

July 23, 2021

Submitted via www.regulations.gov

U.S. Department of Education
Office for Civil Rights
Potomac Center Plaza Room 6125
550 12th Street SW
Washington, DC 20024

***RE: Comments on the Nondiscriminatory Administration of School Discipline,
Docket ID ED-2021-OCR-0068***

To Whom It May Concern:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we submit the following comments in response to the Office for Civil Rights’ (“OCR”) Request for Information regarding the Nondiscriminatory Administration of School Discipline. LDF urges OCR to urgently address school discipline practices which have resulted in racial discrimination against Black students and other students of color. As discussed throughout this Comment, decades of data demonstrate that many schools and districts have systematically failed to meet their obligations under federal civil rights law. OCR must vigorously enforce Title VI of the Civil Rights Act of 1964 through every tool available, including the issuance of comprehensive guidance to facilitate compliance and accountability.

Founded in 1940 under the leadership of Thurgood Marshall, LDF’s mission has always been transformative: to achieve racial justice, equality, and an inclusive society. LDF has relied on the Constitution and federal and state civil rights laws to pursue racial equity and justice. Since the historic U.S. Supreme Court decision in *Brown v. Board of Education*, which LDF litigated and won, we have continued to represent students of color to ensure they receive quality and equitable educational opportunities. Consistent with this mission, LDF engages in legal and policy advocacy to eliminate racial disparities in school discipline, dismantle the school-to-prison pipeline, and

support practices that result in positive school climates for all students, especially students of color.¹

- I. *OCR must rescind the harmful policies of the prior administration, and restore the agency's critical role of protecting the civil rights of all students, particularly students of color.*

The mission of OCR is to “ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights.”² OCR enforces Title VI (prohibiting discrimination based on race, color, and national origin); Title IX (prohibiting discrimination based on sex); Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (prohibiting discrimination based on disability) and the Age Discrimination Act of 1975 (prohibiting discrimination based on age).³

Under the prior administration, racial disparities in school discipline persisted; yet, instead of taking steps to reduce these disparities, OCR acted to weaken protections for students of color. A 2018 ProPublica investigation found that the Trump Administration reduced the number of systemic investigations into the disparate treatment of students based on race, disability and other factors.⁴

The Trump Administration's failure to enforce civil rights laws is further evidenced through examining policy guidance. For instance, under the Obama Administration, OCR issued 38 guidance documents, including the 2014 School Discipline Guidance Package that outlined schools' and districts' obligations to avoid and redress racial discrimination in the administration of school discipline.⁵ Conversely, according to the U.S. Commission on Civil Rights 2019 Statutory Enforcement report, rather than developing proactive policies to protect the civil rights of students or improve educational equity, the Trump Administration focused on rescinding previously issued guidance, including the 2014 school discipline guidance, thereby severely diminishing protections for students of color.⁶ The Trump Administration also undertook an effort

¹ Letter from NAACP Legal Def. and Educ. Fund to Dep't of Educ & Dep't of Justice, Protecting Students' Civil Rights and Safety through Vigorous Enforcement of Federal Law (Apr. 4, 2018), <https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Letter-to-Depts-of-Educ-and-Justice-on-School-Safety-and-Discipline.pdf>

² *About OCR*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Jan. 10, 2020).

³ *Id.*

⁴ Annie Waldman, “*DeVos Has Scuttled More than 1,200 Civil Rights Probes Inherited From Obama*,” PROPUBLICA, Jun. 21, 2018, available at <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>.

⁵ U.S. COMM'N ON CIV. RTS., ARE RIGHTS A REALITY 188 (2019) <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

⁶ *Id.*

to weaken the Civil Rights Data Collection⁷ (“CRDC”), an essential tool for OCR, parents, students and the civil rights community to identify and remedy systemic discrimination

On January 20, 2021, the Biden Administration issued Executive Order 13985 entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” outlining a commitment to “affirmatively advancing equity, civil rights, racial justice and equal opportunity.”⁸ Discriminatory school discipline practices perpetuate institutional racism and deny students and their communities equal educational and economic opportunities. We commend the Administration’s commitment to equity and implore OCR to aggressively repeal the harmful policies inflicted on students of color by the previous administration and pursue actions to advance racial justice in America’s classrooms.

Recommendations:

- Rescind the 2018 Dear Colleague letter and immediately reinstate the 2014 School Discipline Guidance Package, including the explanation of the legal framework of OCR and CRT in the enforcement of Titles IV and VI of the Civil Rights Act of 1964,⁹ an articulation that schools may be held accountable for discriminatory actions taken by school-based law enforcement,¹⁰ the three-part inquiry used to determine whether a facially neutral policy has an unlawful disparate impact based on race, and the compendium of school discipline laws and regulations.¹¹
- Engage in a transparent process that centers community voice and civil rights to develop a more inclusive, bold agenda that is responsive to the needs of Black students, parents, educators and communities. To ensure accountability, communicate a timeline for future OCR guidance and additional agency action.
- Expand the CRDC to a universal, annual collection, institute sanctions for failure to report, and ensure that the data is made available to the public in a timely fashion.
- Increase civil rights investigations into systemic discrimination in schools.

⁷ U.S. DEP’T OF EDUC., 2020-21 Civil Rights Data Collection: General Overview, Changes and List of Data Elements, <https://www2.ed.gov/about/offices/list/ocr/docs/2020-21-crdc-qa.pdf> (last modified Mar. 15, 2021).

⁸ Exec. Ord. No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

⁹ U.S. Dep’t of Educ. and U.S. Dep’t of Justice, Dear Colleague Letter on the Nondiscriminatory Admin. Of Sch. Discipline 6, 21-22 (Jan. 8 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

¹⁰ *Id* at 6.

¹¹ *Id* at 11-13.

II. *OCR should provide guidance to eliminate the use of school-based law enforcement, which disproportionately harms Black students.*

There is a growing student-led movement and urgent call from communities of color to remove school resource officers, security guards and other school-based law enforcement and reinvest the funding in evidence-based initiatives to support school safety and healthy school climates.¹² LDF commends the Administration for its commitment to increasing access to school counselors and other necessary school staff essential to the social, emotional and mental well-being of students. However, the fostering of positive school climates also requires action to identify school policies or practices that are harmful and should be eliminated. In seeking to end discriminatory school discipline and improve racial justice, OCR must prioritize addressing the pernicious nature of school-based law enforcement and its link to the criminalization of Black children.

Black students, parents and the civil rights community have long sounded the alarm on the disproportionate placement of school-based law enforcement and its ensuing risks. Based on the 2013-2014 CRDC, Black students are approximately 11 percent more likely than white students to attend a school with school-based law enforcement.¹³ Research has shown that the presence of school-based law enforcement, does not necessarily improve school safety; however, it does, lead to poorer discipline outcomes and may lead to increased risk for students of color.¹⁴ For instance, after controlling for socioeconomic status and poverty, one researcher found that schools that employed school resource officers had higher arrest rates for subjective offenses such as disorderly conduct, disrespect, or disrupting class.¹⁵ The referral of students to law enforcement, arrests on school grounds, searches, and the use of force should be last resort actions and should only be used to address behavior that imminently and seriously threatens the physical safety of the individual

¹² Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020).

¹³ Sandra Black, et al., *Civil Rights Data Show More Work is Needed to Reduce Inequities in K-12 Schools*, WHITE HOUSE (Dec. 9, 2016 9:00 AM), available at <https://obamawhitehouse.archives.gov/blog/2016/12/08/civil-rights-data-show-more-work-needed-reduce-inequities-k-12-schools>; See, Kristen Harper and Deborah Temkin, *Compared to majority white schools, majority black schools are more likely to have security staff*, CHILD TRENDS (Apr. 26, 2018), available at <https://www.childtrends.org/blog/compared-to-majority-white-schools-majority-black-schools-are-more-likely-to-have-security-staff>. (noting CRDC data that showed 54.1 percent of schools where more than 75 percent of the student population is Black had at least one school-based law enforcement officer, compared to 32.5 percent for schools where the majority of students are white).

¹⁴ See Matthew Theriot, “*School resource officers and the criminalization of student behavior*,” *Journal of Criminal Justice*, vol. 37 (2009), 280-87.; See also NAACP Legal Def. & Educ. Fund, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline 5* (Nov. 30, 2017), available at https://www.naacpldf.org/files/about-us/Bias_Reportv2017_30_11_FINAL.pdf; See also Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012) (finding 70 percent of students involved in school-related arrests or referred to law enforcement are Black or Latinx), available at <https://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html>.

¹⁵ See Theriot, *School resource officers and the criminalization of student behavior*, at 285.

or others. These actions should not be used to address age-appropriate behaviors or discretionary school code violations.

Researchers have found that the presence of school resource officers also correlates with a decreased sense of safety at school for Black students.¹⁶ Below are just a sampling of recent incidents of excessive, and at times violent, law enforcement interaction with Black students which contribute to that decreased sense of safety at school. These incidents are not anomalies but are rather part of a well-documented pattern of systemic violence and the criminalization of Black children.

- In 2021, 16-year old Black student Taylor Bracey was physically assaulted by a school resource officer at Liberty High School, [resulting in her head slamming into the concrete pavement and her subsequently losing consciousness](#). Following the incident, she has suffered from sleep deprivation, headaches, blurry vision and memory loss.
- In 2020, a police officer in Orlando executed two different [arrests of 6-year-old children in the same day and charged them with misdemeanor battery](#) for behavior exhibited during a tantrum. In the video footage, he is heard bragging about his record of arresting young children.
- In 2020, during the pandemic, a 15-year old Black girl was [sentenced to juvenile detention in Michigan for violating her parole when she failed to complete her schoolwork](#).
- In 2019, an 11-year old Black girl was [arrested in New Mexico for taking too much milk in the cafeteria and being disruptive](#).
- In 2018, [a Black 8-year-old student with an Individualized Education Plan \(IEP\) was arrested, handcuffed, taken to jail, and charged with felony battery for allegedly hitting a teacher](#) after he told her “don’t put your hands on me.”
- [In 2016, a school resource officer at a high school in South Carolina violently flipped a Black student in her desk to the floor and dragged her across the classroom after she refused to surrender her cellphone](#). The officer faced no charges despite the fact that there was a video recording of the incident.
- [During the 2011-2012 school year, Bryan Independent School District, a mid-sized school district in central Texas, allowed school-based law enforcement to routinely issue “Class](#)

¹⁶ Matthew Theriot, & John Orme, *School Resource Officers and Students' Feelings of Safety at School*, RESEARCHGATE.NET (Apr. 2016), available at https://www.researchgate.net/publication/285980423_School_Resource_Officers_and_Students'_Feelings_of_Safety_at_School.

C” criminal misdemeanor tickets to students as a standard mode of discipline. Black students received more than half of all tickets issued despite comprising less than 25 percent of the district’s student body.¹⁷

Black students are overrepresented in school-based arrests and referrals to law enforcement.¹⁸ In the most recent CRDC data available for the 2017-2018 school term, Black students accounted for 15.1 percent of total public student enrollment, but 28.7 percent of all students referred to law enforcement and 31.6 percent of all students arrested at school or during a school-related activity.¹⁹ Similar patterns of disparities were observed for Black students with disabilities.²⁰ During the same period, there was an overall 5 percent increase in school related arrests and 12 percent increase in referrals to law enforcement for Black students with disabilities.²¹ The disturbing frequency of high-profile incidents of police violence against Black children coupled with findings based on the CRDC underscore the need for OCR to issue guidance to address policing in schools as a racial justice issue.

The Biden Administration’s FY22 budget request included additional federal funding for programs that will continue to exacerbate the over-policing of Black children.²² An agenda to further racial equity and improve school safety for Black children requires alignment between funding and policy priorities and must not be devoid of governmental accountability for its role in establishing and perpetuating programs and practices that threaten the civil rights of Black students. Accordingly, the Administration must take steps to ensure that it is not requesting or providing funds for efforts which will further the criminalization of Black children.

Recommendations:

- Articulate that racial disparities in the deployment and practices of school-based law enforcement may violate Titles IV and VI of the Civil Rights Act of 1964.

¹⁷ Press Release, Bryan Independent School District – Police In Schools Complaint, NAACP Legal Def. & Educ. Fund (Feb. 2, 2013), available at <https://www.naacpldf.org/case-issue/bryan-independent-school-district-police-in-schools-complaint/>.

¹⁸ ADVANCEMENT PROJECT, LDF, ET AL., POLICE IN SCHOOLS ARE NOT THE ANSWER TO SCHOOL SHOOTINGS (2018), available at <https://advancementproject.org/resources/police-schools-not-answer-school-shootings/>

¹⁹ U.S. Dep’t of Educ., Office for Civ. Rts, An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>.

²⁰ *Id.* (finding Black students with disabilities accounted for 2.3 percent of overall public student enrollment, but 8.4 percent of students referred to law enforcement and 9.1 percent of students of those arrested).

²¹ *Id.*

²² See OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV’T FISCAL YEAR 2022 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/05/budget_fy22.pdf.

- Foster positive school climates by supporting the elimination of school-based law enforcement in schools as well as the elimination of all policies, funding, and practices that support the placement, reliance and use of police in schools.
- Establish that the American Rescue Plan and other school funding made available to support states and districts in the safe reopening of schools should not be used to hire, retain or support school-based law enforcement.
- For schools that maintain the presence of school-based law enforcement, make clear that they should not supplant the role of educators and other school staff in deploying developmentally appropriate, pedagogically sound interventions to address student misbehavior.
- Provide guidance to schools on evidence-based school safety measures that center healing, restorative practices and racial equity.
- Provide guidance on the civil rights implications of the use of threat assessments and prohibit the inclusion of law enforcement on threat assessment teams.
- Collect data on police use of force against students, disaggregated by race, sex, disability, and EL, including: number of students subjected to pepper spray, tasers, physical attack (e.g. tackling, body slamming, etc.), and number of students injured or killed by a firearm.
- Demilitarize schools by ending the transfer of military surplus weapons to schools, school districts or school-based law enforcement.
- Prohibit data-sharing agreements, absent exigent circumstances, between schools, police departments and immigration enforcement agencies.
- Encourage schools to adopt a formal complaint process with an accessible and understandable mechanism for students, parents, and staff to submit complaints of abuses or misconduct by school-based law enforcement.

III. OCR must take all necessary action to eliminate racial disparities in exclusionary school discipline

Title VI mandates that recipients of federal financial assistance do not discriminate on the basis of race, color or national origin;²³ however, stark racial disparities in exclusionary school discipline have plagued America's public school system for decades.²⁴ Black students are routinely subjected

²³ 42 U.S.C. § 2000d

²⁴ Russell J. Skiba, & Reece L. Peterson, *School Discipline at a Crossroads: From Zero Tolerance to Early Response*, 66 *Exceptional Child* 335, 337–338 (2000); U.S. DEP'T OF EDUC. The Transformed Civil Rights Data Collection, (Mar. 15, 2012), <https://ocrdata.ed.gov/assets/downloads/CMOCRTheTransformedCRDCFINAL3-15-12Accessible-1.pdf>; U.S. Dep't of Educ., Office for Civ. Rts, An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year (2021) <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>; See generally, LDF Testimony at U.S. Senate Judiciary Subcomm. on Const. Civ. Rts & Human Rts Hearing on Ending the School-To-Prison Pipeline (Dec 10, 2012), available at <https://www.naacpldf.org/wp-content/uploads/LDF-testimony-Ending-School-to-Prison-Pipeline-hearing-1.pdf>

to overly punitive school discipline practices that lead to school pushout, exacerbate the school-to-prison pipeline and hinder academic achievement.²⁵ Racial disparities in exclusionary school discipline begin as early as preschool²⁶, and are more evident when examining suspension and expulsion rates at the intersection of race, gender and disability status.²⁷ For example, in the most recent data available, Black girls were the only group across all races and ethnicities for girls where suspension disparities were observed.²⁸ And Black students with disabilities are at significantly higher risk of removal than students in all other racial groups.²⁹

There is no evidence which suggests that students of color misbehave more than their white peers, yet they are persistently over-represented in school suspensions, expulsions, corporal punishment and other forms of school discipline. In a July 2019 report, the U.S. Commission on Civil Rights noted that “[s]tudents of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their white peers – but Black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their white peers and receive harsher and longer punishments than their white peers receive for like offenses.”³⁰

School discipline policies that contain subjective offenses, such as disobedience and disruptive behavior, are significant contributors to the disproportionate exclusionary disciplining of students of color.³¹ A Texas study found that 97 percent of school suspensions were

²⁵ Losen, D.J. & Rumberger, *The Hidden Cost of California’s Harsh School Discipline* 6, THE CENTER FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT, UCLA (Mar. 8, 2017) (stating that the Department of Education has noted that suspension is a strong predictor of lower achievement, grade retention, dropping out, juvenile delinquency and adult incarceration rates).

²⁶ Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. AMERICAN PROGRESS (Nov. 6, 2017) (citing a 2016 study that found an estimated 50,000 preschoolers were suspended and another 17,000 were expelled), available at <https://www.americanprogress.org/issues/early-childhood/news/2017/11/06/442280/new-data-reveal-250-preschoolers-suspended-expelled-every-day/>

²⁷ Losen, D. J., Martinez, P., & Shin, G.H.R., *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* 36, THE CENTER FOR CIVIL RIGHTS REMEDIES AT THE CIVIL RIGHTS PROJECT, UCLA (2021). *See also* LDF Written Testimony Submitted to the U.S. Comm. On Civ. Rts. for Public Briefing on the School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities (Dec. 8, 2017), available at <https://www.naacpldf.org/files/about-us/NAACP%20LDF%20Testimony%20to%20USCCR%20Public%20Briefing%20on%20School%20Discipline%20of%20Students%20with%20Disabilities%20-%20FINAL.pdf> *See also*, Cara McClellan, *Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*, NAACP Legal Defense & Educational Fund, Thurgood Marshall Institute (Jun. 26, 2018), available at https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf.

²⁸ U.S. DEP’T OF EDUC., *supra* note 25.

²⁹ Losen, D. J., et al. *Disabling Inequity* at 36.

³⁰ U.S. COMM’N ON CIV. RTS., *BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES* 10 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

³¹ *Id.*

discretionary, and Black students were 31 percent more likely to receive them.³² And as recent as the 2018-2019 school year, Louisiana suspended 1,260 students in preschool, prekindergarten and kindergarten, citing discretionary offenses such as willful disobedience, disturbing the school, injurious conduct or habits and disrespect as the most common reason.³³ Vague school discipline codes open the door for exclusionary discipline outcomes more rooted in race or gender stereotypes than the student's actual conduct.³⁴

Racial disparities in discipline have continued even during school closures caused by the COVID-19-pandemic. There have been multiple incidents reported, demonstrating that even when in distance learning, Black students are still subjected to harmful school discipline practices and loss of instructional time.³⁵ Federal data shows that students of color, especially Black students, are more likely to remain in remote learning settings.³⁶ As the country continues to struggle through the ongoing pandemic and faces the potential of a COVID-19 surge, measures to improve the nondiscriminatory administration of school discipline must also take into account the experiences and needs of students that remain virtual.

We urge OCR to undertake an audacious approach to identifying and eradicating discriminatory discipline practices and ending the school-to-prison pipeline. It is imperative that OCR expands its capacity to fulfill its oversight and enforcement responsibilities in order to hold states and districts accountable for discriminatory conduct, and help create school environments where students feel safe, affirmed, and are equipped to learn, not one where they experience violence, trauma, and marginalization.

Recommendations

- Collect data on exclusionary school discipline practices in fully remote and hybrid learning settings. This must not be limited to suspensions and expulsions, but should be inclusive of any form of removal from the classroom.

³² Libby Nelson, & Dara Lind, *The school-to-prison pipeline, explained*, VOX (Oct. 27, 2015, 11:05 AM ET), available at <https://www.vox.com/2015/2/24/8101289/school-discipline-race>.

³³ Blane Skiles, *More than 1,000 kindergartners were suspended from school in Louisiana last school year, experts warn of detrimental consequences*, KSLA (Jan. 3, 2020 6:36 PM), available at <https://www.ksla.com/2020/01/03/more-than-kindergartners-were-suspended-school-louisiana-last-school-year-experts-warn-detrimental-consequences/>; See generally, La. R.S. § 17:416.

³⁴ NAACP Legal Def. & Educ. Fund and Nat'l Women's Law Ctr, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* (2014), available at https://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf.

³⁵ Nat'l Sch. Boards Ass'n, *Online Discipline Gap*, (Apr 1, 2021), <https://nsba.org/ASBJ/2021/April/online-discipline-gap>; See also Aaron Loewenberg, *New America School Discipline in the Age of COVID-19*, NEW AMERICA (Nov. 16, 2020), available at <https://www.newamerica.org/education-policy/edcentral/school-discipline-age-covid-19/>.

³⁶ Inst. Of Educ. Sciences, *Monthly School Survey Dashboard* (last updated July 8, 2021), <https://ies.ed.gov/schoolsurvey/>.

- Issue guidance encouraging schools and districts to eliminate vague and subjective language from school discipline codes and policies, and address the role of implicit and explicit bias in disciplinary action based on such policies.
- Improve CRDC by collecting data on school discipline practices (e.g. in- and out-of-school suspensions, expulsions, referrals to law enforcement and school-based arrests) and disaggregate by race and reason for the disciplinary action. Also, reverse the Trump Administration’s changes to the CRDC, including the reinstatement of disaggregated data for preschool students who receive one suspension and those who receive more than one suspension.
- Investigate school discipline policies that disproportionately impact girls of color and students of color with disabilities, and conduct compliance reviews of school disciplinary practices that involve the intersection of race, gender and disability status discrimination or stereotypes.
- Provide federal support to expand state bans on exclusionary and punitive school discipline for young learners, including the abolishing of suspension for preschool to third grade students.
- Reinstatement of 2016 federal guidance to governors and chief state school officers highlighting the discriminatory use of corporal punishment and calling for a cessation of its use in America’s public schools.
- Identify recommendations to support the implementation of effective alternatives to disciplinary exclusion, especially strategies for reducing disciplinary disproportionality by race and gender, sexual orientation or gender identification, and disability.
- Identify and report on schools and districts implementing school or district-wide restorative practices or school-wide positive behavioral interventions and supports, and whether there is a racial equity component.
- Support a diverse teacher and leader workforce trained in utilizing positive school climate practices, such as positive behavioral interventions and supports with a racial equity lens.
- Provide guidance concerning the implementation of instruction and classroom management during the COVID-19 public health crisis that is nondiscriminatory by race/ethnicity, gender, sexual orientation and gender identity, and disability status.

Best Practices

- California state law prohibits suspensions and expulsions for children in grades K-3 for willful defiance. <https://www.asumag.com/safety-security/article/20857342/new-california-law-limits-student-suspensions-for-willful-defiance>
- Texas passed state law prohibiting out-of-school suspensions for prekindergarten to second grade students – out of school suspension decreased by nearly 30,000 in the first year of implementation. <https://txchildren.org/posts/2019/8/27/report-tx-schools-still-suspending-many-pre-k-2nd-graders-but-out-of-school-suspensions-dropped-sharply>

IV. *OCR must address emerging school discipline issues that present Title VI Concerns, including hair discrimination and the expanding use of technology and artificial intelligence in schools.*

Hair Discrimination

Black students have been disproportionately targeted for violating grooming policies that are designed to, or have the effect of, profiling and penalizing them for wearing their natural hair.³⁷ Some school policies that prohibit natural hairstyles consider a violation grounds for disciplinary action, such as exclusion from student activities, or removal from school.³⁸ Recently, a Texas school district prohibited two Black students from participating in class and other school activities, and were ultimately suspended indefinitely due to a discriminatory school grooming policy.³⁹ A student's hair texture or length are not indicia of their capacity to learn. Discriminatory school grooming policies that deprive Black students access to equal educational opportunities must be addressed by OCR.

³⁷ Brenda Alvarez, *When Natural Hair Wins, Discrimination in School Loses*, NEA (Sept. 17, 2019), available at <https://www.nea.org/advocating-for-change/new-from-nea/when-natural-hair-wins-discrimination-school-loses>; *See also* Howard Henderson and Jennifer Wyatt Bourgeois, *Penalizing Black hair in the name of academic success is undeniably racist, unfounded, and against the law*, BROOKINGS INSTITUTION (Feb. 23, 2021) available at <https://www.brookings.edu/blog/how-we-rise/2021/02/23/penalizing-black-hair-in-the-name-of-academic-success-is-undeniably-racist-unfounded-and-against-the-law/>.

³⁸ *See* D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?*, AMER. BAR. ASS'N (Apr. 17, 2020), available at https://www.americanbar.org/groups/business_law/publications/blt/2020/05/hair-discrimination/.

³⁹ Amended Complaint & Request for Jury Trial, *K.B. vs. Barbers Hill Indep. Sch District* Civ Action No. 4:20-CV-01802 (S.D. Tex. 2021), available at <https://www.naacpldf.org/wp-content/uploads/128-2021.03.09-Amended-Complaint.pdf>

Recommendations

- OCR must build upon state and municipal level progress⁴⁰ to issue federal guidance articulating hair discrimination as race discrimination.
- Clarify that school grooming policies that target Black hairstyles are a form of race discrimination in violation of Title VI.

Technology and Artificial Intelligence

An emerging school discipline issue is the use of technology and artificial intelligence (AI), automated decision-making, and biometric surveillance technologies in educational settings. There are growing concerns with the use of artificial intelligence in schools, and how seemingly neutral tools may embed implicit bias and racial discrimination. OCR should undertake a process to examine the ways in which technology may disproportionately impact school discipline, safety and student achievement for students of color.

A recent study conducted by the University of Michigan determined that “using [facial recognition] technology in schools is likely to amplify, institutionalize and potentially weaponize existing racial biases, resulting in disproportionate surveillance and humiliation of marginalized students.”⁴¹ OCR must play a prominent role in developing and disseminating key research and recommendations to ensure these tools do not infringe upon the civil rights of Black students. Schools must weigh the benefit of technology being used to tailor academic supports with the dangers of automated decision-making rooted in potentially discriminatory factors.

This is especially urgent given the increased reliance on technology due to COVID-19. Some schools have already begun using facial recognition technology to scan students to detect body temperatures and mask-wearing.⁴² Companies have also suggested these technologies be used to track school attendance.⁴³ Experts have repeatedly warned of how facial recognition technologies are often unreliable and frequently incapable of correctly identifying Black individuals.⁴⁴ Cities across the country have banned the use of facial recognition due to its

⁴⁰ Nicquel Terry Ellis, *Legislation banning hair bias gains momentum in more states as schools and sports leagues face backlash for policies*, CNN (May 20, 2021), available at <https://www.cnn.com/2021/05/20/us/hair-discrimination-laws-crown-act/index.html>. The following jurisdictions have also adopted the CROWN Act or some form of protection against hair discrimination in the workplace and schools: Connecticut, New Jersey, New York, Colorado, California, Virginia, Washington, Maryland, Oregon, and Louisville, Kentucky.

⁴¹ CLAIRE GALLIGAN, ET AL., CAMERAS IN THE CLASSROOM: FACIAL RECOGNITION TECHNOLOGY IN SCHOOLS, UNIV. OF MICH. 5 http://stpp.fordschool.umich.edu/sites/stpp.fordschool.umich.edu/files/file-assets/cameras_in_the_classroom_executive_summary.pdf

⁴² Gregory Barber, *Schools Adopt Face Recognition in the Name of Fighting COVID*, WIRED, (Nov. 3, 2020), <https://www.wired.com/story/schools-adopt-face-recognition-name-fighting-covid/>.

⁴³ *Id.*

⁴⁴ Drew Harwell, *Federal study confirms racial bias of facial recognition systems, casts doubt on their expanding use*, WASH POST (Dec. 19, 2019 11:43 PM).

discriminatory outputs.⁴⁵ The same level of scrutiny and equity focus must occur at the school and district level.

Another troubling technology issue is the use of predictive policing tools in school settings. In Pasco County, Florida school leaders partnered with local law enforcement to carry out an illegal surveillance program that shared confidential student information, such as grades, grade point averages, attendance records, and discipline referrals with the county sheriff's office.⁴⁶ Data-sharing agreements, such as the one in Pasco County, further outsize the role of law enforcement in schools, stigmatize children and divert resources away from addressing the academic needs of students and towards punitive surveillance programs.

The use of facial recognition, predictive policing and other forms of technology have seen a rise in schools due to COVID-19 and the ill-informed position that more surveillance equates to better school security.⁴⁷ The evidence suggests otherwise. High-surveillance schools report lower math performance and higher suspension rates.⁴⁸ Furthermore, Black students are more than four times more likely than white students to attend a school with the highest level of surveillance.⁴⁹ In ending the school-to-prison pipeline, OCR must be prudent to not simply replace school-based law enforcement or educators with technological or AI tools which have grave racial justice and privacy consequences.

Recommendations

- Engage students, education stakeholders, technology experts and civil rights organizations to gain a deeper understanding of all emerging issues at the intersection of race, civil rights, technology and education.
- Issue guidance clearly stating the harms of facial recognition technology in schools, how it primarily threatens the civil rights and student privacy of Black and Latinx students, and discourage its adoption.

⁴⁵ Rachel Metz, *Beyond San Francisco, more cities are saying no to facial recognition*, CNN (July 17, 2019); See also Ban Facial Recognition Interactive Map, Ban Facial Recognition <https://www.banfacialrecognition.com/map/?categories=Bans,States,Cities>.

⁴⁶ Letter from NAACP Legal Def. and Educ. to Superintendent Kurt Browning, Data-Sharing Agreement and School Resource Officer Memorandum of Understanding Between the Pasco County School Board and Pasco County's Sheriff's Office (May 4, 2021), available at https://www.naacpldf.org/2021-05-03_pasco_coalition_open_letter_final_with_logos_formatting_vs_lj/.

⁴⁷ Mark Keierleber, *As Covid Creeps into Schools, Surveillance Tech Follows*, 74 MILLION, (Dec. 2, 2020), available at <https://www.the74million.org/article/as-covid-creeps-into-schools-surveillance-tech-follows/>.

⁴⁸ Sarah D. Sparks, *High Surveillance Schools Lead to More Suspensions, Lower Achievement*, ED WEEK (Apr. 21, 2021), available at <https://www.edweek.org/leadership/high-surveillance-schools-lead-to-more-suspensions-lower-achievement/2021/04>.

⁴⁹ *Id.*



- Ensure schools do not utilize federal funding for safe school reopening, or other federal funding from the Department of Education, to purchase facial recognition technology, predictive policing tools or other harmful technology.
- Monitor the use of AI for instructional purposes and ensure students of color are not disproportionately identified as “at-risk” or “high-risk” or denied access to a high-quality educator during and following the COVID-19 pandemic.
- Prohibit data-sharing agreements between schools and immigration authorities or other law enforcement except in exigent circumstances.

Thank you for considering our recommendations on the non-discriminatory administration of school discipline. LDF remains committed to working with OCR to ensure Black students and other students of color are provided equitable educational opportunities in learning environments free from racial discrimination. If you have any questions, please contact Hamida Labi via email at hlabi@naacpldf.org.

Sincerely,

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