if any Educator chose what disciplinary action to impose on any student or altered any student-disciplinary decision or action in order to produce or maintain statistical parity in the allocation of disciplinary actions between groups of students in various racial, ethnic, sex, gender, or disability classifications?

- Whether the answer to either or both of the questions above would change, should the U.S. Department of Education offer "guidance" that it so interprets or so will interpret Federal law and regulations as to condition the availability of federal funding to Educators on (or that it will pursue a policy of instituting investigations of schools or systems to determine the presence of discrimination on the basis of) a "disparate impact" of facially neutral,

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even-handedly applied school disciplinary policies on groups of students in different racial, ethnic, sex, gender, or disability classifications?

II. Relevant Authority:

In 1967, Texas ratified Section 3a of the Bill of Rights into Article I of the Texas Constitution. In 1972, Texas amended that provision into the current Texas Equal Rights Amendment. Ever since, the Texas Equal Rights Amendment has been entitled and read as follows: "EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."

Meanwhile, Sec. 1.002(a) of the Texas Education Code has provided since at the latest 1995 that "[a]n educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institution shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries pursuant to this code."

III. Application of Authority to Questions Raised

Between them, these authorities require all Educators to provide equal educational opportunities to all enrolled students, without denial or abridgement because of sex, race, color, creed, or national origin. The requirements of the latter authority require the provision of equal opportunities for "any individual within the jurisdiction" – this guaranty has no exception based on disability status or lack thereof. For the purposes of this letter, I assume that Texas's legal guaranty of equal educational opportunities to all enrolled students without regard to students' "sex" includes or could include an implied guaranty that such opportunities will not be denied or abridged because of "gender" classification.

I postulate that these provisions of the Texas Equal Rights Amendment and the Texas Education Code, in forbidding Educators from denying or abridging the educational opportunities available to students because of the race, ethnicity, sex, gender, or disability status of such students, implicitly forbid Educators from, because of the race, ethnicity, sex, gender, or disability status of any student, choosing what disciplinary action to impose on any student or altering any student-disciplinary decision or action. Definitionally, any such action would deny or abridge Texans'

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equality under the law and/or the equal educational opportunities made available to individuals within Texas.

As the rights of Texans under the Texas Equal Rights Amendment and the Texas Education Code are individual rights, I see no way that an interest in jerry-rigging statistical parity between groups of students in various racial, ethnic, sex, gender, or disability classifications could alter Educators' obligations under the Texas Equal Rights Amendment and the Texas Education Code. Nor any way that any "guidance" offered by the Federal Department of Education could alter these obligations. This is true for several reasons.

A. Longstanding Regulations Don't Authorize Application of "Disparate Impact" Analysis and Such Application Would Raise Serious Constitutional Problems

First, the Supreme Court has clearly established that the Equal Protection Clause of the 14th Amendment and Title VI ban *intentional* discrimination by state agents and federal-funding recipients, respectively, but *only intentional* discrimination.[1] There is good reason to doubt that the relevant federal regulations alter Title VI's terms to condition federal funding on the outcome of recipients' facially neutral policies without a showing of discriminatory intent.[2] Simply put, the regulations at issue do not say this on their face and the canon of Constitutional avoidance requires reading them to avoid such a construction.

B. If They Did, the Regulations Would be Invalid

For a moment, though, set aside those reasons to doubt that existing regulations condition Federal funding on an absence of a "disparate impact" without a showing of discriminatory intent; *to the extent* that this is what the relevant regulations mean, they are invalid – agencies cannot use their regulatory authority to legally alter the scope of Title VI's enacted terms.[3] After all, Title VI authorizes agencies only to "to issu[e] rules, regulations, or orders of general applicability which

[1] *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that the Fourteenth Amendment's Equal Protection Clause forbids only intentional discrimination); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that Title VI prohibits only race discrimination that, if practiced by a state entity, would be unconstitutional under the Fourteenth Amendment's Equal Protection Clause); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) ("[I]t is similarly beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination.").

[2] For a thorough discussion of the reasons that existing regulations cannot have this meaning, *see*, Gail Heriot and Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 Tex. Rev. L. & Pol. 471, 544-563 (2018).

[3] See, generally, Heriot and Somin, 22 Tex. Rev. L. & Pol. at 532-544.

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shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."[4] Vastly expanding the reach of Title VI to cover situations where no discriminatory intent is present is *not* "consistent with achiev[ing its] objectives[,]" it fundamentally alters those objectives. Just as "Congress' power under § 5 [of the 14th Amendment] extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment" and not to "alter[ing] the meaning" of that Amendment,[5] the federal agencies' power to regulate as necessary to "achieve[ ]" statutory ends cannot include a power to alter those ends. § 2000d-1's regulatory authorization *must* include a parallel limitation that administrative actions are valid only to the extent they are congruent and proportional to the harm and regularity of actual instances of intentional discrimination.

C. New "Guidance" Would Have No Right to Customary Judicial Deference

Nor could the Federal Department of Education now transform these regulations into "disparate impact" regulations conditioning funding on the outcome of facially neutral policies without a showing of discriminatory intent through issuing any new, administrative "guidance" that would be entitled to the usual levels of judicial deference.[6]

The Supreme Court of the United States has long held that "[a]n agency's interpretation of a … regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view."[7] And any new "guidance" now issued – the Department of Education noticed-out a request for comment on such a new "guidance" document on June 8, 2021 – would be far from "a consistently held agency view." From September 1981 until January 2014, official policy held that "Where there is evenhandedness in the application of discipline criteria, there can be no finding of a Title VI violation, even when black students or other minorities are disciplined at a disproportionately high rate."[8] In January 2014, the Department of Justice and Department of Education reversed this longstanding position, through issuance of a "Dear Colleague" guidance letter in which they asserted that "[s]chools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against

[4] 42 U.S.C. § 2000d-1.
[5] *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).
[6] See, generally, Heriot and Somin, 22 Tex. Rev. L. & Pol. at 556-563.
[7] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987)); *see also*, *Perez v. Mortg. Bankers Ass'n.*, 575 U.S. 92, 123 n.4 (2015, J. Thomas, concurring).
[8] Memorandum from Asst. Sec'y of Educ. Clarence Thomas to Sec'y of Educ. Terrel Bell (Sept. 8, 1981).

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students on the basis of race."[9] The Departments further reversed that reversal in 2018, on the basis that "the [previous] Guidance and associated documents advance policy preferences and positions not required or contemplated by … Title VI."[10] The Department of Education has since made clear that, following review of the comments submitted this summer, it intends to issue guidance building on the rescinded 2014 policy.

It is hard to conceive of a policy better capturing the Supreme Court's reasoning in exempting from deference inconsistent regulatory decisions. Vacillations in policy have not been based in changes of law or in the development of new data undermining the basis of prior policies; they have instead resulted (and will, presumably, again result later this year) from acts of will by unelected officials of the Federal government. Should DoEd and DOJ again reverse policy as they've indicated they intend to do, the reversal would not be preclusive of parties' actual rights under Title VI in the ensuing litigation.

D. Even If It Did, Title VI Conditions Funding, Rather than Preempting State Law

Finally and most pertinently, to the extent that the Federal government could legitimately condition educational funding through the Department of Education's issuance of "guidance" concerning decades-old, promulgated regulations and to the extent that it does so, such Federal action could not preempt Texas law forbidding intentional discrimination by Educators. By its own terms, Title VI *conditions* federal funding on compliance, rather than preempting or invalidating contrary state laws.[11] Nothing the current Department of Education could now do could possibly change Educators' obligations under the law of Texas.

IV. Conclusion

For these reasons, it appears that Texas law establishes that Educators cannot, because of the race, ethnicity, sex, gender, or disability status of any student, choose what disciplinary action to impose

[9] *Joint "Dear Colleague" Letter on Nondiscriminatory Adm. of School Discipline*, U.S. Dept. of Educ. (Jan 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

[10] *Joint "Dear Colleague" Letter on Withdrawal of Previous Policy and Guidance*, U.S. Dept. of Educ. (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[11] 42 U.S.C. § 2000d-1 ("Each federal department and agency … is authorized and directed to effectuate the provisions of [Title VI] with respect to [its] program[s] … (1) by the termination of or refusal to grant or to continue assistance under such program[s] or activit[ies] to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement… or (2) by any other means provided by law[.]"). C.f. *Hi-Voltage Wire Works, Inc.v. City of San Jose*, 12 P.3d 1068, 1088 (Cal. 2000) (recognizing that Title VI does not preempt "a state law that prohibits" allegedly well-intentioned racial discrimination).

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on any student or alter any student-disciplinary decision or action. This prohibition applies, even where an Educator would take such action to produce or maintain statistical parity in the allocation of disciplinary actions between groups of students in various racial, ethnic, sex, gender, or disability classifications. And nothing the Federal Department of Education chooses to try to do can legally change these obligations of Texas Educators to make disciplinary decisions without regard to identitarian classifications of Texas students.

Respectfully,

James White
State Representative
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