



January 16, 2018

Via Email to: schooldiscipline@usccr.gov

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Patricia Timmons-Goodson, Vice Chair
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FAIZ SHAKIR
DIRECTOR

RE: The School-to-Prison Pipeline: Intersections of Students of Color with Disabilities

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Dear Chair Lhamon, Vice-Chair Timmons-Goodson, and Commissioners:

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

The American Civil Liberties Union (ACLU) submits these comments to the United States Commission on Civil Rights to consider as it examines the experiences of students of color with disabilities, and whether existing laws and their enforcement are adequate to protect these students from discriminatory disciplinary actions and policies.

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than 2 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

ROBERT REMAR
TREASURER

The ACLU has spearheaded efforts in developing federal legislation such as the Ending Corporal Punishment in Schools Act and the Positive Behavior for Safe and Effective Schools Act, and other legislation that would work to ban or reduce destructive punishment practices and help schools build environments that enable students to thrive. We have also been at the forefront of advocacy making the case that agencies must collect data and create policies around reducing punitive school discipline.

In addition, ACLU affiliates across the country tackle the challenges of disproportionate discipline through litigation and non-litigation advocacy. Several of their successes are detailed in this statement and provide important examples in support of the need to prevent disproportionate discipline from funneling students of color and students with disabilities into the school to prison pipeline.

The ACLU has decades of experience advocating for the civil rights and civil liberties of students of color with disabilities. Based on our experiences and deep expertise, we know that students of color with disabilities are disproportionately subjected to discipline, suspension, and expulsion. They are more likely to have police interactions, to be handcuffed, and to be arrested. Children of color with disabilities spend less time in class and are less likely to graduate. They are far more likely to experience juvenile detention and, later, adult incarceration. These disastrous and tragic consequences can be reduced and prevented by compliance with nondiscrimination standards, particularly those set out by Titles IV and VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA), and the Americans with Disabilities Act.

Robust leadership by the federal government is essential to compliance with federal standards. States and school districts are also critical leaders with significant roles to play in protecting students of color with disabilities from the school to prison pipeline. And in particular, it is vitally important that the federal government maintain its existing regulations and guidance documents regarding discipline and equity.

Students of Color, Students with Disabilities, and Students of Color with Disabilities Experience Disproportionate and Harmful Discipline at School.

Students of color, students with disabilities, and students of color with disabilities face severe disparities in school discipline.¹ According to data from the U.S. Department of Education's Civil Rights Data Collection (CRDC), students with disabilities served by IDEA are twice as likely to receive out of school suspensions as students without disabilities.² Among children with disabilities served by IDEA, black, American Indian or Alaska Native, Pacific Islander, and multiracial boys were more than twice as likely to receive one or more out-of-school suspensions, in comparison to white boys with disabilities.³ Multiracial girls with disabilities received out of school suspensions at more than four times the rate for white girls with disabilities.⁴ American Indian or Alaska Native, Pacific Islander, and black girls with disabilities were suspended around three times as often as white girls with disabilities.⁵

The ACLU has examined disciplinary disparities for students of color and students with disabilities in several states. The New York Civil Liberties Union (NYCLU) has analyzed the 2013-2014 CRDC

¹ See generally *Civil Rights Data Collection Data Snapshot: School Discipline* (U.S. Dep't of Educ., Office for Civil Rights, March 2014), at <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> (Data Snapshot).

² *Id.* at 3. Certain subgroups show more dramatic disparities. For example, Among Asian and Pacific Islander girls, those with disabilities were six times more likely to receive out-of-school suspensions than those without disabilities. *Id.* at 3, 4.

³ *Id.* at 4.

⁴ *Id.*

⁵ *Data Snapshot* at 4.

data on school suspension for several of the largest cities in the state, and found significant disparities:

- In Rochester, students with disabilities made up 17.9 percent of the student population, but 27.2 percent of students who received out of school suspensions.
- In Syracuse, black students with disabilities were 1.575 times more likely to be suspended than white students with disabilities.
- In Yonkers, while black students with disabilities made up only approximately one quarter of all students with disabilities in Yonkers (24.6 percent), black students with disabilities made up 50 percent of in-school suspensions. Further, 100 percent of students with disabilities who received an in-school suspension were black or Hispanic.
- In New York City, students with disabilities made up 17.6 percent of the student population but 37.8 percent of all out-of-school suspensions and 34 percent of expulsions. While black students made up 31.2 percent of the population of students with disabilities, they made up 54.8 percent of the students with disabilities who received an out-of-school suspension and 61.8 percent of students with disabilities who were suspended.

NYCLU also analyzed data from the 2015-2016 school year for New York City obtained from the City's Independent Budget Office. During the 2015-2016 school year, students with disabilities in grades 6-12 were twice as likely to be suspended as students without disabilities and black students with disabilities were twice as likely to be suspended as white students with disabilities. In kindergarten through fifth grade, black students with disabilities were three times as likely to be suspended as white students with disabilities.⁶

In October 2017, the ACLU of Missouri issued a report showing that in Missouri, both black and white students with disabilities were more likely to receive out of school suspensions than children of the same race without disabilities.⁷ Among students with disabilities covered under IDEA, black children were 38 percent more likely to receive corporal punishment, more than twice as likely to receive in school suspensions, more than three times as likely to receive out of school suspensions, and 12 percent more likely to be expelled.⁸

Breaking down the data by gender revealed other disparities. Boys were more likely than girls of the same race and disability status to receive an out of school suspension.⁹ Black boys with disabilities were three times more likely to face out of school suspensions and were 2.5 times more likely to receive multiple out of school suspensions within a single school year than white boys with disabilities.¹⁰ While black girls with disabilities had a lower out of school suspension rate than black

⁶ See submitted Comments of the New York Civil Liberties Union to the Commission.

⁷ *Missouri's Pipeline of Injustice: From School to Prison* (ACLU of Missouri, Oct. 12, 2017) 28, at <https://www.aclu-mo.org/en/publications/school-prison-missouris-pipeline-injustice> (Missouri's Pipeline of Injustice).

⁸ *Id.* at 23, 25, 27, 28, 30, 32.

⁹ *Id.* at 27-28.

¹⁰ *Id.*

boys with disabilities, black girls experienced greater racial disparities, with five times the out of school suspension rate of white girls with disabilities.¹¹ Black girls with disabilities were also more than twice as likely as white boys with disabilities to receive an out of school suspension.¹²

As the ACLU of Missouri found, the consequences of these disproportionate exclusions reinforce historic inequalities for communities of color, low-income communities, and those living with disabilities. Much of the overuse of punishment imposed on members of these communities begins in school, and results in an overrepresentation of these same groups in the criminal justice system. Students who are forced out of the education system because of out-of-school suspensions or expulsions are up to 10 times as likely to drop out, significantly increasing their likelihood of future incarceration.¹³

Additionally, the ACLU of Washington has investigated the problem of discriminatory discipline, and has shared the stories of a number of students with disabilities who have experienced unfair discipline and exclusion from school for disability-related reasons. Many of the students featured are also children of color.¹⁴ The affiliate has also filed a class action lawsuit against the Office of the Superintendent of Public Instruction, the primary state agency responsible for overseeing K-12 public education, on behalf of students with special education needs who have been wrongfully disciplined for behavior related to their disabilities.¹⁵ According to the state's own data, disproportionate discipline for student with disabilities is only getting worse. During the 2014-15 school year, students with IDEA disabilities were suspended or expelled 2.5 times more frequently than their non-special education peers.¹⁶ And in addition to formal discipline, many children are informally excluded by being repeatedly sent home from school early.¹⁷ The suit seeks changes to the way that OSPI monitors and supervises Washington's school districts and schools to ensure that disabled children remain in school.¹⁸ The state-wide problems identified in Washington make clear the importance of federal guidance on the obligations of states under federal disability laws.

¹¹ *Id.*

¹² *Id.*

¹³ *Missouri's Pipeline of Injustice* at 14, 15, 18.

¹⁴ *Pushed Out, Kicked Out: Stories from Families with Special Education Students in Washington* (ACLU of Washington, Aug. 22, 2017), at <https://www.aclu-wa.org/pages/pushed-out-kicked-out-stories-families-special-education-students-washington-1> (Ethan); <https://www.aclu-wa.org/pages/pushed-out-kicked-out-stories-families-special-education-students-washington-2> (Christian); <https://www.aclu-wa.org/story/pushed-out-kicked-out-stories-families-special-education-students-washington> (Tory); <https://www.aclu-wa.org/pages/pushed-out-kicked-out-stories-families-special-education-students-washington> (Steven).

¹⁵ *ACLU-WA lawsuit seeks to stop students who require special education from being pushed out of Washington's public schools* (ACLU of Washington, June 8, 2017) at <https://www.aclu-wa.org/news/aclu-wa-lawsuit-seeks-stop-students-who-require-special-education-being-pushed-out-washingtons>.

¹⁶ *A.D. v. O.S.P.I., Class Action Complaint* (June 8, 2017), ¶ 97 at <https://www.aclu-wa.org/docs/complaint-ad-vs-osp>.

¹⁷ *A.D. v. O.S.P.I., Class Action Complaint* (June 8, 2017), ¶¶ 14, 28-30, 38, 47 at <https://www.aclu-wa.org/docs/complaint-ad-vs-osp>.

¹⁸ *Id.* at 184-199. See also *ACLU-WA lawsuit seeks to stop students who require special education from being pushed out of Washington's public schools* (ACLU of Washington, June 8, 2017) at <https://www.aclu-wa.org/news/aclu-wa-lawsuit-seeks-stop-students-who-require-special-education-being-pushed-out-washingtons>.

The ACLU of Michigan has filed a similar class action on behalf of students with disabilities in Flint, Michigan.¹⁹ For the children of Flint, who have already suffered the brunt of a staggering public health crisis,²⁰ access to education and special educational supports are crucial tools for self-empowerment, upward mobility, and ascendancy from poverty. Yet in Flint, children with disabilities – including children with disabilities caused or exacerbated by exposure to lead-poisoned water – are being disciplined, suspended, and excluded from the classroom, instead of receiving the instructional and behavioral supports they need.²¹ The Flint school district predominantly serves students of color.²² In 2014-15, special education students in the Flint school district were suspended or expelled at a rate more than five times higher than the statewide rate.²³ The experiences of the named plaintiffs highlight the inappropriate disciplinary responses to students with disabilities in Flint public schools. One seven year old with disabilities was suspended over 30 times during the 2015-2016 school year.²⁴ Another second grader with a disability was suspended for the remainder of the school year for the “threatening behavior” of using his hands to form a gun and pretending to shoot other students.²⁵ In September 2017, the district court ruled that the case could proceed.²⁶

The American Civil Liberties Union of Pennsylvania has also reviewed discipline data for students with disabilities. It has found that Pennsylvania’s patterns of punishment of students of color with disabilities parallels national trends. Black students with disabilities receive out-of-school suspensions at the highest rates of any group of students. Some 22 percent of black students with disabilities were suspended at least once. In fact, the profile of the Pennsylvania student who is most likely to be suspended is a black male student with a disability. Black and Latino students with disabilities are more likely to be suspended multiple times than any other group. Roughly a dozen districts suspend between 40 and 75 percent of black students with disabilities. The state also has significant challenges with the over-identification, misidentification and under-identification of students of color with respect to disability. Schools often fail to conduct manifestation reviews and to provide appropriate individualized education supports. The result is the excessive punishment of students of color, especially those who have disabilities.²⁷ Recognizing the problems experienced by

¹⁹ *D.R. v. Michigan Department of Education, Class Action Complaint* (Oct. 18, 2016), at http://www.aclumich.org/sites/default/files/Flint_Schools_Final_Complaint.pdf (Flint Complaint).

²⁰ Lead is a neurotoxin known to cause cognitive, developmental and behavioral impairment in children. See Abby Goodnough, *Flint Weighs Scope of Harm to Children Caused by Lead in Water* (N.Y. Times, Jan. 29, 2016) at http://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-children-caused-by-lead-in-water.html?_r=0.

²¹ *Flint Complaint* at ¶¶ 382-384.

²² Approximately 57 percent of Flint’s 99,000 residents are Black. See Abby Goodnough, *Flint Weighs Scope of Harm to Children Caused by Lead in Water* (N.Y. Times, Jan. 29, 2016) at http://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-children-caused-by-lead-in-water.html?_r=0.

²³ *Flint Complaint* at ¶¶ 78-81.

²⁴ *Id.* at ¶¶ 166-180.

²⁵ *Id.* at ¶¶ 293-295.

²⁶ *Federal District Court Allows Lawsuit to Address Educational Needs of Flint Children to Proceed* (ACLU of Michigan, Sept. 27, 2017) at <http://www.aclumich.org/article/federal-district-court-allows-lawsuit-address-educational-needs-flint-children-proceed>.

²⁷ *Beyond Zero Tolerance: Discipline and Policing in Pennsylvania Public Schools* (ACLU of Pennsylvania, Feb. 2015) 25, https://www.aclupa.org/files/6914/3144/0044/2-16-2015_FINAL_64204_ACLU_ONLINE.pdf (Beyond Zero Tolerance).

students with disabilities, Pennsylvania’s Developmental Disabilities Council has funded projects that work to stem the school-to-prison pipeline at entry points into the system and that ensure the successful return of students with disabilities to school once they leave the justice system.²⁸

The commitment of federal, state, and local leaders to reducing disciplinary disparities can eliminate practices that disproportionately push children of color and children with disabilities out of school.²⁹ The ACLU of Arizona is partnering with school leaders through its Demand2Learn campaign to develop model schools that are committed to increasing student retention by 2020; providing families with training and organizing opportunities so that they can advocate for reforms that will help children stay in school; and demanding changes at the state level, including better reporting and transparency about school disciplinary practices. The campaign includes a particular focus on improving discipline practices in publicly funded charter programs.

In recent years, federal agencies have taken important steps to help end the disproportionate and unnecessary punishment of students that furthers the school-to-prison pipeline. In 2014, the U.S. Department of Education and the U.S. Department of Justice issued a joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline, together with a joint School Discipline Guidance Package.³⁰ The 2014 materials focus on proactive measures to improve school climate and to ensure nondiscriminatory school discipline. The materials include a directory of federal technical assistance resources, and a Guiding Principles document that compiles emerging research and best practices to describe three key principles and related action steps.³¹ The three key principles are:

- (1) Create positive climates and focus on prevention;
- (2) Develop clear, appropriate, and consistent expectations and consequences to address disruptive student behaviors; and
- (3) Ensure fairness, equity, and continuous improvement.

For each guiding principle, the resource identifies applicable action steps and relevant research and resources.³²

In 2016, the U.S. Department of Education issued the Equity in IDEA regulations.³³ The IDEA requires states to identify districts with “significant disproportionality” in significant disproportionality in the identification, placement, and discipline of students with disabilities based

²⁸ See Pennsylvania Developmental Disabilities Council, at <http://www.paddc.org/grant-funding-opportunities/available-projectsgrants/> (listing PADDCC’s current projects).

²⁹ *Demand to Learn Factsheet* (ACLU of Arizona) at https://demand2learnaz.org/wp-content/uploads/2015/02/ACLU_D2L_FactSheet_P3-Event_FINAL-Digital.pdf

³⁰ School Climate and Discipline: Federal Efforts, ED-DOJ School Discipline Guidance Package, at <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

³¹ Directory of Federal School Climate and Discipline Resources (U.S. Dep’t of Educ., Jan. 2014), at <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf>; Guiding Principles A Resource Guide for Improving School Climate and Discipline (U.S. Dep’t of Educ., Jan. 2014), at <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> (Guiding Principles).

³² *Guiding Principles* at 1.

³³ *Fact Sheet: Equity in IDEA* (U.S. Department of Education, Dec. 12, 2016) at <https://www.ed.gov/news/press-releases/fact-sheet-equity-idea> (Equity in IDEA Fact Sheet).

on race or ethnicity.³⁴ States found to have “significant disproportionality” of students by race or ethnicity must spend a portion of their IDEA funds on early intervention services.³⁵ The Equity in IDEA regulations provide a common standard for identifying significant disproportionality and direct states to take steps to reduce racial and ethnic disparities in the identification, placement and discipline of students.³⁶ By requiring districts to identify and address the factors that contribute to significant disproportionality as part of comprehensive, coordinated early intervening services (CEIS), and giving districts flexibility in the use of CEIS, the regulations empower districts to address the underlying causes of disparities in discipline.³⁷

Prior to the regulation, states were permitted to set their own formulas for determining “significant disproportionality.” A February 2013 federal audit by the General Accounting Office found that under the formulas used by many states, “the definition of overrepresentation made it unlikely that any districts would be identified and thus required to provide early intervening services.”³⁸ For example, under the definition adopted by Pennsylvania education officials, *no* districts were identified as having significant racial or ethnic overrepresentation in special education.³⁹ The regulatory standard is thus central to the Department’s response to the problems identified by the GAO audit.⁴⁰

The Equity in IDEA regulations further clarify the requirements for reviewing and revising policies, practices, and procedures when significant disproportionality is identified. The Department also issued an accompanying Dear Colleague Letter focused on recognizing, redressing, and preventing racial discrimination in special education.⁴¹ The Equity in IDEA regulations together with the 2014 and 2016 guidance materials play a crucial role in directing and supporting states and local school districts in their efforts to address the severe consequences of the school to prison pipeline for students of color, students with disabilities, and students of color with disabilities. It is essential that these authorities and resources be retained.

Federal agency enforcement of these standards is also vitally important. In 2016, the DOE’s Office of Civil Rights (OCR) entered into a resolution agreement with the Lodi Unified School District in Lodi, California. Through its investigation, the OCR found that Lodi’s discipline policy had a disproportionate impact on black students, causing district-wide disparities in discipline practices for black students in contrast with white students.⁴² For example, the OCR found that in 2014-15, black students received out-of-school suspension for willful defiance or disruption at five times the rate of

³⁴ *See id.* and 34 CFR Part 300.

³⁵ 34 CFR § 300.646.

³⁶ *Equity in IDEA Factsheet.*

³⁷ *Id.*

³⁸ Individuals with Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education (U.S. Gov’t Accountability Office, Feb. 27, 2013), at <https://www.gao.gov/products/GAO-13-137>.

³⁹ *Beyond Zero Tolerance* at 25.

⁴⁰ *Id.*

⁴¹ Dear Colleague Letter: Preventing Racial Discrimination in Special Education (U.S. Dep’t of Educ., 2016), at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>.

⁴² *U.S. Education Department Reaches Settlement with Lodi Unified School District in California* (U.S. Department of Education, August 24, 2016) at <https://www.ed.gov/news/press-releases/us-education-department-reaches-settlement-lodi-unified-school-district-california>.

white students.⁴³ Schools with higher percentages of black students established harsher punishment for discipline incidents and black students received disproportionately higher levels of discipline than white students.⁴⁴ The agreement requires Lodi to consult with experts to determine the root causes of its discipline disparities, revise its disciplinary policies, improve staff training, and improve supports for at-risk students.⁴⁵

Also in 2016, the OCR reached a resolution agreement with Oklahoma City Public Schools after an OCR investigation revealed that black students were significantly overrepresented in disciplinary actions.⁴⁶ Both the OCR's investigation and the district's own internal audit uncovered "scores of concerns," including inconsistencies in discipline practices throughout the district and within individual schools. In response, the district reviewed its discipline policies, and hired a director of school climate and student discipline and three student behavior specialists. The resolution agreement reached with OCR requires additional affirmative measures. For example, the agreement prohibits exclusionary discipline to the maximum extent possible, requires the district to consider expert guidance on research-based strategies to prevent discrimination, requires the district to provide staff with the tools and training to support positive student behavior to prevent and address misconduct, requires staff to employ a range of corrective measures before referring a student to disciplinary authorities, and requires a system of supports at each school to assess students who display behavior problems.⁴⁷

These robust enforcement outcomes build on the principles established in the IDEA, the Equity in IDEA regulation, and the 2014 and 2016 guidance documents.

Harsh and Disparate Punishments Are Not Justified By "Bad Kids" or School Safety.

The Commission should reject statements that the documented disparities in discipline reflect poverty or inherent racial differences in misbehavior. Studies have shown that disparities in discipline for children of color persist even when controlling for behavior and socioeconomic status.⁴⁸ Moreover, analysis of the 2011-2012 CRDC data shows significant variation in disparities across the country,⁴⁹ contrary to the proposition that inherent racial attributes, rather than local

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Oklahoma City Public Schools, U.S. Education Department Reach Settlement to Address Disproportionate Discipline of Black Students* (U.S. Department of Education, April 20, 2016) at <https://www.ed.gov/news/press-releases/oklahoma-city-public-schools-us-education-department-reach-settlement-address-disproportionate-discipline-black-students>.

⁴⁷ *Id.*

⁴⁸ Russell J. Skiba and Natasha T. Williams, *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior* (The Equity Project at Indiana University, March 2014), pages 2-5 at http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf; Nathan Barrett, et al., *Disparities in Student Discipline by Race and Family Income* (Education Research Alliance for New Orleans, November 20, 2017), pages 8-11 (reviewing literature), 31-32 (study results) at <https://educationresearchalliancenola.org/files/publications/010418-Barrett-McEachin-Mills-Valant-Disparities-in-Student-Discipline-by-Race-and-Family-Income.pdf> (*Disparities in Student Discipline by Race and Family Income*).

⁴⁹ Edward J. Smith and Shaun R. Harper (2015). *Disproportionate Impact of K-12 School Suspension and Expulsion on Black Students in Southern States* (University of Pennsylvania, Center for the Study of Race

policies and decision-making, are driving discipline disparities. Consistently, research shows that principals' attitudes about discipline are among the most powerful determinants of racial disproportionality in school discipline.⁵⁰

The argument that reducing disciplinary disparities for students of color and students with disabilities makes schools less safe is similarly misguided. Discipline disparities and reliance on school policing can be reduced without compromising school safety. A large percentage of out-of-school suspensions are for offenses that have no direct impact on school safety. According to a 2016 report by the ACLU of California, studies show that the majority of police enforcement on campus is in response to minor offenses and conduct violations that pose no direct threat to personal safety.⁵¹ Similarly, according to a report by the ACLU of Michigan, 19 percent of out of school suspensions given during the 2011-2012 school year in Michigan were for truancy, 14 percent were for insubordination, 16 percent were for disorderly conduct, and hundreds were for the use of electronic devices. A substantial number of suspensions were also for relatively mild infractions, such a verbal abuse or fights that did not result in injury. Less than a quarter of one percent of out of school suspensions were for the possession of a firearm, knife, or other dangerous weapon.⁵² One such example is described in the ACLU of Michigan's litigation on behalf of Flint students: "On June 10, 2016, the school suspended him for the remainder of the school year due to his 'threatening' behavior when he used his hands to form a make-believe gun and pretended to shoot other students. His second grade teacher believed that he needed to be disciplined and 'that's all it comes down to.'" ⁵³

To the contrary, reducing disparities enhances school safety. In fact, after the Los Angeles Unified School District instituted a new suspension policy aimed at reducing discipline disparities, it achieved its highest "sense of safety" rating in five years.⁵⁴ Students take notice of discipline disparities.⁵⁵ Severe disparities can give students the impression that school discipline is arbitrary and unfair or that their schools condone discrimination. According to a 2017 report by the ACLU of Maine:

and Equity in Education, 2015) page 1, at

https://equity.gse.upenn.edu/sites/default/files/publications/Smith_Harper_Report.pdf.

⁵⁰ *Id.* at 3.

⁵¹ Linnea Nelson, *et al.*, *The Right to Remain a Student: How California School Policies Fail to Protect and Serve* (ACLU of California, Oct. 2016) 7, https://www.aclunc.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf (The Right to Remain a Student).

⁵² Christopher Dunbar, Jr., *For Naught: How Zero Tolerance Policy and School Police Practices Imperil Our Students' Future* (ACLU of Michigan, February 2015) pages 8-10, at <http://www.aclumich.org/sites/default/files/2015-ACLUMichigan-AllForNaught.pdf>.

⁵³ *D.R. v. Michigan DOE, Class Action Complaint* (Oct. 18, 2016) ¶¶ 293-295, http://www.aclumich.org/sites/default/files/Flint_Schools_Final_Complaint.pdf.

⁵⁴ Daniel J. Losen and Amir Whitaker, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California* (The Center for Civil Rights Remedies, 2017) 14, https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/lost-instruction-the-disparate-impact-of-the-school-discipline-gap-in-california/UCLA_Lost-Instruction_R7-102317.pdf.

⁵⁵ *Disparities in Student Discipline by Race and Family Income, supra*, at page 32 ("[W]e see that substantial portions of discipline gaps arise within schools, meaning that these gaps are potentially observable to many students and staff."); Emma Findlen LeBlanc, *We Belong Here: Eliminating Inequity in Education for Immigrants and Students of Color in Maine* (ACLU of Maine, Sept. 2017) page 22, at https://www.aclumaine.org/sites/default/files/webelonghere_report.pdf (We Belong Here).

Many students of color offered examples of disparate discipline in their schools, as when a white student and a black student were both suspended after fighting, but the black student's suspension was two weeks longer. Those experiences are commonplace. When students confront educators about those disparities, they are sometimes disciplined further, and administrators usually say that there are "different circumstances" for each student that they can't explain because of student privacy rights. Students are left feeling like their discipline is arbitrary and unfair.⁵⁶

A school environment that condones discrimination makes students less safe. In the process of documenting the discrimination experienced by students of color, the ACLU of Maine uncovered stories of students spitting on students with disabilities, calling gay students "faggots," calling transgender students "abominations," and grabbing girls' bodies in school hallways.⁵⁷ By addressing disciplinary disparities, dismantling other structural barriers to success, and countering harmful stereotypes, schools can help transform hostile and intolerant school cultures, thereby making all children safer.⁵⁸ Thus, efforts to reduce disciplinary disparities enhance school safety, contrary to the arguments of critics that nondiscrimination initiatives are dangerous.

Moreover, any discussion of school safety is incomplete if it does not consider how interactions with school resource officers can threaten the physical safety of students. Students of color and students with disabilities should be just as protected from violence as any other members of the school community. Yet the many accounts of children being handcuffed or otherwise subject to police violence in school vividly illustrate the danger they face from school policing.

School Policing Harms Students, and Particularly Students of Color with Disabilities.

The ACLU has long advocated for the civil rights and civil liberties of students of color with disabilities when interacting with police. Criminalizing childhood behavior is a problem for every student in the U.S., but it is particularly damaging to students of color and students with learning, behavioral, or physical disabilities. The results are even more catastrophic for students who fall into both demographic categories.

The criminalization of children of color, children with disabilities, and children of color with disabilities is occurring at the youngest ages imaginable. In Kansas City, Missouri, the ACLU represents a seven-year-old bullied black child with a disability who was handcuffed with his arms behind his back for 15 minutes by a school resource officer for the "crime" of crying, yelling, and walking away from the officer.⁵⁹ In October of 2017, the federal district court denied the defendants' motion to dismiss the case on summary judgment.⁶⁰

⁵⁶ *We Belong Here* at 22.

⁵⁷ *Id.* at 42.

⁵⁸ *Id.*

⁵⁹ *K.W.P. v. Kansas City Public Schools*, No. 16-974, Complaint for Damages and Declaratory and Injunctive Relief (Sept. 8, 2016), https://www.aclu-mo.org/sites/default/files/primmvkcps_complaint.pdf; *ACLU of Missouri Sues K.C. Public Schools for Handcuffing Second Grader* (ACLU of Missouri, Sept. 8, 2016), at <https://www.aclu-mo.org/en/node/341>.

⁶⁰ *K.W.P. v. Kansas City Pub. Sch.*, No. 16-0974-CV-W-SRB, 2017 WL 5504369, at *5 (W.D. Mo. Oct. 31, 2017).

In Kenton County, Kentucky, the ACLU represents two disabled children, an eight-year-old Latino boy and a nine-year-old black girl, who were shackled with their arms behind their backs at the biceps for misbehavior such as a “severe temper tantrum,” “relatively minor misconduct,” and being “defiant and noncompliant.”⁶¹ In litigation the defendants argued that the less-than-60-pound children committed such crimes as felony assault, “terrorist threatening,” and disorderly conduct. Discovery in the case revealed at least seven handcuffings of elementary age school students, including of one child in kindergarten or first grade.⁶² In October of 2017, the federal district court concluded that the police officer’s conduct violated the U.S. Constitution, reasoning that “[w]hile S.R. kicked a teacher and L.G. tried to and/or did hit a teacher, these are very young children, and their conduct does not call to mind the type of ‘assault’ which would warrant criminal prosecution.”⁶³ In March 2018, the children’s claims for damages will be tried before a jury.

In Flint, Michigan, the ACLU represents a black child with a disability who was exposed to lead-contaminated water for at least 18 months. In 2015, an SRO handcuffed this child – then seven years old – for an hour after the child misbehaved during an after-school program. As a result of the handcuffing, the student was traumatized and publicly humiliated in front of his peers. He now experiences debilitating fear and anxiety, exacerbating his existing disability.⁶⁴

These alarming accounts of small children being handcuffed at school – two of which were captured on video⁶⁵ – have their roots in decades of laws and policies promoting the presence of police officers at school. In 2017, the ACLU issued a report reviewing 50 years of school policing and its devastating consequences on education.⁶⁶ An originating principle of school policing is the harmful belief that criminal tendencies can be identified in children. In the 1970s and 1980s, school districts and cities launched programs to identify “predelinquent” youth – whether or not a crime was committed.⁶⁷ Common youth behaviors became criminalized as “insubordination,” a vague term that was applied in racially discriminatory ways to black and Latino youth, and to children with “short attention spans” or “quick temper” – understood today as likely related to learning and cognitive disabilities.⁶⁸

The presence of law enforcement at school has only escalated in recent years, despite scant evidence that school policing programs enhance safety. For example, in 1998, the Board of Education of New York City voted to transfer school safety from educators to the NYPD. Since this initial transfer, the

⁶¹ *S.R. v. Kenton Cty. Sheriff's Office*, No. 215CV143WOBJGW, 2015 WL 9462973, at **4, 5 (E.D. Ky. Dec. 28, 2015).

⁶² Docket No. 162 at 23.

⁶³ *S.R. v. Kenton Cty. Sheriff's Office*, No. 215CV143WOBJGW, 2017 WL 4545231, at *9 (E.D. Ky. Oct. 11, 2017).

⁶⁴ *Seven-Year-Old Handcuffed at School* (ACLU of Michigan, Mar. 4, 2016), at <http://www.aclumich.org/article/seven-year-old-handcuffed-school>; *Flint Complaint*, at ¶¶ 135-155.

⁶⁵ See *Third-Grader Handcuffed in School* (ACLU) at <https://www.aclu.org/video/third-grader-handcuffed-school> (Kentucky); and Jacquellena Carrero, *Police Apologize For Handcuffing 7-Year-Old Student in Flint, Michigan*, at <https://www.nbcnews.com/news/us-news/flint-police-apologize-handcuffing-7-year-old-student-n455796> (Michigan).

⁶⁶ Megan French-Marcelin and Sarah Hinger, *Bullies in Blue: The Origins and Consequences of School Policing* (ACLU, Apr. 2017), at https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf.

⁶⁷ *Id.* at 4-5 (discussing programs in Kansas City, Mo., Oakland, Chicago, and Baltimore).

⁶⁸ *Id.*

number of police personnel in schools has increased from 3,200 to more than 5,200 – making the NYPD School Safety Division one of the largest police forces in the country. Other states have also dramatically expanded school-based police programs in the last 15 years.⁶⁹

Studies show that the majority of police enforcement on campus is in response to minor offenses and conduct violations that pose no direct threat to personal safety.⁷⁰ A study of the three largest school districts in Massachusetts showed numerous arrests at school based on misbehavior that could have been addressed more appropriately by teachers and school staff, with significantly less harm to students.⁷¹ A 2009 study found that having a regularly assigned police officer at school more than doubled the rate of arrests for “disorderly conduct,” even when controlling for important factors such as school poverty.⁷²

In South Carolina, the ACLU is challenging state laws that make “disturbing a school” or conducting oneself at school in a “disorderly or boisterous manner” a criminal offense, on the grounds that such “crimes” are unconstitutionally vague.⁷³ The ACLU found that students of color, students with disabilities, and students of color with disabilities are particularly subject to prosecution. For example, D.S., one of the plaintiffs in the case, is a black student with learning disabilities and a heart condition who was charged as an adult at age 17 with “disturbing schools” after a minor physical altercation.⁷⁴ The case was recently argued before the Fourth Circuit Court of Appeals.

The availability of outside (non-district) funding from governmental agencies is a driving force behind the expansion of school-based policing.⁷⁵ In July 2013, Pennsylvania lawmakers passed “Safe Schools” legislation that significantly expanded funding for school police and school resource officers.⁷⁶ Pennsylvania law now requires that schools notify law enforcement immediately whenever certain crimes occur on campus (including possession of a knife and felony vandalism).⁷⁷ And the law sets out a long list of additional offenses deemed appropriate for “discretionary notification” of law enforcement, such as simple assault, theft, use of tobacco, and misdemeanor vandalism.⁷⁸ Thus, the law may be encouraging districts to report incidents to police that might otherwise be handled by school personnel.⁷⁹

⁶⁹ *Beyond Zero Tolerance* at 13.

⁷⁰ *The Right to Remain a Student* at 7 (citing Emily Morgan *et al.*, Council of State Gov’ts Justice Ctr., *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and out of the Juvenile Justice System* 11 (2014)).

⁷¹ Robin L. Dahlberg, *Arrested Futures: The Criminalization of School Discipline in Massachusetts’ Three Largest School Districts* (ACLU, ACLU of Massachusetts & Citizens for Juvenile Justice, Spring 2012) 6, <https://aclum.org/wp-content/uploads/2015/06/reports-arrested-futures.pdf>.

⁷² *The Right to Remain a Student* at 12 (citing Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 *J. of Crim. Just.* 280, 280–87 (2009)).

⁷³ Robin Shulman, *A South Carolina Student Was Arrested for ‘Disturbing a School’ When She Challenged Police Abuse, So We Sued* (Aug. 11, 2016), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/south-carolina-student-was-arrested-disturbing>.

⁷⁴ *Id.*

⁷⁵ *Beyond Zero Tolerance* at 28.

⁷⁶ *Id.* at 28–29.

⁷⁷ *Id.* at 30; 24 Pa. Stat. § 13-1303-A(b)(4.1); 22 Pa. Code § 10.21.

⁷⁸ *Beyond Zero Tolerance* at 30; 24 Pa. Stat. § 13-1303-A(b)(4.2); 22 Pa. Code § 10.22.

⁷⁹ *Beyond Zero Tolerance* at 30.

School policing programs intersect harmfully with youth, race, and disability. As the ACLU of Washington explains:

Adolescent misconduct is simply not the same as criminal behavior. Adolescents can engage in risky or defiant behavior simply due to the lack of mature development of the parts of the brain that facilitate self-regulation. Teachers may be more likely to attribute misbehavior to students of color, due to implicit bias. Students who have been exposed to trauma may interact differently with their school environments in ways that can be interpreted as misbehavior. And students with disabilities may require additional behavioral supports to reinforce positive behaviors.⁸⁰

Data collected from schools and school districts demonstrate that students of color, students with disabilities, and students of color with disabilities are significantly more likely to interact with law enforcement. The U.S. Department of Education found during the 2011-2012 school year, black students represented 27 percent of students referred to law enforcement and 31 percent of students arrested at school, despite representing only 16 percent of student enrollment. And students with disabilities represented a quarter of students arrested and referred to law enforcement, even though they are only 12 percent of the overall student population.⁸¹

In Missouri, during the 2013-2014 school year, black students with disabilities made up approximately 16 percent of IDEA enrollment, but experienced 20 percent of IDEA referrals to law enforcement and 22 percent of IDEA arrests.⁸² In Washington state, during the 2011-2012 school year, nearly 26 percent of referrals to law enforcement were students with disabilities, despite making up significantly less of the student population.⁸³ And Latino students made up 28 percent of referrals to law enforcement, but only 13 percent of the student population.⁸⁴ A study of the three largest school districts in Massachusetts showed both students of color and disabled students facing exceptionally high arrest rates.⁸⁵

In 2016, the ACLU of California analyzed data from the U.S. Department of Education Civil Rights Data Collection for 2013-2014, including 22,746 student referrals to police and 9,540 student arrests reported by California K-12 schools:

We uncovered troubling statistics showing that these police interactions disproportionately affect students of color, students with disabilities, and low-income students. In particular, black students are three times as likely as white students to be subjected to school-related arrest, American Indian students are twice as likely as white students to be arrested at school, and Hawaiian/Pacific Islander students are 1.5 times as likely. Latino students are also arrested at a rate higher than their rate of enrollment in California schools. Likewise, students with disabilities are three times as likely as students without disabilities to be arrested. Finally, the average arrest rate in schools where more than 80 percent of students are low-

⁸⁰ *Students Not Suspects: The Need to Reform School Policing in Washington State* (ACLU of Washington, Apr. 2017) 15, <https://www.aclu-wa.org/docs/students-not-suspects-need-reform-school-policing-washington-state>.

⁸¹ *Data Snapshot* at 1, 6, 7.

⁸² *Missouri's Pipeline of Injustice* at 16.

⁸³ *Students Not Suspects* at 20.

⁸⁴ *Students Not Suspects* at 20-21.

⁸⁵ *Arrested Futures* at 6.

income is seven times the average arrest rate in schools where fewer than 20 percent of students are low-income. ...

Nationwide, students of color are more likely to be identified as having a disability, and they are also more likely to be enrolled in schools with a high proportion of students receiving free or reduced-price lunch. Taken together, our statistics suggest that many students of color are triply vulnerable to harsh discipline based on their race, their status as students with disabilities, and their enrollment in high-poverty schools.⁸⁶

The 2016 report by the ACLU of California also included accounts of students with disabilities experiencing violence at the hands of police officers in school. The students included a seven year old boy who was pepper sprayed in the face for refusing to climb down from a bookshelf as well as a five year old boy who was taken to a mental institution with his arms and legs in zip ties in an effort to “scare him straight.”⁸⁷ More recently, the ACLU of Northern California analyzed arrest data from Stockton Unified School District (SUSD), obtained through an ACLU Public Records Act lawsuit brought in 2016. The data showed that Black students with disabilities were more than twice as likely as white students with disabilities to be arrested by SUSD police.⁸⁸ And Black students were arrested for “disturbing the peace” at rates substantially higher than the rates for all other students.⁸⁹

The New York Civil Liberties Union has also analyzed the 2013-2014 CRDC data for several of the largest cities in the state, and found:

- In Buffalo, students with disabilities made up 18.5 percent of the total student population, but were 73.9 percent of the students referred to law enforcement. Of those students with disabilities referred to law enforcement, 76.5 percent were black.
- In Rochester, 100 percent of students with disabilities that were referred to law enforcement in Rochester were black.
- In Yonkers, black students with disabilities made up only approximately one quarter of all students with disabilities, but made up 68.6 percent of referrals to law enforcement.
- In New York City, IDEA students made up 17.6 percent of the student population, but 34.8 percent of all referrals to law enforcement. And black and Hispanic students made up 93 percent of all students with disabilities who were referred to law enforcement.

Obtaining complete data about the experiences of students of color with disabilities during their interactions with law enforcement is difficult. Police department rarely keep records that accurately reflect information about school policing. For example, while police departments may maintain a database of arrest reports, such reports do not generally capture whether the arrestee was a student,

⁸⁶ *The Right to Remain a Student* at 3, 19.

⁸⁷ *The Right to Remain a Student* at 13.

⁸⁸ *ACLU Releases New Data on Stockton Unified’s Pattern of Wrongly Arresting Students* (ACLU of Northern California, June 6, 2017), <https://www.aclunc.org/news/aclu-releases-new-data-stockton-unified-s-pattern-wrongly-arresting-students>.

⁸⁹ Analysis of SUSD data by University of California at Davis, commissioned by the ACLU of Northern California, at https://www.aclunc.org/sites/default/files/Analysis_June-2017-Stockton-USD-Data-Report.pdf.

whether the arrest took place in a school, what grade the arrestee was in, whether a student-arrestee was also subject to a suspension or expulsion, or whether the arrestee was a person with disabilities. This lack of accurate record keeping obscures the often-disproportionate impact that police have on vulnerable student populations. It reinforces and contributes to the notion that school police officers operate in a grey area and are not answerable to educators. Worse, it makes systemic reform of school policing nearly impossible.

For example, in New York City, the NYPD does not publish data on its interactions with students with disabilities. However, it does publish data on “child in crisis” situations. These are incidents where a student “displaying signs of emotional distress” is removed from the classroom and taken to the hospital for a psychological evaluation. Many of the students facing these types of situations have mental health needs and are better served by counselors and other mental health professionals. Between July 2016 and July 2017, the NYPD intervened in 2,702 incidents involving children in crisis. Ninety-five percent of these interactions involved children of color and half (49.6 percent) were black students. Further, children of color made up 100 percent of the 84 students, age 12 and under, who were handcuffed during a “child in crisis” intervention.⁹⁰

The stakes are grave. Students who are arrested at school are three times more likely to drop out than those who are not. And students who drop out are eight times more likely to end up in the criminal justice system than those who remain in school and graduate.⁹¹

Based on its expertise and experience, the ACLU opposes the permanent stationing of police officers at schools. In particular, the ACLU opposes the regular presence of police officers at elementary schools. Children of color, children with disabilities, and children of color with disabilities are particularly subject to harmful police interactions at school. Where police officers are present at schools, the ACLU supports the clear delineation of roles between school personnel and law enforcement through a Memorandum of Understanding (MOU) to combat harmful outcomes, including disproportionate impacts on children of color, children with disabilities, and children of color with disabilities. All officers who participate in school policing should expect that a significant proportion of the students with whom they interact have disabilities, including non-apparent disabilities, and be trained accordingly. The ACLU supports robust record-keeping and reporting about the activities and outcomes of school policing.

School policing programs should only exist where they are supported by the community. In Louisville, Kentucky, families are calling for an end to school policing.⁹²

CONCLUSION

Students of color with disabilities must be treated fairly and granted a real opportunity to receive a Free Appropriate Public Education, as required by IDEA and other federal laws. But far too often, as detailed in this letter, students of color with disabilities are not educated, but are instead disciplined, excluded, and arrested. Changing this harmful dynamic is the key to ending the school-to-prison

⁹⁰ *Children in Crisis: Police Response to Students in Emotional Distress* (Advocates for Children, Nov. 2017), http://www.advocatesforchildren.org/sites/default/files/library/children_in_crisis.pdf?pt=1.

⁹¹ *Arrested Futures* at 5.

⁹² Sarah Hinger, *Police Assault on Black Students in Kentucky Sparks Calls for Reform* (ACLU, Nov. 21, 2107), at <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/police-assault-black-students-kentucky-sparks-calls>.

pipeline.

The Equity in IDEA rule and the 2014 and 2016 guidance documents critical tools for combatting the disproportionate discipline, exclusion, and arrest of students of color with disabilities. They are based on research, data, and the public policy of inclusion and equity. They set the standards for IDEA compliance, and create a pathway to positive behavioral supports, rational discipline, and safer schools. These authorities must be maintained. If you have questions, please do not hesitate to contact Jennifer Bellamy, Legislative Counsel, at jbellamy@aclu.org or (202) 715-0828.

Sincerely,



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