

July 23, 2021

Attn: Acting Assistant Secretary for Civil Rights Suzanne Goldberg
U.S. Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue, SW
Washington, DC 20202-1100

Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline (Docket ID ED–2021–OCR–0068)

Dear Acting Assistant Secretary Goldberg,

The undersigned organizations welcome the opportunity to provide comments on the Request for Information Regarding the Nondiscriminatory Administration of School Discipline. We submit these recommendations as a collaboration of 9 national organizations seeking to advance shared education equity priorities through federal, state, and local policy and advocacy. This administration has an opportunity to advance policies that serve and support improved outcomes and school climate for students living in poverty, students with disabilities, students learning English, students experiencing homelessness and in the foster care system, students who are incarcerated, undocumented students, Black and Brown students, Native students, Asian students, and students who identify as LGBTQ. We recognize that these are cross-cutting and intersectional issues, and that many students experience multiple vulnerabilities (e.g., students of color, students with disabilities, and English-language learners are dramatically over-represented among students who experience homelessness), which means that proposed actions will require careful consideration for addressing multiple needs.

Our groups cover a wide range of issues and have come together to agree on important considerations for students and school discipline policies. Our comments are organized as follows:

- I. Previous, Current, and Future Guidance and Regulations
- II. Evidenced-Based, Promising Practices for Non-Discriminatory School Discipline
- III. Educator Preparation, Experience, Professional Development, Staff Diversity, and School Staffing
- IV. Research and Data on the Impact of Discriminatory School Discipline Practices

I. PREVIOUS, CURRENT, AND FUTURE GUIDANCE AND REGULATIONS

The need for guidance on the nondiscriminatory administration of school discipline is clearly demonstrated by the Civil Rights Data Collection (CRDC) data which consistently shows that students of color face disproportionate disciplinary actions despite no evidence that these

students are more likely to misbehave. Starting in preschool there are racial disparities in out-of-school suspensions. According to the Department of Education's CRDC data, Black preschool students accounted for 18.2 percent of total enrollment but received 43.3 percent of one or more out-of-school suspensions. Multiracial preschool students made up 4.1 percent of total enrollment but received 6.5 percent of one or more out-of-school suspensions. American Indian or Alaska Native students accounted for 1.1 percent of enrollment but received 1.7 percent of one or more out-of-school suspensions.

The most recent discipline data from the 2017-2018 CRDC confirms that discriminatory discipline persists. In the most recent data collection, Black students were 4 times more likely than white students to be suspended out of school at least once, Native students were twice as likely to receive at least one out-of-school suspension. Underscoring the urgent need to apply an intersectional lens, Black and Native girls were 5 times and 3 times more likely to receive at least one out of school suspension.

Students with disabilities served under the Individuals with Disabilities Education Act (IDEA) represented 13 percent of total student enrollment but 27 percent of students referred to law enforcement. Black students with disabilities represented 18 percent of all students but 32 percent of those referred to law enforcement. Students with disabilities were also overrepresented in exclusionary disciplinary actions as shown by the 2017–18 CRDC data. Despite representing only 13 percent of the student population, they represented 25 percent of all students who received one or more out-of-school suspensions and 15 percent of those who were expelled without educational services in 2017–18. Black students with disabilities represented 26 percent of expulsions without educational services although they accounted for only 18 percent of all students provided services under IDEA in 2017–18.

Students experiencing homelessness have been found to be disciplined at greater rates in comparison to their housed peers who are not economically disadvantaged, at 16% and 4% respectively.¹ This number is also greater than that of economically disadvantaged students who have never experienced homelessness, who are disciplined at a rate of 11%. The disproportionality also affects young children experiencing homelessness, with 9% of children in the second grade and below being suspended or expelled from school, on par with the 8% of high school students who have never experienced homelessness that were also at some point subjected to disciplinary action. The starkest contrast is seen with students who had previously experienced homelessness, who are disciplined at the highest rate at 18% in comparison to their housed peers.

Specifically, the previous 2014 Department of Education (ED) Office of Civil Rights (OCR) and the Department of Justice (DOJ) Civil Rights Division's (CRT) Dear Colleague letter (DCL) and guidance packages on school discipline should be strengthened and reissued in a timely

¹ Erb-Downward, J., & Blakeslee, M. (2021). Recognizing trauma: Why school discipline reform needs to consider student homelessness. University of Michigan's Poverty Solutions, https://poverty.umich.edu/files/2021/05/Poverty-Solutions_Recognizing-Trauma_School-Discipline-Reform_May2021-1.pdf

manner. The new guidance should be developed collaboratively by the DOJ's CRT, ED's OCR and ED's Office of Special Education Programs (OSEP) to address the disturbing disparities in the discipline of students with disabilities and students of color. In addition, the full implementation of the [Equity in IDEA regulations](#), effective in 2018, is needed in order to address the overuse of harsh disciplinary practices, including suspension, expulsion, and the use of aversives such as seclusion and restraint on students with disabilities including students of color with disabilities. In addition, it is necessary to include guidance on the rights of students experiencing homelessness listed within the McKinney-Vento Homeless Assistance Act, to increase awareness of an often overlooked population, and prevent violations of this civil rights law through the administration of various disciplinary practices, e.g. the suspension of required McKinney-Vento services, such as transportation.

II. EVIDENCE-BASED, PROMISING PRACTICES FOR NON-DISCRIMINATORY SCHOOL DISCIPLINE

Recommend School-Wide Interventions for Creating Positive Climate

The [science of learning and development](#) provides critical insights on the importance of belonging, identity, relationships, and other key factors in maximizing student success. These insights must be considered in developing [equitable learning environments](#) that will increase the likelihood of students thriving and minimize the need for discipline. Future guidance should provide strong technical assistance to any districts needing to address disproportionate discipline outcomes, including strategies for implementing school-wide interventions and creating positive school climates (i.e. Multi-Tiered Systems of Supports (MTSS), Universal Design for Learning (UDL), culturally responsive teaching (CRT), and restorative practices). We know that evidence-based alternative practices to suspensions like MTSS, restorative justice practices, and social, emotional, and health supports not only decrease the number of student disciplinary referrals, but are correlated with improved academic outcomes and improved school climate for students and staff alike. UDL can be applied to any discipline or setting to ensure that all learners can access and participate in meaningful, challenging activities. When educators use UDL, they assume that barriers to learning are in the design of the environment, not in the student. MTSS can be used to address both academic and behavior challenges and a schoolwide approach requires teachers, counselors, psychologists, and other specialists to work as a team to develop integrated plans for targeted support for struggling students. The goal of MTSS is to screen early and give support quickly, using routinely collected data to monitor the effectiveness of behavioral supports.

Reinforce Alternatives to Exclusionary Discipline

Exclusionary discipline practices are associated with lower academic achievement and increased risk of school disengagement. ED's new guidance should reinforce that alternatives to exclusionary discipline, such as a referral to mental health supports, must be nondiscriminatory (e.g., adequately trained professional with competency to meet the needs of young people with dynamic identities and experiences, including LGBTQ+ students, students with disabilities, undocumented students, students experiencing homelessness, students of color, etc., particularly young people who are experiencing more than one of these identities or challenges

at the same time). The guidance should also clearly state that restorative practices, trauma- and healing-informed practices, mental health supports, and tiered systems of support, and infusing social-emotional learning into daily instruction, are alternative approaches to exclusionary discipline.

In addition, the guidance should clearly state the tremendous harms of corporal punishment, restraint, and seclusion and name that there is no educational justification for corporal punishment or seclusion. The guidance should clearly state that given the absence of any possible educational justification, any racial disparity in these treatments of children is a violation of Title VI of the Civil Rights Act. [No evidence exists](#) demonstrating that corporal punishment is an effective response to student behavior. Instead, it is associated with [a range of negative consequences](#), including higher rates of mental health problems; negative parent-child relationships; lower cognitive ability, academic achievement, and self-esteem; and higher risk for physical abuse. Finally, the guidance should state that seclusion should never be used in schools, and restraining students should only be used in rare circumstances when a student is a threat to themselves or others. Furthermore, restraints should only be used by those trained in using them and that training must include de-escalation techniques to limit the use of them. Restraint and seclusion practices do little to address the origin of the behavior and will only exacerbate existing trauma. To reinforce alternatives to these harmful practices, professional development on de-escalating disruptive behavior and building safe-inclusive learning environments must be provided to all school and district staff members.

Provide Steps to Combat Systemic Racism

We expect the new guidance to reverse many of the flawed and racist policies that have plagued schools in this country for far too long such as removing students from schools, incarcerating children at alarming rates, enforcing immigration laws in schools, and increasing the presence of police in schools. We must make continued gains for students of color by advancing more evidence-based and equitable policies regarding school climate and discipline, and boosting the level of civil rights oversight and enforcement. Discriminatory discipline is tied not only to the school-to-prison pipeline, but also lower rates of high school graduation and college enrollment, which limits economic opportunities for students, trapping them in cyclical poverty. For students experiencing homelessness, who are disproportionately students of color and face disproportionate rates of discipline in comparison to their housed peers, the lack of a high school diploma or GED is the biggest risk factor of continued homelessness in adulthood. These policies also affect the school climate for students and educators, which is tied to students' mental health and attitude towards school. In any guidance, ED should explicitly name the ways that certain students of color experience additional marginalization (or unlawful discrimination) in the context of school discipline as a result of their other identities and experiences which intersect with race, such as sex (including sexual orientation, gender identity, and pregnant or parenting status), immigration status, status as a homeless student, and/or disability.

The updated guidance must also address [hair, dress, and grooming codes](#) — which may be facially discriminatory or enforced in a discriminatory manner. It must also outline how

discriminatory dress and grooming policies constitute or lead to race and sex discrimination, setting forth the agency's authoritative interpretation that Title IX and Title VI forbid rules that target students based on race (e.g., bans on hairstyles worn by Black students) and/or sex (e.g. gender-specific dress codes). The guidance should also reiterate that subjective infractions such as "defiance" or "school disturbance" open the door for bias in administrative discretion and may be related to stereotypes. ED should also clearly state that school districts/jurisdictions should not concentrate law enforcement (including school-based law enforcement) or surveillance technologies, including metal detectors, in schools with high proportions of Black, Native, or immigrant students, and doing so is likely a Title VI violation. Surveillance, which may include monitoring students' social media activity, may be a violation of Title VI and/or Family Educational Rights and Privacy Act (FERPA). Metal detectors and other surveillance tools correlate with higher levels of fear and lower perceptions of school safety among students and perception of more violence than is actually present. When students do not feel safe at school, their social, emotional, and academic wellbeing are negatively impacted.²

Furthermore, ED should clearly state that threat assessments can result in discriminatory action and violations of students' privacy rights, and that school personnel (without law enforcement participation) should address behavioral incidents and situations involving students and that, for children with a disability, the Individualized Education Program (IEP) team and the protections provided under IDEA still apply. We are deeply concerned that threat assessments may be used to label students as threats based on data that has no documented link to violent behavior, such as data on disabilities or those seeking mental health care. Moreover, collecting information via threat assessments conveys a damaging and stigmatizing message to educators, students, and parents about students who fall within targeted categories. Therefore, we urge the Department to also emphasize that if states and districts are to adopt threat assessments, at minimum they should adopt models that meet Tier 1 of ESSA's evidence-based practices standard and have rigorous evaluations of their impacts, including not only impacts on discipline and absenteeism, but also on school climate surveys. Furthermore, the Department should make clear that schools implementing threat assessment practices must also require educators and staff to receive bias training.

Finally, the guidance should clearly state that zero-tolerance policies perpetuate systemic racism and are harmful to many students of color.³ The guidance must state that if school districts concentrate zero tolerance policies and/or application of policies in schools with high proportions of Black, Native, or immigrant students, then this is likely a Title VI violation. To change this, schools should implement restorative or other evidence-based practices rather than trying to deter students with harsh punishments. Employing professionals (e.g. educators, counselors, psychologists, behavior specialists, restorative justice coordinators) who can provide classroom-based support and focus on non-punitive responses to infractions will improve equity and reduce disparities in discipline.

² Schildkraut, Jaclyn, and Kathryn Grogan. "Are Metal Detectors Effective at Making Schools Safer? (2019)."

³ Heitzeg, Nancy A. "—Education Or Incarceration: Zero Tolerance Policies And The School To Prison Pipeline".

III. EDUCATOR PREPARATION, EXPERIENCE, PROFESSIONAL DEVELOPMENT, STAFF DIVERSITY, AND SCHOOL STAFFING

Ensuring that students have access to school staff who are diverse, culturally competent, and qualified in content and in working with students from a variety of identities and experiences is extremely important to improving outcomes and school climate for all students. Comprehensive preparation and ongoing training to help educators obtain the knowledge and skills necessary to create safe and inclusive learning environments is particularly important to support students with historically and systemically marginalized identities. Plus, high-quality comprehensive preparation where educators engage in year-long clinical experiences teaching alongside mentor teachers, can help increase retention--a key factor in reducing incidents of exclusionary discipline. ED should issue guidance that supports educators and school staff. This guidance should include resources in the following areas: 1) supporting access to well-prepared, experienced, and certified teachers; 2) understanding and implementing positive classroom management and school-wide strategies that lead to fewer disciplinary actions ; 3) only when absolutely necessary, strategies to implement discipline practices in a nondiscriminatory and restorative manner, with an understanding that restorative justice practices are largely meant to be preventative and includes community-building pieces; and 4) preventing, identifying, and addressing intersectional discrimination in student discipline policies and practices. ED should commit to monitoring school district implementation of approaches like schoolwide positive behavior interventions and supports, to ensure approaches are not being implemented in ways that are inconsistent with critical, culturally affirming approaches to creating a positive school climate.

The Importance of Comprehensive Teacher Preparation and Teacher Experience

ED should recognize the need for comprehensive education preparation programs for both teachers and leaders that offers a thoughtful, science-based, and developmentally sound course sequence that centers on understanding child and adolescent development, addressing implicit bias, creating culturally responsive classrooms, and advancing equity as well as crafting engaging instructional units that connect students' experiences and move them toward deeper learning outcomes. This training must include a strong clinical component interwoven with this coursework and effective educators in schools that model the practices supportive of student development.

Further, there is a relationship between high suspension rates and a higher-than-average number of novice teachers or those without preparation. Given these facts, it is concerning that the Trump administration [removed questions](#) from the CRDC on teacher experience, retention, and absenteeism. Starting this school year (2020-2021), ED will no longer require these key data elements that impact school discipline in its CRDC. As discussed below, ED should consider reinstating those questions because removing them will obfuscate data that can be used by districts and states to identify and close gaps in access to effective educators, which research shows are important to supporting safe and inclusive learning environments.

Emphasize the Importance of Quality Professional Development

Guidance should highlight the importance of regular professional development and coaching for district and school staff so they can implement with fidelity evidence-based practices known to support inclusive and safe schools, including: adult implicit bias reduction, stress management, child and youth development, cultural humility and competency, transformative justice (with the practice of restorative justice as a means of prevention), healing justice, MTSS, trauma- and healing-informed practices, social and emotional learning, etc. All building staff, including administrative staff, custodial staff, and paraprofessionals, should be provided opportunities to learn how to build safe-inclusive learning environments and de-escalate and handle disruptive behavior in school.

Guidance should make clear the importance of increasing investments in developing, hiring, and retaining antiracist/anti-oppression, culturally affirming counselors, social workers, and other mental health professionals in schools — including through a Community Schools approach. Any guidance issued should include research about fostering culturally affirming and sustaining learning environments.

Highlight the Benefits of Staff Diversity

ED should also issue guidance to states related to strategies for increasing teacher diversity, understanding that increasing diversity in teacher populations has been tied to decreases in racial discipline disparities. The guidance should emphasize the need for increasing the capacity of school counseling and mental health programs to help teachers learn how to create safe learning environments.

In addition, the guidance should include strategies to assist schools to be staffed with appropriate human and social service professionals such as counselors, youth development specialists, social workers, McKinney-Vento liaisons, mental health and wellness practitioners, community interventionists, and restorative justice coordinators. Additionally, it should include an emphasis on creating a workforce that contains a broad range of diversity including race, gender, language, life experience, and cultural background to improve understanding and effectiveness in dealing with all communities. This should include best practices for recruitment, training, and outreach to improve the diversity as well as the cultural and linguistic responsiveness of staffers.

Underscore the Harm of Police in Schools

ED should emphasize the need to break the school to prison pipeline, including by replacing police officers with school staff that can support a more positive climate (e.g counselors, psychologists, restorative justice coordinators). Guidance should make clear that this should be done in deep and ongoing consultation with students, teachers, families, and community members. Guidance should also clearly state that, as demonstrated repeatedly in research, police contact is harmful for the well-being and education of children — especially children of color, including children of color who have a disability, are LGBTQ+, or experience additional

forms of marginalization.⁴ Therefore, ED should advise districts to discontinue school-based policing and involvement (including sharing of information) of law enforcement in discipline, well-being visits, or enforcement of other aspects of a child’s education. ED should also share information on school policies or practices related to discipline, the role teachers play in referrals of students for discipline, and the role of implicit bias in disciplinary decisions.

IV. RESEARCH AND DATA ON THE IMPACT OF DISCRIMINATORY DISCIPLINE

Uplift Research on the Impact of Harsh School Discipline Policies on Students

There is a long history of research around the disparate impact of school discipline on different groups of students, particularly on students with disabilities, students of color, students experiencing homelessness, and students impacted by poverty.⁵ Harsh discipline policies have a direct and detrimental impact on academic achievement and can lead to higher drop out rates and lower graduation rates. As has been pointed out in [reports](#) from the Center for Civil Rights Remedies, students are losing substantial amounts of instructional time (“opportunity to learn”) due to in-school and out-of-school suspensions. And since students of color, students experiencing homelessness, and students with disabilities are disproportionately given such discipline, they disproportionately lose instructional time. Any guidance must reiterate the importance of evidenced-based practices grounded in high quality research.

Expand Data Collection and Monitoring by ED’s Office of Civil Rights (OCR)

ED’s OCR should work to develop a system to administer annually, universally, and with high quality⁶, the Civil Rights Data Collection (CRDC). In addition, the data should be disaggregated based on 504 plan status, IDEA disability category, English learners who have disabilities, status as a homeless student, and the racial/ethnic categories used in American Community Survey categories.

ED should work to have accurate and more complete data on discipline data elements, this should include:

- school-related arrests and law enforcement referrals.
- the number of preschool students who received one out-of-school suspension and those who receive more than one out-of-school suspension (disaggregated by race, sex, disability-IDEA, EL, housing status).

⁴ Fisher, B.W., Hennessy, E.A. (2016). School Resource Officers and exclusionary discipline in U.S. high schools: A systematic review and meta-analysis. *Adolescent Research Review*, 1, 217–233.

Theriot, M. (2009). School resource officers and the criminalization of student behavior. *Journal of Criminal Justice*, 37, 280– 287.

Homer, E.M., & Fisher, B.W. (2020). Police in schools and student arrest rates across the United States: Examining differences by race, ethnicity, and gender. *Journal of School Violence*, 19, 192–204.

⁵ Welsh, R. O., & Little, S. (2018). The school discipline dilemma: A comprehensive review of disparities and alternative approaches. *Review of Educational Research*, 88(5), 752-794.

⁶ We believe that any shift to an annual collection must come with additional support for districts (and ideally states) to report accurate data and for OCR to do more comprehensive data checks.

- whether local education agencies (LEAs) early childhood and preschool programs serve all young children; select program characteristics (free, partial/full day, partial/full charge); and disaggregated by race, sex, disability-IDEA, EL, housing status.
- the number of participating students in credit recovery programs that allow them to earn missed credit to graduate from high school disaggregated by housing status.
- the number of participating students in advanced placement (AP) courses related to “other” subjects (including world languages and cultures) and taking AP exams for each course (disaggregated by race, sex, disability-IDEA, EL, housing status).
- the number of students who experience harassment on the basis of perceived gender identity.
- whether an LEA has a web link to policy or policies prohibiting harassment or bullying of students on the basis of all of the following: sex; race, color, or national origin; disability, housing status.
- the number of preschool through grade 12 personnel full time equivalent (FTE) positions and salaries and non-personnel expenditures at the school level.
- the number of inexperienced teachers and those with high absence rates.
- the number and experiences of children with disabilities placed by school districts in non-public schools subject to exclusionary discipline, restraint and seclusion, and other adverse actions.
- identify when an LEA reports statistically significant reductions in any category of disciplinary removal from one year to the next.

In addition, ED should also issue guidance around the reporting of 504-only students. Our organizations are concerned by the findings in the [report](#) by the Center for Civil Rights Remedies, which provides a thorough analysis of several factors facing students with disabilities including lack of Section 504 compliance, discipline disparities and chronic absenteeism, all of which contribute to the continuing poor performance of students with disabilities. Thus, we encourage ED to review and consider implementation of the report’s recommendations to improve civil rights enforcement and ED oversight such as looking into why over 3,000 school districts don’t have a single student identified as eligible under Section 504. Improving this data collection to be annually collected and disaggregated will provide a stronger evidence base for decision making and targeting districts.

Finally, ED should issue guidance reiterating that if an LEA is flagged for possibly inaccurate data reporting, the relevant authority should conduct an audit of the LEA’s internal data, interview relevant stakeholders, and/or compare against other data sources to verify whether the 0 or drop is accurate. If this inquiry uncovers a failure to appropriately report data, then the LEA must immediately correct its data and for the next year, appropriately report data else face a revocation of federal funding. Furthermore, OCR should be empowered to initiate other relevant compliance activities as though a substantive student-specific violation were verified.

CONCLUSION:

In conclusion, we expect ED to take bold action to dismantle the systemic racism, ableism, and sexism deeply embedded in exclusionary discipline policies in schools. Any new guidance must have the goal of attaining racial equity and allocating resources that support a positive school climate. The undersigned organizations strongly urge ED to issue new guidance to meet the needs of students, families, and the educators that serve them.

Thank you for the opportunity to share these recommendations. We look forward to working with you to remove harm and make schools safer and more equitable for all students. For more information or should you have any questions, please contact Morgan Polk at mpolk@nui.org and Lindsay Kubatzky at lkubatzky@ncld.org.

Sincerely,

Alliance for Excellent Education
Center for American Progress
The Education Trust
Education Reform Now
National Center for Learning Disabilities
National Urban League
SchoolHouse Connection
TeachPlus
UnidosUS