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School Discipline Guidance Recommendations

After years of advocacy, the Obama administration released a guidance package on January 8, 2014, including a Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline to assist states, districts, and schools in developing practices and policies to enhance school climate and comply with federal civil rights laws. Unfortunately, that guidance was rescinded by the Trump administration on December 21, 2018. While this rescission did not change the way in which civil rights laws are enforced, it did undermine the protections the guidance describes. The following recommendations are provided below as we urge the Biden administration to strengthen and issue new guidance to ensure nondiscrimination of students in the context of school discipline.

The following are pieces that we do not want to see lost in the Dear Colleague Letter:

- **Disparate impact**, including the three-part test and flow charts.
- **Examples**, including of disproportionality, positive climate and prevention recommendations, and selective enforcement as a potential violation.
- **Remedies**, what the U.S. Department of Education (ED)/Department of Justice (DOJ) can do.
- **Descriptions of the harm** of the school-to-prison pipeline and racially disproportionate discipline.
- **Accountability** for contractors (including school-based police and private security).
- **Equity and safety** are not in conflict.

The following are changes we would like added in the Dear Colleague Letter:

Role of the Department of Education (ED) and ED's Office for Civil Rights (OCR)

- Provide an overview of ED's role in implementing and enforcing laws protecting students from discrimination related to school discipline.
- Clarify OCR's role in investigating claims of discriminatory school discipline practices.
- Describe the various tools ED and DOJ will use to intervene when there is noncompliance, including resolution agreements with specific corrective actions, withholding of federal funds, etc.

Failure to Act

- Make clear that unlawful discrimination as demonstrated through a disparate impact analysis can occur both when actions are taken (e.g., a discriminatory policy in a school code, uneven enforcement of policy, etc.) but also when actions are not taken (e.g., failure to provide behavioral assessments and intervention plans, failure to conduct manifestation determinations, etc.).¹ These actions, while likely violations of other laws, may also be violations of Title VI

¹ Additional examples include calling the police instead of implementing IEP/504 intervention plans, failure to identify children who are eligible for supports and services under Section 504, and failure to meet the requirements of the McKinney-Vento Homeless Assistance Act for children experiencing homelessness.

when such failures burden students of color more than White students.²

Language and Framing

- Use gender-inclusive language instead of “both sexes.”
- Use language that invites a student-centered, developmentally sound approach to education and schooling (two distinct things).
- Use language that reminds people that adults are responsible for themselves and the healthy development of the young people in their care (who are compelled, incidentally, to be in their care, by law).

Data Collection

- Uplift record keeping, data broadly, and the Civil Rights Data Collection (CRDC).
- Ensure accurate and complete data on discipline data elements, including school-related arrests and law enforcement referrals.
- Clearly state that CRDC collection must be completed to ensure compliance with civil rights laws.³

School-Based Law Enforcement and Limitations on Law Enforcement’s Interactions in and Around Schools

- Clearly state that, as demonstrated repeatedly in research,⁴ 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. Therefore, districts are advised 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.
- Clearly state that training and Memorandum of Understanding (MOU) agreements are insufficient to protect students from the harms of school-based policing generally and racially disproportionate policing specifically.
- Clearly state that in instances in which jurisdictions/districts fail to discontinue school-based police programs, law enforcement (including school-based police) should have no role in

² One source of supporting evidence of such failure is if students of color with disabilities have much higher rates of lost instruction due to disciplinary removals including school-related arrests.

³ ED should consider interventions to address noncompliance with CRDC through the management (e.g., ineligibility for competitive funds or withholding of grant renewals) of grant funds administered by the department.

⁴ Extensive research has shown that school-based policing poses high risks of harm to children in general, and especially to Black and Brown students, including increased risk of academic disengagement, school suspension, school dropout, and arrest and incarceration. School-based policing creates a more punitive learning environment that harms all students in that environment (for example: the Brea Perry and Ed Morris study among others). It must be recognized and acknowledged that the negative effects of school policing fall disproportionately on Black and Brown students. School police are more likely to be placed in schools with higher proportions of disadvantaged or Black and Brown students and are more likely to engage in law enforcement roles in urban, diverse school districts than in suburban, White school districts. As a result, students of color are disproportionately at risk for a host of negative outcomes, including suspension, arrest, and referral to law enforcement.

enforcing the student code of conduct, or other aspects of routine school discipline matters and such programs should be accompanied by extensive scrutiny and oversight by local education agencies (LEAs).

- 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.
- Clearly and specifically articulate Family Educational Rights and Privacy Act (FERPA) limitations on police access to records and describe the potential additional harm to students if records were to be provided to police.⁵
- Clearly state the obligation under FERPA to provide students and parents/guardians access to records (including video and audio recordings) related to discipline or police contact.
- Clearly and specifically name the presence of or coordination with law enforcement, including data sharing and referrals to law enforcement, as particularly harmful to undocumented or immigrant students or students from immigrant families, and potentially in violation of FERPA or *Plyler v. Doe*.
- Clearly describe the ways in which 287g and other agreements with immigration enforcement violate the Title VI rights of students and have no place in schools (including through the sharing of information).

Social-Emotional Learning

- Use language to describe social emotional competencies that centers an equitable, developmentally sound, student-centered, safe, and welcoming learning environment, using contemporary discourse that is informed by critical scholarship and updates older findings.
- Highlight research on social-emotional learning and strategies that teach students skills that enable positive relationships, help them resolve conflicts peaceably, and prevent bullying.
- Describe how social-emotional learning approaches can be racially and culturally affirmative and not another form of policing students of color.
- Include recommendations for creating identity-safe classrooms, such as teaching that promotes understanding, student voice, and student responsibility; cultivating diversity through regular use of diverse materials, ideas, and activities; and creating relationships in caring, orderly, and purposeful classroom environments.
- Clarify the importance of social-emotional learning that is culturally affirming/sustaining, culturally humble, antiracist, anti-oppression, trauma- and healing-informed, and research-based, using contemporary discourse that is informed by critical scholarship and updates older findings.

Support and Training for Adults

- Centering that student behavior is first, attached to student needs and second, directly responsive to the behavior of adults and the culture/climate that adults create.
- Highlight the importance of training for district and school staff so they can implement with

⁵ Examples include immigration enforcement actions against a child or their family, profiling of a student based on their academic record, etc.

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 use of restorative justice for acute situations), healing justice, multi-tiered system of supports (MTSS), trauma- and healing-informed practices, social and emotional learning, etc.

- Highlight the importance of increasing investments in training, hiring, and retaining antiracist/anti-oppression, culturally affirming counselors, social workers, and other mental health professionals in schools — including through a Community Schools approach (include research about fostering culturally affirming and sustaining learning environments).
- 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.

Intersectionality

- 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 which intersect with race, such as sex (including sexual orientation, gender identity, and pregnant or parenting status), immigration status, and/or disability (including examples such as hair, dress, and grooming codes — which may be facially discriminatory or enforced in a discriminatory manner — and subjective infractions such as “defiance” or “school disturbance” that allow for bias in administrator discretion and may be related to stereotypes).
- Explicitly name that students are entitled to protection on the basis of all of their identities and that civil rights violations should be addressed and enforced as such. Describe how protections under Title VI coordinate with protections under Title IX and/or Section 504, the Americans with Disabilities Act (ADA), or the Individuals with Disabilities Education Act (IDEA) (*e.g.*, the right to a free and appropriate education [FAPE]).
- Clearly connect IDEA/504 discipline and ChildFind requirements to students’ nondiscrimination rights, as well as to the use of non-exclusionary alternatives.
- 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.

Non-exclusionary Alternatives

- 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, including LGBTQ+ students, students with disabilities, undocumented students, students of color, etc., particularly young people who are experiencing more than one of these identities or challenges at the same time).
- Clearly state that restorative practices, trauma- and healing-informed practices, mental health supports, and positive behavior interventions are alternative approaches to exclusionary

discipline.

- Clearly 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.

Corporal Punishment, Restraint, and Seclusion

- Clearly state the tremendous harms of corporal punishment, restraint, and seclusion and name that there is no educational justification for corporal punishment or seclusion. Given the absence of any possible educational justification, any racial disparity in these treatments of children is a violation of Title VI.⁶
- Include strong language encouraging changes to state statutes that permit these actions — eliminating corporal punishment and seclusion and severely restricting the use of restraints. Assert that there is never an educational justification for hitting children.

Protecting Student Privacy

- Surveillance, which may include monitoring students' social media activity, may be a violation of Title VI and/or FERPA.
- Prohibit the use of biometric surveillance, such as facial recognition technology.

Alternative Settings

- Clearly state how racially disproportionate school discipline practices in remote learning environments are subject to Title VI violations.
- Clearly state how racially disproportionate school discipline practices in non-public schools (when a child is placed by a school district) are subject to Title VI and IDEA, including FAPE.

Community Involvement

- Highlight the importance of schools and districts being guided by students, parents, guardians, community members, and those most impacted, in building supportive and welcoming school climates and in responding to student behavior. Indicate that some students and families, especially those who have been involuntarily placed in alternative programs, are even less likely to have had a voice at the table of school-based decision-making.

For Inclusion in Guidance Package (Not DCL Directly)

Provide Technical Assistance

- Provide information, training, and technical assistance to support stakeholders in understanding and implementing student discipline practices in a nondiscriminatory manner (Title VI).
- Provide information, training, and technical assistance for using non-exclusionary discipline practices and implementing evidence-based strategies outlined in the guidance.

⁶ The use of corporal punishment has been most freely used in schools with students who have a larger percentage of students who are identified as Black. See: Gershoff, E. T., & Font, S. A. "Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy." *Social Policy Report*. 2016. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/>

- Provide information, training, and technical assistance to support stakeholders in preventing, identifying, and addressing intersectional discrimination in student discipline policies and practices.

Provide More Accessible Resources and Examples

- Make the guidance more user-friendly, include an updated compendium of current examples of school, district, and state approaches to implementing effective, high-impact, and student-affirming practices outlined in the guidance searchable by topic.
- Include resources for implementing nondiscriminatory school discipline in a virtual setting and to foster culturally responsive learning environments.
- Provide resources for how to engage in ongoing implicit bias reduction.
- Include strategies to ensure student access to well-prepared, experienced, and certified teachers.
- Provide examples of how to respond to the behavior of all students with evidence-based, asset-driven, healing-informed practices, including ongoing training in de-escalation, proper use of functional behavior assessments (FBAs), behavior intervention plans (BIPs) for students with disabilities, etc.

Resource Equity and Access to Staff Personnel

- Include additional information on how states, districts, and schools can identify and target resources to increase student access to mental health services and supports to address underlying issues that might contribute to student behavior.
- Incorporate current research about how student access to well-prepared, experienced, and certified teachers improves school climate.
- Address equitable distribution of resources and how disproportionate amounts of resources spent on criminalization in marginalized communities rather than on health and social-emotional supports for students are civil rights violations.

Include Reference to the Related Requirements of the Every Student Succeeds Act (ESSA)

- Align recommendations with the requirements of ESSA Title I Sec. 1111 (b)(g)(C)(i-iii) requiring all states to support local educational agencies to improve school conditions for student learning, including through reducing incidences of bullying and harassment based on race, color, national origin, sex, disability, sexual orientation, gender identity, and religion; the overuse of discipline practices that remove students from the classroom; and the use of aversive behavioral interventions that compromise student health and safety, defined as seclusion and restraint.

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National Alliance for Partnerships in Equity (NAPE)
National Center for Learning Disabilities
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Center for Transgender Equality
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National Disability Rights Network (NDRN)
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