

New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738

T 212.965.2200
F 212.226.7592

www.naacpldf.org



Washington, D.C. Office
1444 Eye Street, NW, 10th Floor
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312

April 4, 2018

The Honorable Betsy DeVos, Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

The Honorable Jeff Sessions, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

RE: Protecting Students' Civil Rights and Safety through Vigorous Enforcement of Federal Law

Dear Secretary DeVos and Attorney General Sessions:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we write to express our unequivocal support of federal laws and policies intended to protect the civil rights and educational futures of students, and urge you to exercise your obligation to vigorously enforce Title VI of the Civil Rights Act of 1964 ("Title VI"); maintain the January 8, 2014 Dear Colleague letter and school discipline guidance package issued by the U.S. Departments of Education and Justice; and promote proven school-based programs that support students' social and behavioral health and keep them safe.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights legal organization. For almost 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for African Americans and other people of color. Since the historic U.S. Supreme Court decision in *Brown v. Board of Education*,¹ which LDF litigated and won, we have continued to represent students of color to ensure they receive quality and equitable educational opportunities.

Sadly, despite the *Brown* decision, racial discrimination in this nation's educational systems persists. For example, just last month, a federal appellate court agreed with our clients' argument that the efforts of the predominantly white residents of Gardendale, Alabama to create a separate municipal school district and exclude Black students from it was done with racially discriminatory purpose in violation of the 14th Amendment to the

¹ 347 U.S. 483 (1954).

U.S. Constitution.² This blatant effort to re-segregate schools is only one way that racial discrimination presents itself in educational systems. School districts across the country have taken steps to reform school disciplinary policies and practices that have a discriminatory effect on students of color. Indeed, in February 2018, Durham Public Schools in North Carolina voluntarily entered into an agreement with the Office for Civil Rights of the U.S. Department of Education (“ED”) to resolve a complaint of racial discrimination against Black students and students with disabilities in the application of school discipline in violation of Title VI’s prohibition of discrimination by recipients of federal funds.³

These cases demonstrate the continued need for robust enforcement of civil rights laws by the federal government. Yet instead, in the aftermath of the mass school shooting at Marjory Stoneman Douglas High School in Parkland, Florida, ED will preside over a Federal Commission on School Safety to study and recommend the “[r]epeal of [the] Obama Administration’s ‘Rethink School Discipline’ policies,” including the 2014 Dear Colleague Letter on school discipline that summarizes districts’ Title VI obligations.⁴ Repeal of these policies will harm not only the students of color explicitly protected by Title VI, but also students with disabilities,⁵ LGBTQ students,⁶ and other members of protected groups who are disproportionately affected by harsh disciplinary policies and excessive rates of school exclusion.

LDF strongly opposes the Administration’s use of the tragedy in Parkland to advance its efforts to repeal policies designed to eliminate racial disparities in school discipline as well as its effort to “harden” this nation’s schools by providing firearms training to school personnel. Instead of taking actions that will make schools less safe and disproportionately impact students of color, ED and the Department of Justice should fulfill

² See *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018), available at <https://bloximages.chicago2.vip.townnews.com/njeffersonnews.com/content/tncms/assets/v3/editorial/f/0d/f0d9478e-10f6-11e8-bcc8-fb97e4b9e1ca/5a83415c13576.pdf.pdf>.

³ Letter from Kristi Harris, Supervisory Attorney, D.C. Office, Office for Civil Rights, Dep’t. of Educ. (OCR), to Jennifer R. Story, Supervising Attorney, Advocates for Children’s Services, Legal Aid of North Carolina (Feb. 12, 2018), available at <https://www.documentcloud.org/documents/4385637-DPS-resolution-letter.html> (OCR notifying complainant that Durham Public Schools had entered into a resolution agreement to resolve allegations of racial discrimination in the administration of school discipline); see also Kelly Hinchcliffe, *Federal education officials to monitor Durham Public Schools after discipline complaint*, WRAL, Feb. 22, 2018, <http://www.wral.com/federal-education-officials-to-monitor-durham-public-schools-after-discipline-complaint/17364144/>.

⁴ White House Fact Sheet, *President Donald J. Trump is Taking Immediate Actions to Secure Our Schools*, Mar. 12, 2018, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/>.

⁵ *2013-2014 Civil Rights Data Collection: A First Look*, 4, OCR (June 7, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (finding that one out of five boys of color with disabilities received one or more out-of-school suspensions compared to one in ten white boys with disabilities)

⁶ Neal A. Palmer, et al., *EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND THE SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH, GAY, LESBIAN & STRAIGHT EDUCATION ALLIANCE (GLSEN)* (2016), available at https://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf.

their leadership role in protecting the civil rights of all students by taking these recommended actions:

- Ensure Fair Disciplinary Practices by Maintaining the Rethink School Discipline Policies;
- Vigorously Enforce Title VI by Utilizing Purposeful Discrimination and Disparate Impact Theories;
- Promote Effective Policies and Procedures that Keep Students Safe;
- Do Not Facilitate the Arming of School Staff; and
- Do Not Expand the Presence and the Role of Police in Schools.

I. Ensure Fair Disciplinary Practices by Maintaining the Rethink School Discipline Policies

In January 2014, ED and the Department of Justice issued a joint Dear Colleague Letter and guidance package on the Nondiscriminatory Administration of School Discipline (“school discipline guidance”) to assist school districts in “meeting their obligations . . . to administer school discipline without discriminating on the basis of race, color, or national origin.”⁷ The guidance recognizes that students have been subjected to racially discriminatory practices in schools and that racial disparities in discipline data are not explained by more frequent misbehavior by students of color. It states further that a school is in violation of Title VI of the Civil Rights Act of 1964 if it implements policies that have a discriminatory effect or disparate impact on students of a particular race, color, or national origin, and provides examples of situations in which schools may be in violation of federal civil rights laws.

Research shows that there is no evidence that students of color misbehave more than their White peers.⁸ However, students of color are often disproportionately disciplined for minor, subjective offenses such as disobedience and disruptive behavior, which are left up to the discretion of school staff, administrators, and school police who may be more likely to negatively interpret the behavior of certain racial and ethnic groups based on their own conscious or unconscious bias.⁹ For example, a study in Massachusetts found that

⁷ *ED-DOJ School Discipline Guidance Package*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

⁸ See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMIN. OF SCH. DISCIPLINE (2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (citing multiple studies and articles supporting the conclusion that “substantial racial disparities . . . are not explained by more frequent or more serious misbehavior by students of color.”). Accord Russell J. Skiba, et al., *Are Black Kids Worse? Myths and Facts About Racial Differences In Behavior: A Summary of the Literature*, Indiana University, March 2014, available at: http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf.

⁹ See, e.g., LDF, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline* (2017), available at http://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf;

students of color were disproportionately arrested for acting in a “verbally confrontational manner” in front of their teachers.¹⁰ A Texas study found that 97% of school suspensions were discretionary, and Black students were 31% more likely to receive them.¹¹ Students of color made up a disproportionate percentage of the 8,000 preschoolers suspended from public schools nationally during the 2011-2012 school year, often for behaviors like hitting, biting, and pinching.¹² Also, recent incidents show the importance of addressing race-based discrimination in discipline:

- In January 2018, Milwaukee Public Schools entered into an agreement with OCR addressing a complaint of discrimination against Black students in the administration of school discipline, agreeing to improve monitoring and data collection, train staff, update discipline policies, and develop early identification for students at risk of behavioral problems.¹³
- Last month, two Black students were suspended for posting a video of a white classmate saying the n-word.¹⁴
- A Black eighth-grader in Virginia who was enrolled in his school’s free lunch program was handcuffed and charged with petit larceny after taking a carton of milk from the lunch line.¹⁵

The negative consequences of exclusionary discipline practices impact students both in school and into adulthood. Students who are suspended or expelled are more likely to have decreased academic achievement, drop out of school, and become involved in the juvenile justice system.¹⁶ For instance, a recent study by the UCLA Civil Rights Project

KIRWIN INST., RACIAL DISPROPORTIONALITY IN SCHOOL DISCIPLINE (2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf>; Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101 (2016); David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. Rev. 506 (2014).

¹⁰ Learning Lab, *Massachusetts’ School-To-Prison Pipeline, Explained*, WBUR, Apr. 21, 2015, <http://learninglab.legacy.wbur.org/topics/massachusetts-school-to-prison-pipeline-explained/>.

¹¹ Libby Nelson & Dara Lind, *The school-to-prison pipeline, explained*, VOX, Oct. 27, 2015, <https://www.vox.com/2015/2/24/8101289/school-discipline-race>.

¹² Melinda D. Anderson, *Why Are So Many Preschoolers Getting Suspended*, THE ATLANTIC, Dec. 7, 2015, <https://www.theatlantic.com/education/archive/2015/12/why-are-so-many-preschoolers-getting-suspended/418932/>.

¹³ Annysa Johnson, *MPS agrees to settle U.S. civil rights complaint over discipline of black students*, JOURNAL SENTINEL, Jan. 17, 2018, <https://www.jsonline.com/story/news/education/2018/01/17/mps-enters-into-agreement-feds-settle-civil-rights-complaint-over-alleged-discrimination-against-bla/1039370001/>.

¹⁴ Amber Jamieson, *Two Black Students Got Suspended for Posting Video of a White Classmate Saying The N-Word*, BUZZFEED NEWS, https://www.buzzfeed.com/amberjamieson/racist-snapchat-video-school-walkout?utm_term=.mhhkjeG9zQ#.xiLW1YEba.

¹⁵ *Latest Data Shows Black Students Disproportionately Suspended, Expelled, Arrested*, EQUAL JUSTICE INITIATIVE, Apr. 20, 2017, <https://eji.org/news/latest-data-shows-black-students-disproportionately-suspended-expelled-arrested>.

¹⁶ See U.S. DEP’T OF EDUC., *supra* note 8 (citing a number of studies).

found that, during the 2014-15 school year, California students missed approximately two days of instruction each time they were suspended and Black students, on average, missed 32 more days than their White peers. This lost instruction time has a negative impact on student achievement.¹⁷ The negative impacts of these disparities are not limited to the excluded students – at schools with higher levels of exclusionary discipline, students who are not suspended have also been shown to have decreased academic achievement.¹⁸

Withdrawing or amending the school discipline guidance will harm students and districts across the country. The guidance clarifies districts’ legal obligation to ensure that their discipline policies and procedures do not discriminate against students on the basis of race. The guidance does not create any new requirements for schools or districts and does not make schools less safe, but, consistent with well-established best practices and legal precedents, provides valuable information to assist schools and districts in determining whether their disciplinary policies result in different treatment or have a disproportionate impact on certain groups of students.

The school discipline guidance is designed to help schools follow the law they are obligated to obey to make sure students’ rights are protected while maintaining an environment where all students can learn. ED must maintain this important tool, which serves the critical role of ensuring that schools and districts that receive federal funds follow existing laws designed to protect the rights of vulnerable students.

II. Vigorously Enforce Title VI by Utilizing Purposeful Discrimination and Disparate Impact Theories

The school discipline guidance also serves as an important reminder of federal and state educational officials’ obligation under Title VI and its implementing regulations to ensure that school disciplinary practices do not intentionally discriminate or have discriminatory effect. John F. Kennedy eloquently explained the need for robust enforcement of Title VI, which states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,”¹⁹ by clarifying that:

[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But,

¹⁷ Daniel J. Losen & Amir Whitaker, *The Disparate Impact of the School Discipline Gap in California*, CTR. FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT (Oct. 24, 2017).

¹⁸ See, e.g., Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOCIOLOGICAL REV. 1067 (2014); *Out-of-School Suspension and Expulsion*, 131 PEDIATRICS e1000 (2013).

¹⁹ See 42 U.S.C. § 2000d.

indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.²⁰

Title VI's implementing regulations also clarify that policies and practices that have an unwarranted disparate impact based on race, color or national origin constitute impermissible discrimination.²¹ In *Alexander v. Sandoval*, however, a sharply divided U.S. Supreme Court held that there is no private right of action to enforce Title VI's disparate impact regulations.²² Therefore, federal agencies, including ED and the Department of Justice, are the only entities that can enforce disparate impact regulations and are obligated to do so.

Social science research and data from school districts underscore the need for the federal government's enforcement of protections against these disparities, demonstrating "that implicit bias against people of color remains a widespread problem. Such bias can result in discrimination that federal agencies can prevent and address through enforcement of their disparate impact regulations."²³ According to the CRDC for the 2013-14 school year, as early as preschool, Black children are 3.6 times more likely to receive an out-of-school suspension than their white peers. Black K-12 students are 3.8 times more likely to receive an out-of-school suspension than white students.²⁴ As mentioned above, this disparity is not caused by a difference in behavior.²⁵

Given the myriad of actors involved, the role of implicit bias, and the limited resources of school districts, it is not feasible to remedy these discriminatory practices on an individual, case-by-case basis. Because the issue is so widespread, and the available remedies limited, it is important for OCR to continue to implement the disparate impact regulations to ensure that students are being treated equitably and provided access to quality education. Taking these options off the table would allow for the continuation of district practices that result in students of color being excluded from school and denied educational opportunity at unacceptable rates in clear violation of federal civil rights laws.

²⁰ U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL § II p. 1, <https://www.justice.gov/crt/case-document/file/934826/download>.

²¹ 34 C.F.R. § 100.3.

²² 532 U.S. 275 (2001).

²³ See, e.g., U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL § VII p. 2 n.1, <https://www.justice.gov/crt/case-document/file/934826/download> (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 954-59 (2006); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5-9 (2006)).

²⁴ *A First Look*, *supra* note 5.

²⁵ See *supra* note 8.

III. Promote Effective Policies and Procedures that Keep Students Safe

In addition to protecting students of color from discrimination in the administration of school discipline, the guidance provides districts with information regarding resources that keep schools safe through the promotion of positive school climates. Programs such as Positive Behavior Interventions & Supports (PBIS)²⁶ and trauma-informed care²⁷ are evidence-based and promising means of creating and maintaining supportive school environments that are recommended in the 2014 discipline guidance package.²⁸ A recent report issued by the National Center on Education Statistics shows that school-based crime has dropped from 2014 to 2016, providing evidence that the guidance does not make schools less safe or prevent districts from implementing effective safety measures.²⁹

Additionally, ED, with the U.S. Secret Service, has published a guide (the “ED/SS Guide”) on what makes schools safe, recommending the following steps:

- Systematically surveying students, teachers, and other stakeholders about the emotional climate of a school to continuously assess and improve school climate;
- Encouraging students and teachers to respectfully listen to each other;
- Ensuring that students feel comfortable speaking with adults in the school community;
- Preventing and addressing bullying through promotion of pro-social behaviors;
- Involving students and staff in the maintenance of a culture of safety and respect;
- Ensuring all students have a trusting relationship with at least one adult at school; and
- Creating mechanisms for developing and maintaining safe school climates.³⁰

²⁶ See Jenni Owen, et al., *Instead of Suspension: Alternative Strategies for Effective School Discipline*, Duke Center for Child and Family and Policy, 2015, available at https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf.

²⁷ See Katy O’Grady, *Transforming Schools with Trauma-Informed Care*, ASCA SCHOOL COUNSELOR, Jan. 2017, available at <https://www.schoolcounselor.org/asca/media/asca/ASCAU/Trauma-Crisis-Management-Specialist/TransformingSchools.pdf>.

²⁸ Guiding Principles: A Resource Guide for Improving School Climate and Discipline, <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; Directory of Federal School Climate and Discipline Resources, <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf>.

²⁹ National Center for Education Statistics, *Indicators of School Crime and Safety: 2017*, <https://nces.ed.gov/pubs2018/2018036.pdf>.

³⁰ *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*, U.S. SECRET SERVICE & U.S. DEP’T OF EDUC. (Jul. 2004). See also U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUCATION, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (January 8, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (providing that “[s]chools are safer when all students feel comfortable and are engaged in the school community Equipping school officials with an array of tools to support positive student behavior . . . will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate.”).

The ED/SS guide, similar to the discipline guidance, emphasizes that safe and secure school climates are created only through focusing on maintaining a respectful and supportive school environment where students' emotional and academic needs are met. These recommendations are supported by other experts.³¹ ED should continue to promote and support effective programs that are proven to keep students safe. This could be done in part through support of climate provisions within states' plans under the Every Student Succeeds Act that improve school environments while decreasing the use of exclusionary discipline.³²

IV. Do Not Facilitate the Arming of School Staff

LDF joins the growing list of law enforcement officials and school administrators who oppose this Administration's proposal to use federal funds for firearms training for school staff,³³ which is more likely to create gun violence than resolve or prevent violence. "Gun use in self-defense is rare, and it appears that using a gun in self-defense is no more likely to reduce the chance of being injured during a crime than various other forms of protective action."³⁴ Indeed, a study by the FBI found that unarmed individuals were more likely to disarm active shooters than someone with a gun.³⁵ Meanwhile, research

³¹ See Anya Kamenetz, *Here's How to Prevent the Next School Shooting, Experts Say*, NPR, Mar. 7, 2018, <https://www.npr.org/sections/ed/2018/03/07/590877717/experts-say-here-s-how-to-prevent-the-next-school-shooting>.

³² Samantha Batel, *ESSA Analysis: How States Are Looking to Drive Stronger School Climate Through New Education Plans*, THE 74, Feb. 20, 2018, <https://www.the74million.org/article/essa-analysis-how-states-are-looking-to-drive-stronger-school-climate-through-new-education-plans/>.

³³ See, e.g., the National Education Association, <http://www.nea.org/home/72835.htm>; Ruth Weissman, *NYPD Commissioner: Arming teachers isn't a good idea*, N.Y. POST, Feb. 23, 2018, <https://nypost.com/2018/02/23/nypd-commissioner-arming-teachers-isnt-a-good-idea/>; Jeffrey Benzing, *From Wilkensburg to Harrisburg, citizens and lawmakers alike discuss issue of arming school employees*, PUBLIC SOURCE, Mar. 15, 2018, <https://www.publicsource.org/from-wilkinsburg-to-harrisburg-citizens-and-lawmakers-alike-discuss-arming-teachers-in-pennsylvania/>; Paige Cornwell, *Arming teachers is a 'misguided suggestion,' Seattle School Board says in resolution*, SEATTLE TIMES, Mar. 1, 2018, <https://www.seattletimes.com/seattle-news/education/arming-teachers-is-a-misguided-suggestion-seattle-school-board-says-in-resolution/>; Emily Lawler, *Sheriffs don't support arming teachers in Michigan schools*, MLIVE, Mar. 1, 2018, http://www.mlive.com/news/index.ssf/2018/03/sheriffs_dont_support_arming_t.html; *Michigan Governor On Arming Teachers: 'We Need To Be Careful About Things Like That'*, CBS DETROIT, Feb. 23, 2018, <http://detroit.cbslocal.com/2018/02/23/michigan-governor-on-arming-teachers-we-need-to-be-careful-about-things-like-that/>; Olivia Steen, *Scottsboro City Schools superintendent says he isn't comfortable with the idea of arming teachers*, WHNT 19 NEWS, Feb. 28, 2018, <http://whnt.com/2018/02/28/scottsboro-city-schools-superintendent-says-he-isnt-comfortable-with-the-idea-of-arming-teachers/>; Donna Thornton, *Superintendents wary of arming teachers*, GADSDEN TIMES, Feb. 21, 2018, <http://www.gadsdentimes.com/news/20180221/superintendents-wary-of-arming-teachers>; Michelle Basch, *In wake of shooting, Montgomery Co. police chief talks schools safety*, WTOP, Mar. 9, 2018, <https://wtop.com/montgomery-county/2018/03/montgomery-co-police-chief-talks-school-safety/>.

³⁴ David Hemenway, PRIVATE GUNS, PUBLIC HEALTH 78 (2004).

³⁵ Federal Bureau of Investigation, *A Study of Active Shooter Incidents in the United States Between 2000 and 2013*, September 2013, available at <https://www.fbi.gov/news/stories/2014/september/fbi-releases-study-on-active-shooter-incidents/pdfs/a-study-of-active-shooter-incidents-in-the-u.s.-between-2000-and-2013>.

consistently shows that the presence of guns is correlated with a higher risk of violence, homicide, and suicide.³⁶ One study showed that individuals carrying a gun were 4.5 times more likely to be shot during an assault than unarmed individuals.³⁷ There have already been reported incidents of armed school staff accidentally misplacing or firing weapons, often injuring themselves or others:

- In March 2018, an instructor in California accidentally shot the ceiling and falling debris hurt a student;³⁸
- On the same day, a school resource officer accidentally discharged his weapon inside a middle school in Virginia;³⁹
- In 2014, a teacher in Utah accidentally shot herself in the leg while in the school bathroom;⁴⁰
- In Michigan, a school resource officer’s gun discharged and hit a teacher in the neck;⁴¹
- A teacher at Idaho State University was wounded in the foot after the person’s concealed handgun discharged;⁴²
- Since a “campus carry” law went into effect in Texas in 2016, several guns have been left unattended in restrooms.⁴³

Allowing staff to carry guns in schools especially endangers Black children because the judgment of the very people charged with keeping them safe is clouded by the implicit, and sometimes explicit,⁴⁴ bias that is endemic in our society. Implicit social cognition

³⁶ See, e.g., Matthew Miller, et al., State-level homicide victimization rates in the US in relation to survey measures of household firearm ownership, 2001-2003, *SOCIAL SCIENCE & MEDICINE*, Feb. 2007, available at <https://www.sciencedirect.com/science/article/pii/S0277953606004898?via%3Dihub>.

³⁷ Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 *AM. J. PUB. HEALTH* 2034 (Nov. 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2759797/pdf/2034.pdf>.

³⁸ Nicole Chavez, *Teacher accidentally fires gun and injures student during safety lesson*, CNN, Mar. 15, 2018, <https://www.cnn.com/2018/03/14/us/california-teacher-fires-gun/index.html>.

³⁹ Emily Stewart, *2 “good guys with guns” accidentally fired them in schools on Tuesday*, VOX, Mar. 14, 2018, <https://www.vox.com/2018/3/14/17120046/school-shooting-accidental-california-virginia-gun-control>.

⁴⁰ Vinnie Longobardo, *An armed Utah teacher accidentally shot herself at school*, WASHINGTON PRESS, Feb. 23, 2018, <https://washingtonpress.com/2018/02/23/armed-utah-teacher-just-accidentally-shot-school/>.

⁴¹ Brianna Owczarzak, *Police: Firearm discharged at high school, hit teacher in neck*, WNEM, Nov. 11, 2016, <http://www.wnem.com/story/33691674/police-firearm-discharged-at-high-school>.

⁴² *Idaho State University teacher accidentally shoots self in class*, CBS NEWS, Sep. 24, 2014, <https://www.cbsnews.com/news/idaho-state-university-teacher-accidentally-shoots-self-in-class/>

⁴³ Jorge Rivas, *An Alarming Number of Guns Are Waiting to Be Found in Campus Restrooms*, SPLINTER NEWS, Mar. 23, 2018, <https://splinternews.com/an-alarming-number-of-guns-are-waiting-to-be-found-in-c-1823997714>.

⁴⁴ See, e.g., Matt Stevens, *Florida Teacher Says Her Racist Podcast Was ‘Satire’*, N.Y. TIMES, Mar. 7, 2018, available at <https://www.nytimes.com/2018/03/07/us/florida-teacher-racism.html>; WFLA Web Staff, *Florida teacher used n-word, told students dating black people was ‘not worth it,’ district says*, WFLA, Mar. 10, 2018, available at <http://wfla.com/2018/03/10/florida-teacher-used-n-word-told-students-dating-black-people-was-not->

research consistently shows that, even for individuals with good intentions, negative stereotypes about race can affect split-second decisions such as the decision to discharge a weapon.⁴⁵ For example, white research subjects were more likely to mistake a toy for a weapon when they saw a five-year-old boy who was Black than when they saw a five-year-old boy who was white.⁴⁶ Likewise, when research subjects were forced to make a split-second decision about whether an individual had a gun, they were more likely to inaccurately believe they saw a gun when the individual was Black.⁴⁷ Similarly, when research subjects were faced with a split-second decision about whether to shoot a potentially armed person, they shot faster and more often when the potentially armed person was Black.⁴⁸

Research also shows that Black children are perceived as older than their actual age, less innocent, less childlike, more culpable for their actions, and more appropriate targets for police brutality than white children.⁴⁹ Similarly, research confirms that Black men are perceived as larger and more threatening than similarly-sized white men.⁵⁰ Implicit biases against Black children begin to cloud the judgment of their teachers as early as preschool.⁵¹ There are also multiple reports of teachers being afraid of Black students

[worth-it-district-says/](#); The Griot, *Florida teacher put on probation for telling racist jokes in classroom*, THE GRIOT, Oct. 27, 2016, available at <https://thegriot.com/2016/10/27/florida-teacher-racist-jokes/>.

⁴⁵ B. Keith Payne, *Weapons Bias: Split-Second Decisions and Unintended Stereotyping*, CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 2006, available at <http://www.psych.uncc.edu/pagoolka/cdps287.pdf>.

⁴⁶ Andrew R. Todd, et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, PSYCHOLOGICAL SCIENCE, Feb. 1, 2016, available at <http://journals.sagepub.com/doi/abs/10.1177/0956797615624492>.

⁴⁷ *Id.*

⁴⁸ Joshua Correll, et al., *Event-related potentials and the decision to shoot: The role of threat perception and cognitive control*, 42 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 120–128 (2006), available at http://psych.colorado.edu/~tito/Correll_et_al_2006.pdf.

⁴⁹ Philip A. Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY (February 2014), available at <https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>; Rebecca Epstein, et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Center On Poverty and Inequality at Georgetown Law School, available at <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf>.

⁵⁰ John Paul Wilson, et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY (March 2017), available at <http://www.apa.org/pubs/journals/releases/psp-pspi0000092.pdf>.

⁵¹ Walter S. Gilliam, et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, Yale University Child Study Center, September 28, 2016, available at http://ziglercenter.yale.edu/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf.

without sufficient grounds.⁵² The confluence of these factors means that arming school staff could have deadly consequences for Black students.

V. Do Not Expand the Presence and the Role of Police in Schools

When considering school discipline and school safety, ED must address the presence of police in schools. There is currently a push to increase the number of police assigned to schools. However, law enforcement officers placed in schools have not been shown to make schools safer,⁵³ and they too often address routine disciplinary matters best left to educators. Students who attend schools where a school resource officer is present are more likely to be referred to law enforcement for typical childhood behaviors that previously would have been handled by educators using developmentally appropriate, pedagogically sound interventions.⁵⁴ For example, police have arrested students, some as young as five years old, for throwing a tantrum, texting, passing gas, violating the school dress code, arriving late, bringing a cell phone to school, or having a nonviolent verbal disagreement with a schoolmate.⁵⁵

During the 2013-2014 school year, there were nearly 223,000 school-based referrals to law enforcement and almost 70,000 school-based arrests.⁵⁶ Students are often arrested and referred for minor incidents.⁵⁷ In Florida, for example, two-thirds of referrals to law enforcement during the 2011-2012 school year were for misdemeanors, such as disruption

⁵² See, e.g., Tony Favro, *Discipline and civil rights in American state schools*, CITY MAYORS, November 22, 2011, available at <http://www.citymayors.com/education/usa-school-discipline.html> and Wesley Wright, *Fear of black students, unfair treatment rampant in Denver schools, black educators say*, CHALKBEAT, August 5, 2016, available at <https://www.chalkbeat.org/posts/co/2016/08/05/fear-of-black-students-unfair-treatment-rampant-in-denver-schools-black-educators-say/>.

⁵³ See Cheryl Corley, *Do Police Officers in Schools Really Make Them Safer?*, NPR, Mar. 8, 2018, <https://www.npr.org/2018/03/08/591753884/do-police-officers-in-schools-really-make-them-safer>.

⁵⁴ Jason Nance, *Students, Police, and the School-to-Prison Pipeline*, University of Florida Levin College of Law, 2016, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577333.

⁵⁵ *Id.*

⁵⁶ EdWeek, *Which Students Are Arrested the Most*, 2017, <https://www.edweek.org/ew/projects/2017/policing-americas-schools/student-arrests.html#/overview>.

⁵⁷ See, e.g., Kerrin Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NORTHWESTERN J. OF LAW & SOCIAL POLICY 1 (Fall 2013), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1109&context=njlsp> (finding that over 90% of school-based arrests in Delaware during the 2010-2011 school year were for misdemeanors); Phillip Kassel, et al., *Let's stop arresting kids for being kids*, BOSTON GLOBE, Feb. 10, 2014, <https://www.bostonglobe.com/opinion/2014/02/10/let-stop-arresting-kids-for-being-kids/pFuP3MWcCR0T2T14rjG7IK/story.html> (finding that in Boston, Worcester, and Springfield, Massachusetts, children are most often arrested for minor offenses, with more than half of misconduct arrests in Springfield being for “disrespect”); Deanna Pan and Paul Bowers, *Criminal offense or adolescent misbehavior? ‘Disturbing schools’ blurs the line*, POST & COURIER, Aug. 5, 2016, available at https://www.postandcourier.com/archives/criminal-offense-or-adolescent-misbehavior-disturbing-schools-blurs-the-line/article_dc56c01c-efe1-5bbb-bb73-7d266cc72bc0.html (Since 2001, in South Carolina there have been more than 29,000 referrals to the juvenile justice system for “disturbing school”).

of a school function, disorderly conduct, or minor scuffles with schoolmates.⁵⁸ This criminalization of developmentally appropriate childhood misbehavior has dire consequences. Turning police into school disciplinarians increases student anxiety, creates alienation and distrust, diminishes students' faith in the legitimacy of the authority of school staff, and can trigger, rather than prevent, misbehavior.⁵⁹ Furthermore, harsh disciplinary practices, such as school-based arrests, increase the risk that students will fail a grade, drop out of school, and become entangled in the criminal justice system.⁶⁰

Furthermore, law enforcement officers placed in schools too often discipline, arrest, and assault Black children at a higher rate than their white peers,⁶¹ violating Title VI. Although Black and Latinx students do not misbehave more than white students,⁶² they make up over 58% of school-based arrests, but only 40% of public school enrollment.⁶³ Black students are more than twice as likely as their white peers to be referred to law enforcement or arrested at school.⁶⁴ For example, in New York City last year, police used handcuffs on black students 15% of the time, almost twice the rate of white students, when called in to take students in crisis for mental health evaluations.⁶⁵ Furthermore, the presence of police in schools makes Black students and students who have been victims feel

⁵⁸ ACLU of Florida, Advancement Project, and Florida State Conference of the NAACP, *Still Haven't Shut Down the School-to-Prison Pipeline* 6-8 (March 2011), available at http://b3cdn.net/advancement/be89ef01bcb350c7fc_z5m6btbgo.pdf.

⁵⁹ Philip J. Cook, et al., School Crime Control and Prevention, 39 CRIME & JUST. 313, 372 (2010). Accord Matthew J. Meyer et al., A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools, 22 EDUCATION AND TREATMENT OF CHILDREN 333, 352 (1999); Randall R. Beger, The Worst of Both Worlds, 28 CRIM. JUST. REV. 336, 340 (2003); Kathleen Nolan, POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL 53 (2011).

⁶⁰ Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? A Report by the American Psychological Association Task Force* (2006), available at <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>. Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011); Centers for Disease Control, *Health Risk Behaviors among Adolescents Who Do and Do Not Attend School – United States, 1992*, 43 MORBIDITY AND MORTALITY WEEKLY REPORT, 129 (Mar. 4, 1994). See also Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade* (Dec. 2012) (Paper prepared for the Closing the School Discipline Gap: Research to Practice national conference in Washington, D.C., Jan. 10, 2013) (finding that being suspended even once in 9th grade doubles the chance of dropping out of school).

⁶¹ See Ajmel Quereshi et al., *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline*, NAACP Legal Defense & Educational Fund, Inc., 2017, available at http://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf.

⁶² See *supra* note 8.

⁶³ Education Week Research Center original analysis of Civil Rights Data Collection, 2017. (<https://www.npr.org/sections/ed/2017/01/27/511428075/does-your-school-arrest-students>)

⁶⁴ *A First Look*, *supra* note 5.

⁶⁵ Alex Zimmerman, *Mental health crises are major cause of police interventions in New York City schools, new data show*, CHALKBEAT (Nov. 15, 2017), <https://chalkbeat.org/posts/ny/2017/11/15/mental-health-crises-are-major-cause-of-police-interventions-in-new-york-city-schools-new-data-show/>.

less safe,⁶⁶ which negatively affects school climate. Black students at Marjory Stoneman Douglas High School recognize their heightened risk from school-based law enforcement, providing in a recent press conference that Black students will face most of the consequences if their school becomes overly militarized.⁶⁷

To guard against the criminalization of children and to ensure compliance with Title VI, ED should work to decrease the number of officers assigned to schools. And for school districts that do have officers assigned to schools, they should enter into memoranda of understanding or contracts with law enforcement providers that thoughtfully define and limit the roles of school resource officers and promote a positive school climate. These documents should make clear that:

(1) school resource officers should not supplant the role of educators in deploying developmentally appropriate, pedagogically sound interventions to student misbehavior;

(2) the referral of students to law enforcement, arrests on school grounds, searches, and the use of force should only be done as a last resort and only to address behavior that imminently and seriously threatens someone's physical safety (not minor scuffles);

(3) on-campus law enforcement interviews should only be done as a last resort and should not be performed outside the presence of a parent and/or guardian unless permission from the parent or guardian is first obtained;

(4) school resource officers should complete training in youth-appropriate, bias-free conflict resolution, de-escalation, and policing techniques;

(5) there should be a formal complaint process with a simple and straightforward mechanism for students, parents, and staff to submit complaints of abuses or misconduct by school police; and

(6) officials should collect and publicly share data, disaggregated by race, on referrals to law enforcement, school-based arrests, searches, the use of force, and the filing of criminal complaints so that officials and community stakeholders can determine whether school resource officers should be given further support and training to ensure that they are complying with federal anti-discrimination laws and promoting a healthy school climate.

⁶⁶ Matthew T. Theriot et al., *School Resource Officers and Students' Feelings of Safety at School*, 14 YOUTH VIOLENCE AND JUVENILE JUSTICE 2, 130-146 (Dec. 2014) (abstract available at <http://journals.sagepub.com/doi/10.1177/1541204014564472>).

⁶⁷ P.R. Lockhart, *Parkland's black students say they're being forgotten in the gun control debate*, VOX, Mar. 29, 2018, <https://www.vox.com/identities/2018/3/29/17177446/black-parkland-students-criticize-media-school-safety-discipline>.

VI. Conclusion

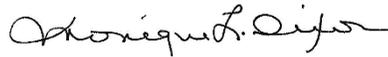
In order to fulfill the mission of fostering educational excellence and ensuring equal access, ED and the Department of Justice must maintain the school discipline guidance, vigorously enforce civil rights laws, and promote policies and procedures that actually keep students safe and in school. At the same time, it must fight against efforts, such as increasing police in schools and arming school staff, that threaten not only students' educational attainment, but also their lives.

Thank you for considering this letter. If you have any questions, please contact us at 202-682-1300.

Sincerely yours,



Todd A. Cox
Director of Policy



Monique L. Dixon
Deputy Director of Policy and Senior Counsel

cc: Jason Botel, Acting Assistant Secretary of Elementary and Secondary Education,
U.S. Department of Education
Candice Jackson, Acting Assistant Secretary for Civil Rights, U.S. Department of
Education
John Gore, Acting Assistant Attorney General, Civil Rights Division, U.S.
Department of Justice