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Written Testimony
of the NAACP Legal Defense and Educational Fund, Inc.
submitted to the U.S. Commission on Civil Rights for its
public briefing on
The School-to-Prison Pipeline: The Intersections of Students
of Color
with Disabilities

December 8, 2017

Submitted via email – schooldiscipline@usccr.gov



On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we welcome the opportunity to submit written testimony in support of the U.S. Commission on Civil Rights' (USCCR or Commission) investigation into school districts' compliance with federal civil rights laws created to protect students of color with disabilities from discriminatory disciplinary actions. Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law 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 in school districts to ensure they receive quality and equitable educational opportunities² and are not subject to racially biased school discipline practices and policies.³

As part of the Commission's school discipline investigation, LDF urges members to review and promote federal policies and laws that:

- 1) Continue and expand the national Civil Rights Data Collection program to document and address disparities in the discipline rates of students of color with disabilities;
- 2) Maintain the U.S. Departments of Justice and Education Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline;
- 3) Ensure federal agencies appropriately conduct systemic investigations of schools or school districts to address disparities in school discipline;
- 4) Maintain and immediately implement significant disproportionality regulations Under Part B of the Individuals with Disabilities Education Act; and
- 5) Ensure adequate federal oversight of state plans created under the Every Student Succeeds Act.

¹ 347 U.S. 483 (1954).

² See, e.g., Thomas, et al. v. St. Martin Parish School Dist., et al., Civil Action No. 6:65-cv-11314, Doc. 178 (W.D. La., Jan. 25, 2016) (approving a school desegregation plan designed to racially integrate St. Martin Parish School District and ensure African-American students have equal access to quality educational opportunities), <http://www.naacpldf.org/update/ldf-announces-consent-decree-thomas-v-school-board-st-martin->; see also Br. for the Black Student Alliance at the University of Texas at Austin, the Black Ex-Students of Texas, Inc., and the NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae, *Fisher v. University of Texas at Austin*, 2015 WL 6690039 (Nov. 2, 2015), available at http://www.naacpldf.org/files/case_issue/14-981%20bsac%20The%20Black%20Student%20Alliance%20at%20the%20University%20of%20Texas%20at%20Austin%20et%20al._1_1.pdf.

³ See Complaint from NAACP Legal Def. & Educ. Fund, Inc. (hereinafter LDF) & Nat'l Ctr. for Youth Law to U.S. Dep't of Educ. Office for Civil Rights against Bryan Indep. Sch. Dist. (Feb. 20, 2013), available at http://www.naacpldf.org/files/case_issue/Bryan%20ISD%20OCR%20Complaint.pdf.

I. Continue and Expand the National Civil Rights Data Collection Program to Document and Address Disparities in the Discipline Rates of Students of Color with Disabilities

This briefing is being held at an important time in our nation’s history. Despite the passage of federal laws that prohibit educational systems and institutions from engaging in discrimination based on race⁴ and disability,⁵ students of color with disabilities are frequently disciplined at dramatically disproportionate rates. According to the U.S. Department of Education’s (the Department’s) Civil Rights Data Collection (CRDC) for the 2013-2014 school year, one in four Black boys with disabilities received at least one out-of-school suspension, compared to only one in ten White boys with disabilities.⁶ Alarming, the suspension rates for students of color with disabilities are higher than the rates for each subgroup alone. For example, 18% of all Black boys received at least one out-of-school suspension during the 2013-2014 school year; 12% of students with disabilities received at least one out-of-school suspension; and 25% of Black boys with disabilities received at least one out-of-school suspension.⁷

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

Recent incidents show the importance of addressing race- and disability-based discrimination in discipline. A school security officer handcuffed a second-grader with a disability and took him to the principal’s office after the student was bullied by other students.¹⁰ School administrators in Michigan expelled a high school student who received special education services for bringing an airsoft (toy) gun and kitchen knife to school.¹¹ Additionally, in New York City last year, police used handcuffs on black students

⁴ See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2011).

⁵ See, e.g., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2010).

⁶ 2013-2014 Civil Rights Data Collection: A First Look, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, (June 7, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

⁷ *Id.*

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.”).

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; 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 *Kids in Cuffs: Why Handcuff a Student with a Disability*, NBC NEWS (Feb. 20, 2017), <https://www.nbcnews.com/news/us-news/kids-cuffs-why-handcuff-8-year-old-student-disability-n722451>.

¹¹ Lauren Slagter, *Ypsilanti teen speaking at federal hearing on ‘school-to-prison’ pipeline*, MLIVE (Dec. 3, 2017), http://www.mlive.com/news/ann-arbor/index.ssf/2017/12/ypsilanti_teen_to_testify_at_f.html.

15% of the time, almost twice the rate of white students, when called in to take students in crisis for mental health evaluations.¹²

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.¹³ A recent study by the UCLA Civil Rights Project 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. Clearly, this lost instruction time has a negative impact on student achievement.¹⁴ 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.¹⁵

To address this problem, LDF has urged the Education Department to continue its current level of civil rights data collection by maintaining the existing questions and disaggregation of data by student subgroups, such as racial and ethnic minorities; requiring all schools and districts to report the data; and making the CRDC available to the public.¹⁶ LDF, along with other national civil rights organizations, community members, and policymakers, depend on the CRDC to measure and monitor educational opportunities offered to our nation’s students, particularly those who have historically been disadvantaged.

Additionally, the Department should expand the CRDC to gather discipline and teacher quality data for students with disabilities placed by public school districts in private or “non-public” schools when required under the Individuals with Disabilities Education Act (the IDEA) and Section 504 of the Rehabilitation Act of 1973. Currently, no data is collected on discipline practices in these schools; however, in 2009, the U.S. Government Accountability Office (GAO) reported that a number of deaths and injuries occurred in both public and private schools,¹⁷ leading the Department to collect data on restraint and seclusion in public schools in 2009 and release a resource document on restraint and seclusion in 2012.¹⁸

The CRDC must collect discipline and restraint and seclusion data from private and non-public schools that serve students with disabilities placed in these settings by public school districts. These

¹² 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/>.

¹³ See U.S. DEP’T OF EDUC., *supra* note 8 (citing a number of studies).

¹⁴ 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).

¹⁵ 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).

¹⁶ See Letter from Elizabeth Olsson & Monique Dixon, LDF, to Dir. of Info. Collection Clearance Div., U.S. Dep’t of Educ. (Aug. 21, 2017) (on file at LDF).

¹⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009).

¹⁸ See U.S. DEP’T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT (2012), *available at* <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

students are often those with the most significant behavioral needs who may be unable to describe their experiences effectively. They are more likely to be students of color and to be receiving services through the child welfare system.¹⁹ This type of data collection is critical to ensure that these vulnerable students are not placed away from the regular oversight that public school placements provide.

II. Maintain the U.S. Departments of Justice and Education Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline

In January 2014, the Departments of Justice and Education issued a joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline to assist school districts in “meeting their obligations . . . to administer school discipline without discriminating on the basis of race, color, or national origin.”²⁰ The guidance recognizes the findings described above 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 an unfair effect and 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.

LDF is concerned that the Departments may withdraw or amend this guidance, to the detriment of students and districts across the country. High-ranking Education Department officials recently met with a group interested in rescinding the guidance, including the president of the Thomas B. Fordham Institute, former teachers, and parents.²¹ The group argued that efforts to reduce discipline put teachers and students in danger, with two former teachers providing that they were injured by students.²² However, as the guidance notes, effective efforts aimed at reducing discipline disparities and promoting positive behavior supports, such as those described in the guidance, make schools safer, helping prevent, not promote, the types of incidents described by the former teachers. Districts that implement with fidelity well-chosen programs that use alternatives to suspension, such as Positive Behavioral Interventions and Support (PBIS) and My Teaching Partner, have higher student achievement, less student misconduct, and safe schools.²³

¹⁹ See VANESSA X. BARRAT & BETH ANN BERLINER, *THE INVISIBLE ACHIEVEMENT GAP, PART 1: EDUCATION OUTCOMES OF STUDENTS IN FOSTER CARE IN CALIFORNIA’S PUBLIC SCHOOLS* 19 & fig. 8 (2013), available at https://www.wested.org/wp-content/uploads/2016/11/1400283692Invisible_Achievement_Gap_Full_Report-3.pdf (finding that California foster children are 3 times more likely to be placed in nonpublic special education schools as are other children).

²⁰ U.S. DEP’T OF EDUC., *supra* note 8.

²¹ Andrew Ujifusa, *DeVos’ Team Hears Criticisms of Obama-Era Guidance on Student Discipline*, EDUC. WEEK, (Nov. 17, 2017), http://blogs.edweek.org/edweek/campaign-k-12/2017/11/devos_criticisms_obama_student_discipline_guidance.html.

²² Solvejg Wastvedt, *Former Minnesota teachers join discussion on federal school discipline policy*, MPR NEWS (Nov. 17, 2017), <https://www.mprnews.org/story/2017/11/17/former-minnesota-teachers-join-discussion-federal-school-discipline-policy>.

²³ See Jenni Owen, Jane Wettach, & Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline*, DUKE CTR. FOR CHILD & FAMILY POLICY & CHILDREN’S LAW CLINIC (2015), available at https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf; Russell J. Skiba & Daniel J.

The guidance also serves as an important reminder of the Department’s obligations to ensure that even facially neutral policies do not have a disparate impact on students of color as required by regulations for Title VI of the Civil Rights Act of 1964.²⁴ In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the U.S. Supreme Court held that there is no private right of action to enforce Title VI’s disparate impact regulations, leaving federal agencies as the only entities that enforce these regulations. This enforcement authority is especially important for disparities in school discipline as they are often caused by facially neutral policies being applied more harshly to students of color due to explicit and implicit biases. Social science research underscores the need for the federal government’s enforcement of these protections, 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.”²⁵ The Department should continue to use every legal tool and theory at its disposal to ensure that students are being treated equitably and provided access to quality education.

The school discipline guidance does not create any new requirements for schools or districts that 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. Supplementary materials released with the guidance provide recommendations on implementing safe and positive school climates.²⁶ The 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. Although it specifically addresses discrimination based on race, it is particularly important for students of color with disabilities because they are disciplined at such a disproportionate rate. The Department must maintain this important tool, which serves the critical role of ensuring that schools and districts that receive Department funds follow existing laws designed to protect the rights of vulnerable students.

Losen, *From Reaction to Prevention: Turning the Page on School Discipline*, AM. EDUCATOR 4 (2016), available at https://www.aft.org/ae/winter2015-2016/skiba_losen.

²⁴ 34 C.F.R. § 100.3 (1980).

²⁵ 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)).

²⁶ *ED-DOJ School Discipline Guidance Package*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance> (last visited Dec. 4, 2017).

III. Ensure Federal Agencies Appropriately Conduct Systemic Investigations of Schools or School Districts to Address Disparities in School Discipline

The Education Department's Office for Civil Rights (OCR) investigates and resolves complaints of discrimination based on race, color, and national origin; sex; disability; and age.²⁷ Complaints alleging racial bias in school discipline practices often trigger systemic concerns, whether raised by the complainant or not,²⁸ for valid reasons. Racial disparities in school discipline, such as those described above, have been well documented for decades.²⁹ During the Obama administration, OCR began looking more systemically into allegations of racial discrimination in school discipline, even when allegations were raised individually.³⁰ This provided an avenue for OCR to comprehensively address system-wide issues within school districts, rather than having to repeatedly examine issues within a district one student at a time. It also provided a means to more efficiently address issues of disparate impact, where facially neutral policies have an adverse effect on students of color, even where there is insufficient evidence to find that the individual student who raised the complaint was treated differently.

LDF is deeply concerned by an internal memorandum circulated at OCR indicating a reversal in course by OCR leadership to discourage systemic investigations of district-wide concerns raised by individual allegations.³¹ LDF encourages the Commission to urge OCR to conduct investigations consistent with its mission to vigorously enforce civil rights for students: namely, recognizing that a systemic approach is warranted in any district where data indicates a significant racial disparity in the application of school discipline.

IV. Maintain and Immediately Implement Significant Disproportionality Regulations Under Part B of the IDEA

LDF encourages the Commission to support the IDEA and related 2016 regulations setting a common standard for defining disproportionality based on race and ethnicity in the areas of identification, placement in restrictive settings, and discipline, and assisting school districts in reviewing policies and practices to determine the root causes of any disparities and whether changes are needed.³² In 2013, a GAO

²⁷ *About OCR*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Oct. 15, 2015).

²⁸ *See, e.g.*, Complaint from LDF & Nat'l Ctr. for Youth Law to U.S. Dep't of Educ. Office for Civil Rights against Bryan Indep. Sch. Dist. (Feb. 20, 2013), *available at* http://www.naacpldf.org/files/case_issue/Bryan%20ISD%20OCR%20Complaint.pdf; Resolution Letter from U.S. Dep't of Educ. Office for Civil Rights to Lodi Unified Sch. Dist. (Aug. 24, 2016), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131314-a.pdf>.

²⁹ RUSSELL SKIBA, ET AL., THE EQUITY PROJECT AT INDIANA UNIVERSITY NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE 2 (2014), *available at* http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity_NewResearch_010915.pdf.

³⁰ *See* Erica L. Green, *Educ. Dep't Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES (Jun. 16, 2017).

³¹ *Id.* (linking to a copy of the memorandum, which instructed OCR staff to treat individual complaints individually unless the OCR investigative team determines a systemic approach is warranted).

³² 34 C.F.R. § 300.646-47 (2012).

study found that most states did not comply with these provisions,³³ setting such high levels for identifying districts with significant disproportionality that no district ever exceeded them. This meant that these districts neither identified existing disparities nor received assistance in determining the root causes of any disparities and implementing needed change.

Despite the significant disparities in school discipline described above and the GAO report, the Department recently drafted a Federal Register notice seeking comment on whether to delay the compliance date for the 2016 regulation from July 1, 2018 until July 1, 2020³⁴ so that the Department could collect data from states that have already begun implementing the rule to determine if the regulations should be maintained or if they should be modified, replaced, or removed. LDF urges the Commission to help ensure that these regulations go into effect in 2018 as currently planned. Significant disproportionality regulations have been included in the IDEA since 2004 and states have had adequate time to develop appropriate measures for determining disparities. Furthermore, the regulations were already subjected to a public comment period in 2016. The Department's final regulations incorporate changes based on the comments the Department received from hundreds of individuals and organizations, including LDF.³⁵ Further delay will only allow states to continue to abdicate their duty to identify and address these disparities.

V. **Ensure Adequate Federal Oversight of State Plans Created Under the Every Student Succeeds Act**

Finally, LDF encourages the Commission to acknowledge that all children and youth, including students of color with disabilities, should receive equal educational opportunity through robust implementation of the Every Student Succeeds Act (ESSA). ESSA reauthorized the 50-year-old Elementary and Secondary Education Act, and provides that all students, regardless of race, income, disability, or background, should be provided with the tools for academic success.³⁶ Each state is required to submit a state plan to the Department describing how they will implement the ESSA requirements.³⁷ As the Department completes its review and approval of ESSA state plans, it is critical that it ensure that these plans meet the letter and intent of the law, including provisions related to school discipline.

In part, ESSA requires states to describe in their plans how they will assist districts in reducing the overuse of school exclusion and aversive discipline practices such as seclusion and restraint.³⁸ The

³³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION (2013).

³⁴ Benjamin Wermund, *What to expect from Trump's pick to lead the civil rights office*, POLITICO (Oct. 27, 2017), <https://www.politico.com/tipsheets/morning-education/2017/10/27/what-to-expect-from-trumps-pick-to-lead-the-civil-rights-office-223032> (including a link to the draft notice).

³⁵ *Fact Sheet: Equity in IDEA*, U.S. DEP'T OF EDUC. (Dec. 12, 2016), <https://www.ed.gov/news/press-releases/fact-sheet-equity-idea>.

³⁶ *Every Student Succeeds Act*, U.S. DEP'T OF EDUC., <https://www.ed.gov/essa?src=rn> (last visited Dec. 7, 2017).

³⁷ *ESSA Consolidated State Plans*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/admins/lead/account/stateplan17/index.html> (last modified Nov. 7, 2017).

³⁸ Every Student Succeeds Act, Public Law No. 114.95, S. 1177, 114th Cong. §1111(g)(1)(C) (Dec. 10, 2015).



Department must ensure that states take meaningful steps to address these issues, including by providing districts with funding and professional development to address implicit and explicit bias exhibited by school staff and administrators, as well as the supports needed to implement effective alternative discipline practices such as PBIS and restorative justice.

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

Respectfully submitted,

A handwritten signature in blue ink that reads "Todd A. Cox". The signature is fluid and cursive, with the first name being the most prominent.

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