

Date: July 23, 2021

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Acting Assistant Secretary
Office for Civil Rights
U.S. Department of Education
Potomac Center Plaza (PCP)
550 12th Street SW, Washington DC 20024
Submitted electronically via: www.regulations.gov

Re: School Climate and Discipline (ED-2021-OCR-0068)

Dear Acting Secretary Goldberg:

On behalf of the American Civil Liberties Union (ACLU), and its undersigned state affiliates, we respectfully submit the following comments in response to the Department of Education Office for Civil Rights' (OCR) request for information on school climate and discipline practices in our nation's elementary and secondary schools.

The ACLU is a non-partisan public interest organization dedicated to preserving the principles of liberty and equality set forth in the Constitution and in our nation's civil rights laws. We believe that every person has the right to an equal education, free from invidious discrimination. The ACLU has long worked to end the school-to-prison pipeline through federal, state, and local legislation and advocacy, and through litigation targeting punitive and discriminatory school discipline and policing practices—including corporal punishment, suspension and expulsion, and referral to law enforcement—that deny students of color, students with disabilities, and others equal access to education and push them into the juvenile and criminal systems. Several examples of this work are detailed in this comment and provide the basis for our strong urging that OCR provide guidance on the issues of school climate and discipline as they impact the civil rights of our nation's students.

I. Guidance on the Nondiscriminatory Administration of School Discipline Is Still Necessary.

OCR should revise and re-instate its prior guidance on school discipline and climate as a foundation for its work in this area. The ACLU was among the many organizations, researchers, students, and families to advocate for the adoption of the 2014 Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline and related materials. The Department's guidance was urgently needed then and is no less important today. In our work across the country, the ACLU continues to address issues of discriminatory school discipline.¹ A 2018 national

¹ See, e.g., ACLU FLA., SAFE TO LEARN: AN ASSESSMENT OF SCHOOL CLIMATE AND DISCIPLINE IN FLORIDA (2017-2018), https://www.aclufll.org/sites/default/files/aclu_of_florida_safe_to_learn_report.pdf; ACLU Mo.,



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report from the ACLU and UCLA’s Center for Civil Rights Remedies demonstrates the persistent need to address the discriminatory use of school discipline. As detailed in the report, due to out-of-school suspensions, students in the 2015–16 school year lost over 11 million days of instruction.² This loss disproportionately impacted Black, Native American, Pacific Islander, and Latinx students, as well as students with disabilities.³ The report highlights the ways in which disparate discipline has profound consequences on educational opportunity and future involvement with law enforcement.⁴

Research conducted since 2014 likewise reaffirms the need to redress discrimination in school discipline and the serious impacts for students’ education. A recent meta-analysis of research in the field found that “the causes of disproportionality in school discipline are numerous and multifaceted,” and that these disparities could not be explained by socioeconomic status or differences in behavior, but rather, that the “policies, practices, and perspectives” of educators play an important role.⁵ Additionally, researchers have documented how racial stereotypes lead teachers to view behaviors more harshly when committed by Black students as compared to white students, and to escalate their responses over multiple encounters.⁶ The intersection of race and sex stereotyping has also been documented in the discriminatory discipline of Black girls.⁷ Research has also expanded on the availability and efficacy of alternatives to punitive discipline,⁸ such as the use of restorative practices,⁹ and has demonstrated the close relationship

FROM SCHOOL TO PRISON: MISSOURI’S PIPELINE OF INJUSTICE (2017), <https://www.aclu-mo.org/en/missouris-pipeline-injustice-school-prison>; HILLARY DAVIS, ACLU R.I., THE SCHOOL-TO-PRISON PIPELINE IN BLACK AND WHITE (2015), <https://www.aclu.org/press-releases/aclu-report-highlights-racial-disparities-school-prison-pipeline>.

² DANIEL J. LOSEN, U.C.L.A. CTR. FOR CIV. RTS. REMEDIES & AMIR WHITAKER, ACLU OF S. CAL., 11 MILLION DAYS LOST: RACE, DISCIPLINE, AND SAFETY AT U.S. PUBLIC SCHOOLS 4 (2018), https://www.aclu.org/sites/default/files/field_document/final_11-million-days_ucla_aclu.pdf.

³ *Id.* at 5.

⁴ *Id.* at 3.

⁵ Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 UNIV. GA. 752 (2018).

⁶ Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 J. OF PSYCH. SCI. (2015); *see also* Jason A. Okonofua, et al., *A Vicious Cycle: A Social–Psychological Account of Extreme Racial Disparities in School Discipline*, 11 PERSP. PSYCH. SCI., 381-98 (2016); Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PROC. NATL. ACAD. SCI. 8255-8260 (2019).

⁷ Leah A. Hill, *Disturbing Disparities: Black Girls and the School-to-Prison Pipeline*, 87 FORDHAM L. REV. 11, 58–59 (2018); MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2016).

⁸ *See generally* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION (Daniel J. Losen ed. 2015).

⁹ SONIA JAIN ET AL., RESTORATIVE JUSTICE IN OAKLAND SCHOOLS, IMPLEMENTATION AND IMPACTS (2014), https://www.ousd.org/cms/lib/CA01001176/Centricity/Domain/134/Exec_Summary_OUSD_RJR_eport_2014.pdf; *see also* CATHERINE H. AUGUSTINE ET AL., CAN RESTORATIVE PRACTICES IMPROVE SCHOOL CLIMATE AND CURB SUSPENSIONS? (2018), https://www.rand.org/pubs/research_reports/RR2840.html; Francis Huang & Yolanda Anyon et al,



between investing in inclusive and affirming school climate and the reduction in harmful, punitive school discipline.¹⁰

In addition to guidance addressing school discipline, OCR's commitment to investigate and resolve complaints is pivotal in removing the barriers to education created by discriminatory discipline. For example, in 2017, OCR responded to a complaint filed by the ACLU of Northern California and partners¹¹ alleging racial and disability discrimination against Native American students in the Loleta Union School District. Through its investigation, OCR found substantial evidence of the disparate treatment of Native American students, including through discipline,¹² and entered into a voluntary resolution agreement with the school district requiring the district to address historic discrimination and create a safe learning environment. These remedies open an equitable educational opportunity for hundreds of students.

We urge OCR to revise and reinstate its guidance on the nondiscriminatory use of school discipline and to further invest in its outreach and assistance as well as investigation and enforcement efforts.

II. Technology Plays an Increasing Role in Discriminatory School Discipline.

Punitive school discipline is not limited to the use of suspensions and expulsions. In its guidance, we urge OCR to address the range of control and compliance-oriented approaches that negatively and disproportionately impact students of color. These include the increasing use of surveillance technologies like metal detectors, video surveillance technologies—some enhanced with analytics and facial recognition—and in the era of remote learning, digital surveillance tools. These systems have a negative impact on school climate, invade student privacy, are ineffective, and fuel the school-to-prison-pipeline.

For example, many school districts utilize metal detectors to scan students. These systems are frequently staffed by police or security guards, can create flashpoints for confrontations, and take away from invaluable classroom time. A 2016 study found that a school with more than 50% students of color is between 2 and 18 times more likely to use metal detectors, law enforcement or guards, or locked gates than

An Examination of Restorative Interventions and Racial Equity in Out-of-School Suspensions, 47 RUTGERS UNIV. 167 (2018).

¹⁰ See Constance A. Lindsay & Cassandra M.D. Hart, *Exposure to Same-Race Teachers and Student Disciplinary Outcomes for Black Students in North Carolina*, 39 EDUC. EVALUATION & POL'Y ANALYSIS 485 (2017); DeLeon L. Gray, et al., *Black and Belonging at School: A Case for Interpersonal, Instructional, and Institutional Opportunity Structures*, 88 EDUC. PSYCH. 98 (2018), <https://www.tandfonline.com/doi/abs/10.1080/00461520.2017.1421466?journalCode=hedp20>.

¹¹ ACLU N. CAL., *Education Equity for All Students, Including Native Americans* (Apr. 2, 2018), <https://www.aclunc.org/article/education-equity-all-students-including-native-americans-loleta-ca>. The complaint was filed by the ACLU jointly with the National Center for Youth Law and California Indian Legal Services. *Id.*

¹² *Id.*



a school with fewer than 20% students of color.¹³ In addition to the racial bias in their deployment, these systems do not make students feel safer. A 2013 study found that “metal detectors and the number of visible security measures employed in school were associated with a decrease in student reports of feeling safe.”¹⁴ The Department of Education itself has determined that these systems are ineffective, finding that “the impact of metal detectors, X-ray machines, and similar screening technologies on school violence is questionable, with at least one study concluding that metal detectors have no apparent effect on reducing violence on school grounds.”¹⁵

The ACLU has seen the negative impacts of metal detectors in practice. In New York City, Black and Latinx students are three times more likely to attend a school with a metal detector than white students.¹⁶ Despite the clear racial disparity, the New York City Department of Education and the NYPD have repeatedly refused to provide public information about the location of the devices or a justification for their use.¹⁷ The ACLU of Southern California was able to obtain records from the Los Angeles Unified School District and found the district’s mandatory metal detector search policy was not only expensive and ineffective, but was also utilized to target particular students for punishment and humiliation, and that the school district implemented the policy unevenly, disproportionately affecting students of color.¹⁸ These searches forced students to forgo crucial classroom instruction and made students “feel like criminal suspects.”¹⁹ Following public conversation about these facts and advocacy to the school district, in 2020 the LAUSD Board of Education agreed that the policy was discriminatory and ineffective in improving school safety and ultimately voted to end random metal detector searches in the district.²⁰

In addition to metal detectors, school districts deploy surveillance cameras, some equipped with biometric identifying technology, which have a disproportionate impact on students of color. The use of this technology by schools raises many concerns, including: misidentification; the unnecessary exposure of children to

¹³ Jason P. Nance, *Student Surveillance, Racial Inequities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017).

¹⁴ Suzanne E. Perumean-Chaney & Lindsay M. Sutton, *Students and Perceived School Safety: The Impact of School Security Measures*, 38 AM. J. CRIM. JUST. 570 (2012).

¹⁵ See U.S. DEPT. OF EDUC., FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 125 (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

¹⁶ Cecelia Reyes, *100,000 NYC School Children Face Airport-Style Security Screening Every Day*, PRO PUBLICA (Jan. 12, 2016), <https://www.propublica.org/article/nyc-school-children-face-airport-style-security-screening-every-day>.

¹⁷ NYCLU, *NYCLU Sues NYPD for Data on Metal Detectors in NYC Schools* (Aug. 26, 2020), <https://www.nyclu.org/en/press-releases/nyclu-sues-nypd-data-metal-detectors-nyc-schools>.

¹⁸ Victor Leung, et al., ACLU OF S. CAL., *Here to Learn: Creating Safe and Supportive Schools in Los Angeles Unified School District*, 2–3 (2018), https://www.aclusocal.org/sites/default/files/aclu_socal_report_here_to_learn.pdf.

¹⁹ *Id.*

²⁰ Sonali Kohli, *When LAUSD’s Random Searches of Students End, What’s Next for School Safety?*, L.A. TIMES (Jul. 6, 2019), <https://www.latimes.com/local/education/la-me-edu-laUSD-random-metal-detector-search-analysis-20190706-htmlstory.html>.



discipline and the juvenile, criminal, and immigration systems; and infringement on privacy and First Amendment rights. In one alarming example confronted by the New York Civil Liberties Union, the Lockport City School District purchased a facial recognition system to use on its students.²¹ Within the system, Black women are 16 times more likely to be misidentified.²² Furthermore, the databases to which the images are paired are unreliable, and because they are provided by law enforcement, often disproportionately include young men of color.²³ This creates an unfair and undue risk of false identification for students of color who are already unfairly targeted by the criminal and school discipline systems.

The latest frontier in surveillance technologies is the use of digital surveillance tools to monitor student social media, email, and other online interactions. Schools are adopting programs using web filtering, spyware, and other social media monitoring tools under the guise of safety, but as with other surveillance tools, there is substantial risk of abuse.²⁴ Some social media monitoring tools automatically notify law enforcement if key words are triggered, creating unnecessary interactions between students and law enforcement and perpetuating the school-to-prison-pipeline. These tools can turn innocuous student expression into discipline and potentially stifle student speech. Further, these tools also can have a disproportionate racial impact. For example, in one Alabama school district, 12 of 14 students suspended over social media posts were Black.²⁵

The use of highly invasive surveillance technologies, including metal detectors, high-tech surveillance cameras, and digital surveillance, disproportionately harms

²¹ Davey Alba, *Facial Recognition Moves into a New Front: Schools*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/business/facial-recognition-schools.html>.

²² Aff. Ex. 12, *Shultz v. NYSED*, Index No. 904134-20, (N.Y. Sup. Ct., Albany, Jun. 22, 2021), available at https://www.nyclu.org/sites/default/files/field_documents/schwarz_affidavit.pdf.

There are well-documented issues with the accuracy of facial recognition technology, particularly when used to identify women and people of color. See, e.g., Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (Jun. 24, 2020),

<https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>; Natasha Singer &

Cade Metz, *Many Facial-Recognition Systems Are Biased, Says U.S. Study*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html>; Cynthia M.

Cook et al., *Demographic Effects in Facial Recognition and their Dependence on Image*

Acquisition: An Evaluation of Eleven Commercial Systems, TRANSACTIONS ON BIOMETRICS,

BEHAV. & IDENTITY SCI., at 32–41 (2019); Joy Buolamwini & Timnit Gebru, *Gender Shades:*

Intersectional Accuracy Disparities in Commercial Gender Classification, PROCS. OF MACH.

LEARNING RSCH. (2018), <http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>.

²³ Sidney Fussell, *School Districts Can Hardly Wait to Start Tracking Kids with Police State-Style Face Recognition*, GIZMODO (May 21, 2018), <https://gizmodo.com/school-districts-can-hardly-wait-to-start-tracking-kids-1826197713>.

²⁴ Mona Wang & Gennie Gebhart, ELEC. FRONTIER FOUND., *Schools are Pushing the Boundaries of Surveillance Technologies* (Feb. 27, 2020), <https://www.eff.org/deeplinks/2020/02/schools-are-pushing-boundaries-surveillance-technologies>.

²⁵ Sharada Jambulapati, S. POVERTY LAW CTR., *Story from the Field: Children of Color Pushed Out of Alabama Schools Over Social Media Posts* (July 9, 2015),

<https://www.splcenter.org/news/2015/07/09/story-field-children-color-pushed-out-alabama-schools-over-social-media-posts-0>.

students of color and should be limited in schools. We recommend that OCR address these issues in its guidance.

III. OCR Should Address the Role of Law Enforcement in Discriminatory School Discipline and Criminalization.

In addition to revision and reinstatement of OCR's prior guidance, it is imperative that the Department of Education address the discriminatory reliance on law enforcement in schools across the country. Police continue to play an inappropriate role in our nation's schools, resulting in the criminalization and physical abuse of students, especially Black and Brown students with and without disabilities, including girls of color, and other marginalized students. The ACLU is especially concerned by the rise of criminalization of students by police in schools. The rate of school-based referrals to law enforcement in schools increased 12% from the 2015–16 school year to the 2017–18 school year, and the rate of school-based arrests has increased 5% during the same time period.²⁶ OCR made clear in its 2014 Dear Colleague Letter that schools are responsible for discriminatory actions of law enforcement and security personnel with whom they contract.²⁷ The ACLU urges OCR to take further action to equip educators with information about the negative and discriminatory consequences that can follow from inviting law enforcement into schools and to take enforcement action against discriminatory policing in schools.

Experiences from the ACLU's work highlight the harms of police presence in schools.²⁸ In 2017, the ACLU issued a report reviewing the history of school policing and its devastating consequences for education.²⁹ As detailed in our report, the history of school policing is deeply racialized and predicated on the misguided belief that criminal tendencies can be identified in children.³⁰ The presence of police in schools is rooted in law enforcement objectives to address crime and



²⁶ U.S. EDUC. DEP'T, OFFICE FOR CIV. RTS, CIVIL RIGHTS DATA COLLECTION, 2017-18 STATE AND NATIONAL ESTIMATIONS (Jun. 2021), <https://ocrdata.ed.gov/estimations/2017-2018>.

²⁷ U.S. EDUC. DEP'T, OFFICE FOR CIV. RTS. & U.S. DEP'T JUST., CIV. RTS. DIV., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY APPLICATION OF SCHOOL DISCIPLINE (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html#ftn16> (citing 34 C.F.R. § 100.3(b)(1), (2)).

²⁸ See, e.g., MICHELLE MORTON ET AL., ACLU OF FLA., THE COST OF SCHOOL POLICING: WHAT FLORIDA'S STUDENTS HAVE PAID FOR A PRETENSE OF SECURITY (2018-2019), <https://www.aclufl.org/en/publications/cost-school-policing>; KIRSTEN BOKENKAMP & LAURIE A. WALKER, EMPTY DESKS: DISCIPLINE & POLICING IN MONTANA'S PUBLIC SCHOOLS, ACLU OF MONT. & UNIV. OF MONT. SCH. OF SOC. WORK (2019), <https://www.aclumontana.org/en/edureport2019>; ROSE GODINEZ & SCOUT RICHTERS, ACLU NEB., FROM THE CLASSROOM TO THE COURTROOM: A REVIEW OF NEBRASKA'S SCHOOL POLICE PROGRAMS (2018), <https://www.aclunebraska.org/en/publications/classroom-courtroom-review-nebraskas-school-police-programs>.

²⁹ MEGAN FRENCH-MARCELIN & SARAH HINGER, ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING (2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf.

³⁰ *Id.* at 4–5 (discussing programs in Kansas City, Mo., Oakland, Chicago, and Baltimore).

disorder and presents fundamental conflicts with students’ rights and the objectives of the education system.

When police are in schools, students of color with and without disabilities, and other students with disabilities are disproportionately subjected to criminalization for childish or disability-related behavior. For example, in South Carolina, the ACLU has challenged the constitutionality of student arrests under the state’s “Disturbing Schools” and “Disorderly Conduct” laws.³¹ These laws prohibit students from being “disturbing,” “obnoxious,” “disorderly,” or “boisterous” at school, despite the fact—as the court of appeals observed—that students “are in many ways disorderly or boisterous by nature.”³² Black students in South Carolina are over six times as likely as their white classmates to be charged with disorderly conduct in schools and over four times more likely to be charged with disturbing school.³³ Additionally, the vague terms of the laws allow students with disabilities to be arrested for behaviors that are directly covered by a Behavior Intervention Plan or other plan of supportive services. Across the country, students face arrest in school for these and other behaviors—like wearing saggy pants (indecent exposure); inventive science experiments (weapons); throwing food (assault); or experiencing a behavioral health crisis or “temper tantrum” (battery on an officer)—that would be better addressed through supportive school-based interventions instead of punitive and traumatizing law enforcement responses.³⁴

Police presence in schools increases the criminalization of students for these typical childhood and adolescent behaviors and of disability-related behaviors. Nationwide data analyzed by the ACLU shows that schools with police reported 3.5 times as many arrests as schools without police.³⁵ Further, the ACLU of Florida’s examination of data from the 2018–19 school year found that while arrests in the community declined by 12%, school arrests increased by 8%, and that at all school levels, the presence of law enforcement was related to a greater frequency of school arrests.³⁶ The presence of law enforcement predicted greater numbers of behavioral incidents reported to law enforcement, particularly for less severe infractions, indicating that police were escalating the consequences of misbehavior for students and contributing to the school-to-prison pipeline. In contrast, in Pennsylvania, the Woodland Hills School District cancelled its contract with the police department following a series of assaults on students by school-based police and an administrator, and years of advocacy by parents and the ACLU of Pennsylvania, eventually removing “school resource officers” from schools. These changes have



³¹ ACLU, *Kenny v. Wilson*, <https://www.aclu.org/cases/kenny-v-wilson>.

³² *Kenny v. Wilson*, 885 F.3d 280, 290 (4th Cir. 2018).

³³ See P.’s Mot. Sum. J., *Kenny v. Wilson*, Case No. 16-cv-02794 (D.S.C., Jul. 23, 2021), available at <https://www.aclu.org/cases/kenny-v-wilson>.

³⁴ See French-Marcelin, BULLIES IN BLUE at 20 and sources cited therein.

³⁵ AMIR WHITAKER ET AL., ACLU, COPS AND NO COUNSELORS (2019), <https://www.aclu.org/report/cops-and-no-counselors>.

³⁶ MORTON, ET AL., THE COST OF SCHOOL POLICING.

resulted in a 73% reduction in student arrests in the 2019–20 school year compared to 2017–18.³⁷



The ACLU has also encountered disparate enforcement by police in schools across the country. The ACLU of Montana, for example, found that schools with police officers present had nine times more student arrests and nearly four times as many referrals than schools without police officers.³⁸ These arrests and referrals disparately impacted Indigenous students—especially those living on reservations. Schools on reservations are more than twice as likely to have a school police officer present³⁹ and while only 8% of students in Montana go to school on reservations, 13% of school-related arrests occurred on reservations.⁴⁰ Similarly, the ACLU of Pennsylvania found that in the Erie City School District, a district with its own police force, some 65% of all arrests were of Black students, a rate that is five times that of white students.⁴¹ Latinx students were arrested at over two times the rate of white students and seven out of every ten Latinx students arrested were students with disabilities.⁴² Additionally, district police issued “summary citations” (tickets that order a student to appear before a magisterial judge in adult court)⁴³ to Black students at four times the rate of their white classmates and to students with disabilities at twice the rate of students without disabilities.⁴⁴

Police in schools also apply abusive force against students. The ACLU found that in addition to the use of chemical restraints like pepper spray and tasers, police in schools beat students with batons, punched them, kicked them, slammed them to the ground, placed them in chokeholds, and sexually assaulted them.⁴⁵ They also engage the use of “pain compliance techniques,” which has led to hyperextension of limbs and even broken bones.⁴⁶ As discussed further below, police often use handcuffs to punish students, including students experiencing behavioral crisis. Even when policies state that police will not be involved in “formal” school discipline, police are frequently involved in discipline, including by ordering a student to follow school rules or escorting them to the principal’s office.⁴⁷ When a student fails to respond to a police officer’s directive to follow a school rule, or

³⁷ *Safe Schools*, PA DEP’T EDUC., <https://www.education.pa.gov/Schools/safeschools/Pages/default.aspx> (last accessed Jul, 21, 2021) (Arrests declined from 22 to 2 during that period).

³⁸ BOKENKAMP & WALKER, *EMPTY DESKS* at 7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Data provided by the Erie County School District on file with the ACLU of Pennsylvania.

⁴² *Id.*

⁴³ *Id.* Although these citations or “tickets”—frequently issued for offenses like disorderly conduct or vaping—are sometimes minimized in their implications, these adult court convictions must be disclosed by young people if they are asked on a job, military, or college application.

⁴⁴ *Id.*, see also, ACLU PA., *POLICE IN PENNSYLVANIA’S SCHOOLS: WHAT EDUCATION LEADERS NEED TO KNOW* (2019), <https://www.endzerotolerance.org/what-educators-need-to-know> (capturing dialogues with leaders from 42 Pennsylvania school districts).

⁴⁵ See generally FRENCH-MARCELIN & HINGER, *BULLIES IN BLUE* at 22-25; *infra* Section V.A.

⁴⁶ See FRENCH-MARCELIN & HINGER, *BULLIES IN BLUE* at 22-25.

⁴⁷ See *id.* at 15.



shakes an officer's grip, police frequently escalate the conflict, leading to the use of increased force and criminal charges for resisting or interference.⁴⁸

A further devastating consequence of school policing is the resource drain on schools and the compounding of resource inequities. Students of color and students with disabilities often attend schools with fewer resources, fewer supportive staff, and school staff who are inadequately trained to accommodate children with disabilities or manage classroom discipline in a positive way.⁴⁹ However, millions of federal, state, and local funds are directed towards policing students while education budgets are reduced.⁵⁰ When there are no other support staff to address behavioral problems, some teachers request help from law enforcement, escalating conflict and the consequences for students. This resource inequity impacts millions of students. An ACLU analysis found that 10 million students were in schools with cops but no social workers.⁵¹ Six million students were in schools with cops but no school psychologists.⁵² Three million students were in schools with cops but no nurses.⁵³ Finally, 1.7 million students were in schools with cops but no counselors.⁵⁴

The consequences of these inequitable resource distributions are witnessed, for example, in the ACLU of Ohio's work with student activists. Every major district in Ohio is drastically deficient in the national and state recommended ratios of student support services such as counselors and social workers.⁵⁵ Cincinnati Public Schools (CPS) has one of the more favorable support staff-to-student ratios of Ohio school districts. Yet, to achieve the recommended number of support staff, CPS would need to hire five times more counselors, twelve times more social workers, and three times more nurses than it currently employs.⁵⁶ Instead, Cincinnati (along with the 70% of Ohio schools that use school police)⁵⁷ have put their resources into policing students; it has more police per student than social workers, counselors, or

⁴⁸ *Id.*

⁴⁹ While there is extensive research on effective approaches to managing student behavior, there is a significant gap between research and practice. *See, e.g.,* Julie Greenberg, et al., Nat'l Council on Teacher Quality, *Training our Future Teachers: Classroom Management* (2014), <https://eric.ed.gov/?id=ED556312>; J.G. Coggshall, et al., *Evaluating the Effectiveness of Teacher Preparation Programs for Support and Accountability*, NAT'L COMPREHENSIVE CTR. TEACHER QUALITY (2012); Regina M. Oliver & Daniel J. Reschly, *Special Education Teacher Preparation in Classroom Management: Implications for Students with Emotional and Behavioral Disorders*, 35 BEHAV. DISORDERS 188 (2010); *cf.* AMBER BENEDICT, ET AL., CTR. GREAT TEACHERS & LEADERS AMER. CTR. RESEARCH, CEEDER CTR., & IDEAS THAT WORK, *LEARNING TO TEACH: PRACTICE-BASED PREPARATION IN TEACHER EDUCATION* (2016), https://gtlcenter.org/sites/default/files/Learning_To_Teach.pdf.

⁵⁰ WHITAKER, COPS AND NO COUNSELORS at 8.

⁵¹ *Id.* at 18–19.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

⁵⁷ Patrick O'Connell, *What Does A School Resource Officer Do?*, CLEVELAND.COM (Mar. 8, 2018),

https://www.cleveland.com/metro/2018/03/what_does_a_school_resource_officer_do.html#:~:text=It%20also%20estimates%20that%2070,sometimes%20local%20police%2C%20or%20both.



nurses, and one of the highest rates of disparate discipline in the state.⁵⁸ CPS employs one police officer for every 2235 students, supplemented by an additional 106 security guards.⁵⁹

In Ohio, as elsewhere, disparate discipline is exacerbated by school police and a lack of clarity on police intervention restrictions in schools. Cincinnati's School Resource Officer contract gives unilateral control to the police department and renders the district powerless to know about, or enforce, what police do in schools.⁶⁰ An ACLU of Ohio review of law enforcement records found that police were involved in at least 4,850 incidents in Cincinnati schools in an average year.⁶¹ As a result of this excessive reliance of police, over 400 students in Cincinnati negatively interact with the criminal system through warrants, arrests, and court summonses each year.⁶² Most of these students are Black, disabled, or both.⁶³ Black students in Cincinnati are *nearly five times more likely* than white classmates to face discipline and law enforcement referrals,⁶⁴ and the vast majority of arrests and summons are for misdemeanor assaults or other minor offenses (i.e. truancy, littering, disorderly conduct).⁶⁵ Students in Cincinnati, as in other districts across the country, are both over policed and deprived of the positive supports that would afford them an equitable educational opportunity.

Based on its expertise and experience, the ACLU firmly opposes the presence of law enforcement in schools. Students of color with and without disabilities, as well as other students with disabilities, are more likely to be subject to harmful police interactions at school with substantial immediate and collateral consequences. Moreover, police in schools contribute to a negative school climate for the entire school community. Given this well-documented evidence, the ACLU calls on OCR to issue guidance recognizing the immense harm of school policing and recommending that schools no longer rely on police officers stationed in schools.

⁵⁸ U.S. DEP'T EDUC., OFF. CIV. RTS., *Civil Rights Data Collection District Summary: Cincinnati Public Schools (2017)*, <https://ocrdata.ed.gov/profile/9/district/27210/summary>.

⁵⁹ *Id.*

⁶⁰ Elena Thompson, ACLU OHIO, *New Data Shows Over-Policing and Lack of Accountability in Cincinnati Public Schools* (Apr. 22, 2021), <https://www.acluohio.org/en/news/new-data-shows-over-policing-and-lack-accountability-cincinnati-public-schools>. Similar problem exists in Columbus,

Ohio, where the police instituted an additional youth policing unit of plain-clothes detectives, independent from its SRO program, who work with prosecutors to "charge youth offenders" for actions occurring during the school day. See *School Investigation Unit*, City of Columbus, <https://www.columbus.gov/Templates/Detail.aspx?id=2147494400>. Through records requests, the ACLU of Ohio discovered that 72% of their 150 arrests and court summonses were on elementary and middle school students between 11–15 years old for misdemeanor assault.

⁶¹ Thompson, *New Data Shows Over-Policing and Lack of Accountability in Cincinnati Public Schools*.

⁶² *Id.*

⁶³ WHITAKER, COPS AND NO COUNSELORS at 8.

⁶⁴ *Civil Rights Data Collection District Summary: Cincinnati Public Schools*.

⁶⁵ Thompson, *New Data Shows Over-Policing and Lack of Accountability in Cincinnati Public Schools*.

IV. Improved Reporting under the Civil Rights Data Collection Is Urgently Needed.

Collecting and reviewing data on school discipline is a necessary step in addressing the problems of discriminatory school discipline and policing. Unfortunately, despite their obligations under the Civil Rights Data Collection (CRDC), too many schools and school districts not only do not meaningfully review and respond to disparities in their school discipline data but fail even to collect and report on this information publicly. This lack of transparency leaves students, families, and advocates further disadvantaged in their efforts to attain educational equity. The Department of Education can ameliorate many of these issues by investing in stronger oversight and compliance for the Civil Rights Data Collection.



Again, the ACLU has encountered these problems in school districts across the country. For example, the ACLU of Pennsylvania found that the Pittsburgh Public Schools (PPS) reported zero arrests to the CRDC in the 2017–18 school year, while reporting 86 arrests to the Pennsylvania Department of Education.⁶⁶ However, the actual number of school-related arrests was far higher than reported to either education department. An analysis of juvenile justice system records publicly report in Allegheny County Analytics indicates 499 school-related arrests were processed in the criminal justice system data for Pittsburgh, a figure that is consistent with local Pittsburgh city police data.⁶⁷

Similarly, the ACLU of Hawai‘i and researchers at the University of Hawai‘i raised significant concerns with Hawai‘i’s Department of Education’s (HIDOE) compliance with CRDC reporting mandates.⁶⁸ In 2005–06, HIDOE indicated that no students were arrested and no students were referred to the police, and in both 2011–12 and 2017–18, that only students with disabilities were arrested. These figures were unlikely to be accurate, based upon the researcher’s examination of a number of school-based arrest records obtained from police.⁶⁹ Further, a June 2019 federal Government Accountability Office report on rates of restraint and seclusion among the largest 20 districts said Hawai‘i reported zero incidents of restraint or seclusion in the 2015–16 school year. Responses to a data request by the ACLU of Hawai‘i revealed at least 67 schools having at least one case of restraint in 2017–18 and 66 schools having at least one case of restraint the first semester of 2018–19. HIDOE later went on record in 2019 saying any instances of zero in 2015–16 were inaccurate because they had not collected any data for that year. The longstanding and uncorrected reporting inconsistencies are a fundamental

⁶⁶ See ACLU PA., *STUDENT ARRESTS IN ALLEGHENY COUNTY: THE NEED FOR TRANSPARENCY AND ACCOUNTABILITY* (forthcoming).

⁶⁷ *Id.*

⁶⁸ See OMAR BIRD ET AL., *DISCRIMINATORY POLICING IN HAWAII’S PUBLIC SCHOOLS: RELIANCE ON POLICE IN HAWAII’S SCHOOLS IS EXCESSIVE, DISCRIMINATORY, AND VIOLATES NATIONAL JUVENILE JUSTICE POLICIES* (2021), <https://www.documentcloud.org/documents/20521930-police-in-schools-policy-brief>.

⁶⁹ *Id.*



shortcoming in the ability of the HIDEOE to identify and properly respond to disparate school discipline and policing practices.

The ACLU has also seen the difference made by data transparency in redressing discrimination in school discipline and policing. In Northern California, advocates in Stockton have long campaigned for comprehensive reform of school policing due to entrenched discriminatory targeting of Black students and a history of shocking police attacks against vulnerable students.⁷⁰ In June 2016, the ACLU of Northern California sued Stockton Unified School District (SUSD) for failing to release student arrest and citation data.⁷¹ After SUSD was ultimately ordered to turn over full student arrest data, the ACLU released a report documenting the culture of over-policing in the district, including the disproportionate criminalization of Black and Latinx students and students with disabilities.⁷² Subsequently, SUSD and its police department settled with the California Department of Justice and agreed to implement reforms to “stop criminalizing student misbehavior and prevent discriminatory policing.”⁷³ Unfortunately, severe racial disproportionalities in policing within the district persist,⁷⁴ and the ACLU will continue to monitor data and work with advocates who continue to press for the removal of police from Stockton schools.

The importance of complete and accurate data collection, and its public reporting, is critical to ensuring that school discipline is administered in a non-discriminatory manner. The Department of Education’s Civil Rights Data Collection provides a key source of this information and the Department’s additional attention to compliance will allow educators and students to make better use of this data source in pursuing education equity.

⁷⁰ Michael Males, *Stockton, San Bernardino District Officers Have Arrested Over 90,000 Youths*, CTR. ON JUV. & CRIM. JUST. 2 (May 2015), http://www.cjcj.org/uploads/cjcj/documents/final_childcrime-stockton_supplement.pdf; ACLU N. CAL., *ACLU Releases New Data on Stockton Unified’s Pattern of Wrongly Arresting Students*, (Jun. 6, 2017), <https://www.aclunc.org/news/aclu-releases-new-data-stockton-unified-s-pattern-wrongly-arresting-students>; STOCKTON EDUC. EQUITY COALITION, *OVER-POLICING IN STOCKTON SCHOOLS: A REPORT CARD*, https://www.aclunc.org/sites/default/files/Report_Card_SEEC.pdf (last accessed Jul. 20, 2021).

⁷¹ ACLU N. CAL., *ACLU OF NORTHERN CALIFORNIA V STOCKTON UNIFIED SCHOOL DISTRICT (SCHOOL TO PRISON PIPELINE)* (2019) <https://www.aclunc.org/our-work/legal-docket/aclu-northern-california-v-stockton-unified-school-district-school-prison>; Laura Hibbard, *Michael Davis, 5-Year-Old Student, Forcibly had Legs and Feet Bound, Arrested at School*, HUFFINGTON POST (Nov. 29, 2011) http://www.huffingtonpost.com/2011/11/29/michael-davis-5-year-old-_n_1118963.html; Jennie Rodriguez-Moore & Elizabeth Roberts, *D.A. Files Complaint in Strip Search of Teen*, RECORDNET.COM (Feb. 3, 2015), <http://www.recordnet.com/article/20150203/NEWS/150209938>.

⁷² *ACLU Releases New Data on Stockton Unified’s Pattern of Wrongly Arresting Students* (June 6, 2017).

⁷³ *ACLU OF NORTHERN CALIFORNIA V STOCKTON UNIFIED SCHOOL DISTRICT (SCHOOL TO PRISON PIPELINE)*.

⁷⁴ In 2019, Black students were six-and-a-half times more likely than white students to be booked or cited by Stockton USD police, and Native American students were over three times more likely than white students to be booked or cited by Stockton USD police. ACLU of Northern California Foundation Report (forthcoming).

V. OCR Should Address the Discriminatory Use of School Discipline Based on Protected Characteristics in Addition to Race.

While it is important for OCR’s discipline guidance to focus on the disproportionate discipline of students of color, it is critical that it also address disproportionate impact on students based on other protected characteristics, such as disability or gender, in addition to (or in combination with) race. The Department’s guidance on school climate and discipline have proved to be an important and effective tool and will be strengthened by incorporating a further inclusive lens addressing the use of school discipline that discriminates against students on the basis of other protected characteristics and in ways that intersect with racial discrimination.

A. Students with Disabilities

The ACLU has long advocated for the civil rights and civil liberties of students of color with disabilities experiencing discipline and policing in school. Punitive discipline and the criminalizing of childhood behavior are problems for every student in the U.S., but these practices are particularly damaging to students of color and students with disabilities, and even more catastrophic for students who fall into both demographic categories. The need for guidance on the nondiscriminatory administration of school discipline is clearly demonstrated by the most recent 2017–18 CRDC. Despite being only 13% of total student enrollment, students with disabilities represented 25% of all students who received one or more out-of-school suspensions and 15% of those who were expelled without educational services in 2017–18.⁷⁵ Black students with disabilities represented 26% of expulsions without educational services although they accounted for only 18% of all students provided services under IDEA in 2017–18.⁷⁶ Moreover, students with disabilities represented 27% of students referred to law enforcement.⁷⁷ Black students with disabilities represented 2.3% of all students but 8.4% of all students referred to law enforcement and 9% of all students arrested.⁷⁸ The consequences of these disproportionate exclusions reinforce historic inequalities for communities of color, economically disadvantaged communities, and those living with disabilities.

The ACLU has worked to address the adverse impacts of exclusionary discipline and school policing on students of color and students with disabilities across the country.⁷⁹ For example, the ACLU of Washington has reported the stories of a number of students with disabilities—of whom many are also students of color—

⁷⁵ *Civil Rights Data Collection*, 2017–18.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See, e.g., GODINEZ, ACLU PA., FROM THE CLASSROOM TO THE COURTROOM at 4; BEYOND ZERO TOLERANCE: DISCIPLINE AND POLICING IN PENNSYLVANIA PUBLIC SCHOOLS 28 (2015), https://aclupa.org/sites/default/files/field_documents/10497b_56b2ce93961c47eda1db0fb6b3b3b58.pdf; ACLU MO., MISSOURI’S PIPELINE OF INJUSTICE: FROM SCHOOL TO PRISON 28 (2017), <https://www.aclu-mo.org/en/publications/school-prison-missouris-pipeline-injustice>; BOKENKAMP & WALKER, EMPTY DESKS at 6.





subjected to discipline and exclusion from school for disability-related reasons.⁸⁰ The ACLU of Washington also filed a statewide lawsuit on behalf of students with special education needs wrongfully disciplined for behavior related to their disabilities.⁸¹ According to the state’s own data, students with disabilities were suspended or expelled two-and-a-half times more frequently than their non-special education peers.⁸² In addition to formal discipline, many children are informally excluded by being sent home from school early on a repeated basis.⁸³

The ACLU of Michigan filed a similar class action on behalf of students with disabilities in Flint, Michigan⁸⁴ seeking access to education and special educational supports that are not only a student’s right but also provide crucial tools for self-empowerment, future economic stability, and achieving positive life goals. In Flint School District, which predominately serves students of color,⁸⁵ children with disabilities—including children with disabilities caused or exacerbated by exposure to lead-poisoned water—were disciplined, suspended, and excluded from the classroom, instead of receiving the instructional and behavioral supports they needed.⁸⁶ 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.⁸⁷ Among the plaintiffs, one seven-year old with disabilities was suspended over 30 times during the 2015–16 school year.⁸⁸ 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.⁸⁹ The case was settled in August 2020.⁹⁰ As part of the settlement, the State of Michigan and

⁸⁰ ACLU WASH., PUSHED OUT, KICKED OUT: STORIES FROM FAMILIES WITH SPECIAL EDUCATION STUDENTS IN WASHINGTON, (2017), <https://www.aclu-wa.org/pages/pushed-out-kicked-out-storiesfamilies-special-education-students-washington-1> (Ethan); <https://www.aclu-wa.org/pages/pushed-outkicked-out-stories-families-special-education-students-washington-2> (Christian); <https://www.acluwa.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-studentswashington> (Steven).

⁸¹ ACLU WASH., *ACLU-WA Lawsuit Seeks to Stop Students Who Require Special Education from Being Pushed out of Washington’s Public Schools* (Jun. 8, 2017), <https://www.aclu-wa.org/news/aclu-wa-lawsuit-seeks-stop-students-who-require-special-education-being-pushed-out-washingtons>.

⁸² Compl. ¶ 97, *A.D. v. O.S.P.I.*, Case No. 17-2-03293-34 (Wash. Super. Ct., Jun. 8, 2017), available at <https://www.aclu-wa.org/docs/complaint-ad-vs-osp>.

⁸³ *Id.* at ¶¶ 14, 28–30, 38, 47.

⁸⁴ Compl. *D.R. v. Michigan Dep’t of Educ.*, Case No. 16-cv-13694 (E.D. Mich., Oct. 18, 2016), available at http://www.aclumich.org/sites/default/files/Flint_Schools_Final_Complaint.pdf (Flint Complaint).

⁸⁵ 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), http://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-childrencausedby-lead-in-water.html?_r=0.

⁸⁶ Compl. *D.R. v. Michigan Dep’t of Educ.* at ¶¶ 382–84.

⁸⁷ *Id.* at ¶¶ 78–81.

⁸⁸ *Id.* at ¶¶ 166–80.

⁸⁹ *Id.* at ¶¶ 293–95.

⁹⁰ ACLU MICH., *Special Education in Flint*, <https://www.aclumich.org/en/cases/special-education-flint>, (last accessed Jul. 21, 2021).



the County of Flint will significantly increase funding for special education screening and services, and will undertake a comprehensive assessment and modification of Flint-area special education plans and policies to ensure that no other students experience the disciplinary pushout experienced by the plaintiffs.⁹¹

In Kansas City, Missouri, the ACLU represented 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.⁹² Similarly, in Kenton County, Kentucky, the ACLU represented 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.”⁹³ Discovery in the case revealed at least seven instances of handcuffing elementary age school students, including of one child in kindergarten or first grade.⁹⁴ 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.”⁹⁵

OCR should issue guidance specifically addressing the intersectional impacts of school discipline, as race and disability can intertwine to compound the negative effects of discipline. Additionally, new guidance should be developed collaboratively with the U.S. Department of Justice Civil Rights Division to address all students with disabilities.

B. LGBTQ+ Students

The ACLU encourages OCR to address the disproportionate manner in which LGBTQ+ (lesbian, gay, bisexual, transgender, and queer+) youth are disciplined at school. A growing body of research documents the disparate impact of school discipline on LGBTQ+ youth. This includes a 2011 national study finding that students who identify as non-heterosexual were 1.25 to 3 times more likely to experience school discipline than their heterosexual peers.⁹⁶ In 2016, GLSEN similarly found that 62.8% of LGBTQ students experienced school discipline

⁹¹ *Id.*

⁹² See Compl., *K.W.P. v. Kansas City Public Schools*, Case No. 16-974 (W.D. Mo., Sept. 8, 2016), available at https://www.aclu-mo.org/sites/default/files/primmvkcps_complaint.pdf; *ACLU of Missouri Sues K.C. Public Schools for Handcuffing Second Grader*, ACLU Mo. (Sept. 8, 2016), <https://www.aclu-mo.org/en/node/341>.

⁹³ *S.R. v. Kenton Cty. Sheriff's Office*, No. 215CV143WOBIGW, 2015 WL 9462973, at **4, 5 (E.D. Ky. Dec. 28, 2015).

⁹⁴ *S.R. v. Kenton Cty. Sheriff's Office*, No. 2:15-cv-143 (E.D. Ky.), Docket No. 162 at 23.

⁹⁵ *S.R. v. Kenton Cty. Sheriff's Office*, No. 2:15-cv-143, 2017 WL 4545231, at *9 (E.D. Ky. Oct. 11, 2017).

⁹⁶ Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS J. 49, 54 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3375466/pdf/zpe49.pdf>.



compared to 45.8% of non-LGBTQ students.⁹⁷ LGBTQ students also self-report high rates of exclusionary discipline.⁹⁸

Students who identify as both LGBTQ and students of color have an even higher likelihood of experiencing school discipline. According to the Gay-Straight Alliance Network, LGBTQ youth of color are “targeted by school staff with increased surveillance and policing” and generally feel monitored and unsupported because of both their race and gender identity or sexual orientation,⁹⁹ and “report incidents of harsh school discipline and biased application of policies.”¹⁰⁰ LGBTQ students with disabilities also have an elevated likelihood of experiencing schools discipline, with a national study findings that LGBTQ students with disabilities were more likely to experience both in-school and out-of-school discipline, as compared to their non-disabled LGBTQ peers.¹⁰¹

The disparate discipline of LGBTQ+ students stems from factors related to “unsafe or unfair school environments.”¹⁰² LGBTQ students increased risk of victimization often leads to them being perceived as the perpetrator.¹⁰³ In one study, 49.4% of students who experienced increased “victimization based on sexual orientation reported experiencing detention, compared to just under one third (30.2%) of students experiencing lower levels of victimization.”¹⁰⁴ Students also face discipline due to absenteeism out of fear of being bullied. The same study found that “53.6% of students who had missed school due to safety reasons had been disciplined at school, compared to 34.0% of students who had not missed school due to safety reasons.”¹⁰⁵ These differing outcomes demonstrate the importance of educators’ responsiveness. As reported in a separate national study, when school

⁹⁷ EMILY A. GREYTAK ET AL., GLSEN, FROM TEASING TO TORMENT REVISITED: A SURVEY OF U.S. SECONDARY SCHOOL STUDENTS AND TEACHERS 30, (2016); *see also id.* (finding that “[s]pecifically, LGBTQ students were more likely to: have been called to the principal’s office (38.1% vs. 24.8%), have received detention (45.0% vs. 33.4%), and have been suspended (24.9% vs. 14.5%).”).

⁹⁸ NEAL A. PALMER ET AL., GLSEN, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH 11 (2016), https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf (reporting that in the 2012–2013 National School Climate Survey, 39.8% of LGBTQ+ students reported being disciplined at school, including 35.6% who received detention, 15.1% who had been suspended, and 1.3% who had been expelled).

⁹⁹ HILARY BURDGE ET AL., GAY-STRAIGHT ALLIANCE NETWORK, LGBTQ YOUTH OF COLOR: DISCIPLINE DISPARITIES, SCHOOL PUSH-OUT, AND THE SCHOOL-TO-PRISON PIPELINE 6–7 (2014), https://www.njjn.org/uploads/digital-library/GSA-Network_LGBTQ_brief_FINAL-web_Oct-2014.pdf.

¹⁰⁰ *Id.* at 8.

¹⁰¹ JOSEPH KOSCIW ET AL., GLSEN, THE 2017 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ YOUTH IN OUR NATION’S SCHOOLS (2018), <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

¹⁰² PALMER, EDUCATIONAL EXCLUSION, at 11.

¹⁰³ *Id.* at 12; Ryan Thoreson, HUMAN RTS. WATCH, *Like Walking Through a Hailstorm: Discrimination Against LGBT Youth in US Schools* (2016).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*



staff responded in discriminatory or stigmatizing ways to LGBTQ students' reports of bullying and harassment, LGBTQ students faced higher rates of school discipline, than did victimized LGBTQ students who experienced more positive and helpful responses from school staff.¹⁰⁶

LGBTQ students are also more likely to be disciplined in schools under discriminatory policies and practices. These restrictions on LGBTQ expression in school include preventing students from writing or presenting on LGBT topics for assignments, limiting their inclusion in school activities, and enforcing strict gender norms that dictate what clothes they wear, name they are called, and bathroom they use.¹⁰⁷ For example, the ACLU of Texas has worked across the state to address discriminatory dress and grooming codes, and encountered numerous examples of discriminatory policies. In September 2020, a transgender girl in El Campo, Texas was physically barred from entering her school building by a high school principal who tried to force her to follow the school's dress code for boys based on her gender assigned at birth.¹⁰⁸ Last fall, a non-binary student in West Texas was told that they would have to shave their head if they refused to follow either the boys' or girls' dress code; the student ultimately had to transfer schools because the district refused to recognize their gender identity.¹⁰⁹ In November 2020, a gay student in Clyde, Texas, was sent to in-school suspension for decorating his nails, even though his school district allowed girls to paint their nails without repercussion.¹¹⁰ LGBTQ students, and students who are transgender, non-binary, and gender nonconforming are harmed by these policies in particularly severe ways.¹¹¹ Dress and grooming policies that treat students differently based on gender intrinsically force students to conform to sex stereotypes, are out of step with federal law under Title IX and the Equal Protection Clause, and have no place in our schools.

¹⁰⁶ Neal A. Palmer & Emily A. Greytak, *LGBTQ student victimization and its relationship to school discipline and justice system involvement*, 2 CRIM. J. REV. 2, 163-187 (2017).

¹⁰⁷ Thoreson, *Like Walking Through a Hailstorm* at 13-14.

¹⁰⁸ Erica Simon, *Transgender Student Says She's Banned from School Until She Follows Male Dress Code*, ABC 13 (Oct. 2, 2020), <https://abc13.com/sanay-martinez-transgender-teen-student-dress-code-louise-isd/6700252/>

¹⁰⁹ This student's private information is being kept confidential at the student's request, but it is important to note that non-binary students face immense discrimination and harassment when schools are permitted to maintain separate dress and grooming codes for boys and girls. By assuming that all students identify within the gender binary and can conform to sex stereotypes enshrined in dress codes, schools inflict severe harm, stigma, and isolation on students who are non-binary. See ACLU, *ACLU Tells Alaska Airlines to Stop Discriminating Against Non-Binary and Gender Non-Conforming Flight Attendants* (Jun. 4, 2021), <https://www.aclu.org/press-releases/aclu-tells-alaska-airlines-stop-discriminating-against-non-binary-and-gender-non>.

¹¹⁰ Timothy Chipp, *Texas High School Suspends Student for Painted Fingernails: "I've Been Trapped in Closed Minded People's Minds"*, USA TODAY (Dec. 4, 2020), <https://www.usatoday.com/story/news/education/2020/12/04/texas-high-school-senior-serving-suspension-painted-fingernails/3828431001/>.

¹¹¹ Kelly L. Reddy-Best & Eunji Choi, *Male Hair Cannot Extend Below Plane of the Shoulder" and "No Cross Dressing": Critical Queer Analysis of High School Dress Codes in the United States*, 67 J. HOMOSEXUALITY 1290 (2019).



In light of these disparities, OCR should ensure that the discipline guidance address these concerns and provide recommendations to ensure that school discipline is not handled in a manner that disproportionately impacts LGBTQ+ students.

C. Black Girls and Other Students Experiencing Discrimination Based on Sex and Race

The ACLU also urges OCR to address the unique harms and challenges facing girls of color, and particularly Black girls, because of intersecting race and gender discrimination in school discipline. Black girls are punished more harshly and at greater rates than any other female demographic from preschool through grade 12.¹¹² Nationwide, ACLU analysis found that Black girls are over four times more likely to be arrested in school than white girls.¹¹³ Native American girls were three and a half times more likely, and Latinx girls almost twice as likely, to be arrested in school than white girls.¹¹⁴ These inequities in school discipline are a major reason Black girls are the fastest growing population in the juvenile justice system.¹¹⁵

In addition to being over disciplined and criminalized for common childhood behaviors,¹¹⁶ girls of color face interlocking issues of race and gender discrimination. Black girls are perceived as needing less support and protection,

¹¹² Leah A. Hill, *Disturbing Disparities: Black Girls and the School-to-Prison Pipeline*, 87 *FORDHAM L. REV.* 11, 58–59 (2018); see also MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS*, (2016); Erica L. Green, et al., ‘*A Battle for the Souls of Black Girls*’, *N.Y. TIMES* (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html> (reporting Department of Education data showing that Black girls are over five times more likely to be suspended from school, seven times more likely to receive multiple out-of-school suspensions, and three more times likely to receive referrals to law enforcement than white girls); WHITAKER, *COPS AND NO COUNSELORS* at 5.

¹¹³ WHITAKER, *COPS AND NO COUNSELORS* at 5.

¹¹⁴ *Id.* at 5, 31.

¹¹⁵ Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 *U.C.L.A. L. REV.* 1584, 1617 (2012); see also GIRLS FOR GENDER EQUITY, *POLICY BRIEF: SCHOOL POLICING DISPARITIES FOR BLACK GIRLS: ANALYZING REPORTED NYPD INTERVENTIONS DURING SCHOOL YEAR 2018-2019* at 6, https://www.ggenyc.org/wp-content/uploads/2020/01/GGE-Policy-Brief_-NYPD-School-Policing-Data-Impact-on-Girls-of-Color.pdf (last accessed July 22, 2021) (“Black female students [in New York City] represented nearly 60% of all juvenile reports received among girls, a slightly higher disparity as compared to Black male students at 52%.”).

¹¹⁶ See, e.g., Allyson Chiu, *Florida Officer Fired for ‘Traumatic’ Arrests of Two 6-year-old Students at School*, *WASH. POST* (Sept. 24, 2019), <https://www.washingtonpost.com/nation/2019/09/23/girl-tantrum-orlando-classroom-arrested-battery-school-investigation/>; Bob Herbert, *6-Year-Olds Under Arrest*, *N.Y. TIMES* (Apr. 9, 2007), <https://www.nytimes.com/2007/04/09/opinion/09herbert.html>; GIRLS FOR GENDER EQUITY, *SCHOOL POLICING DISPARITIES FOR BLACK GIRLS* at 14; Hassan Washington, *8-year-old Special Needs Student Handcuffed, Arrested for Tantrum at School*, *GRIO* (Mar. 8, 2013), <https://thegrio.com/2013/03/08/8-year-old-special-needs-student-handcuffed-arrested-for-tantrum-at-school/#51100226>; Kelsey Stein, *Hoover Student Claims in Lawsuit that She was Injured, Arrested After Falling Asleep at Desk*, *ALA. NEWS* (Mar. 6, 2019), https://www.al.com/spotnews/2013/05/hoover_student_claims_in_lawsu.html.

being less innocent and knowing more about sex and “adult topics”—otherwise known as the “adultification bias.”¹¹⁷

Adultification bias contributes to the fact that Black girls and other girls of color are at greater risk of sexual harassment and abuse but less likely to be believed when they report it.¹¹⁸ In fact, Black and Latina girls are more likely to be *punished or disciplined* than to receive support when they report sexual harassment and assault.¹¹⁹ In Florida, for example, high school administrators suspended a Latina ninth-grader for engaging in “inappropriate sexual behavior” on campus after she reported being sexually assaulted by three boys in a school bathroom.¹²⁰ In 2016, a New York high school suspended an Afro-Latina girl with developmental disabilities who reported being sexually assaulted by a group of boys because administrators considered it “consensual sexual conduct on school premises.”¹²¹



¹¹⁷ REBECCA EPSTEIN ET AL., GEORGETOWN L. CTR. POV’Y & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>; see also Alex Laughlin, *The Startling Thing that Happens to Black Girls in Preschool*, WASH. POST (Apr. 25, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/04/25/monique-morris-pushout/> (noting that Black girls are stereotyped as being “social deviants” and having “certain attitude”); Edward W. Morris, “Ladies” or “Loudies?,” 38 YOUTH & SOC’Y 490, 502–512 (2007), https://www.researchgate.net/publication/258200296_Ladies_or_Loudies/link/54be6b4e0cf218d4a16a60ac/download; EPSTEIN ET AL., GIRLHOOD INTERRUPTED; NAT’L WMN’S L. CTR., LET HER LEARN: A TOOLKIT TO STOP SCHOOL PUSH OUT FOR GIRLS OF COLOR at 1 (2016), https://nwlc.org/wp-content/uploads/2016/11/final_nwlc_NOVO2016Toolkit.pdf.

¹¹⁸ Jennifer M. Wilmot et al., *Policy as Punishment and Distraction: The Double Helix of Racialized Sexual Harassment of Black Girls*, 35 EDUC. POLICY 347 (2021); see also maya finoh & jasmine Sankofa, ACLU, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence* (Jan. 28, 2019), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non>; LETICIA SMITH-EVANS ET AL., NAACP LDF & NAT’L WMN’S L. CTR. UNLOCKING OPPORTUNITY FOR AFRICAN AMERICAN GIRLS: A CALL TO ACTION FOR EDUCATIONAL EQUITY 25–26 (2014), https://www.nwlc.org/sites/default/files/pdfs/unlocking_opportunity_for_african_american_girls_final.pdf; Scott Michelman & Rebecca Ojserkis, ACLU, *Punished for Reporting Sexual Harassment: How One Law School Almost Got a Student Survivor Banned From the Bar* (Sept. 29, 2020), <https://www.aclu.org/news/womens-rights/punished-for-reporting-sexual-harassment-how-one-law-school-almost-got-a-student-survivor-banned-from-the-bar/>.

¹¹⁹ SMITH-EVANS ET AL., UNLOCKING OPPORTUNITY at 25–26.; see also KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFR. AMER. POL’Y FORUM & CTR. FOR INTERSECTIONALITY & SOC. POL. STUDIES, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf; Hill, *Disturbing Disparities* at 61 (noting that Black girls who are victims of sexual harassment or bullying are “seen as aggressive when they are really just standing up for themselves” because of intersecting race and sex stereotypes); Wilmot et al., *Policy as Punishment*.

¹²⁰ Tyler Kingkade, *Schools Keep Punishing Girls—Especially Students of Color—Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, 74 MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/>.

¹²¹ Compl., *L.W. v. City of New York*, Case No. 1:17-cv-08415-DLC (S.D.N.Y. Oct. 31, 2017), available at <https://s3.documentcloud.org/documents/5017824/LW-v-City-of-New-York-NYC-Dept-of-Education-complaint.pdf>.



Such unjust discipline perpetuates dangerous school environments while contributing to the school-to-prison pipeline.

Schools also discipline Black and Latina girls for dress and grooming code violations at greater rates than white girls.¹²² School codes frequently target clothing and grooming styles that have strong racial, religious, and cultural dimensions, such as bans on head coverings or hair length that effectively prohibit many natural hairstyles for Black students.¹²³ Discriminatory dress code enforcement against girls of color not only perpetuates a school environment where girls are blamed for sexual harassment or abuse that they experience, but also leads to humiliation, anxiety, low self-esteem, and negative body image.¹²⁴

Boys of color also face discriminatory discipline under student dress codes. For example, a Black male student in Greenwood, Texas, was told by school administrators that he would not be allowed to play football if he did not cut his cornrows citing a policy prohibiting boys from wearing long hair.¹²⁵ In another case resulting in federal litigation, a student was told that he would not be permitted to walk across the stage at graduation if he did not cut his natural Black hair.¹²⁶ Gender-specific hair length requirements also have a disparate impact on Indigenous students for whom wearing long hair is an important part of religious, cultural and/or spiritual identity. The ACLU and ACLU of Texas recently filed a complaint to OCR on behalf of two Native American boys in West Texas who have been forced to wear short hair in violation of their ancestry, heritage, and beliefs, and the school district's gender-specific grooming code prompted the principal to unlawfully inquire into the students' race and national origin.¹²⁷

¹²² NAT'L WMN'S L. CTR., DRESS CODED: BLACK GIRLS, BODIES, AND BIAS IN DC SCHOOLS (2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/Final_nwlc_DressCodeReport.pdf; *see also* Rachel Anspach, *School Dress Codes Unfairly Target Black Girls. But Students are Fighting Back*, MIC (Oct. 30, 2019), <https://www.mic.com/p/school-dress-codes-unfairly-target-black-girls-but-students-are-fighting-back-19276290>.

¹²³ NAT'L WMN'S L. CTR., DRESS CODED at 1.

¹²⁴ *Id.* at 16–20; *see also* Samantha Schmidt, *Black Girls say D.C. School Dress Codes Unfairly Target Them. Now They're Speaking Out.*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/dc-md-va/2019/09/05/black-girls-say-dc-school-dress-codes-unfairly-target-them-now-theyre-speaking-up/>.

¹²⁵ Gianni Windahl, *Proposed Greenwood ISD Grooming Code Sparks Controversy*, CBS 7 (Oct. 12, 2018), <https://www.cbs7.com/content/news/Greenwood-ISD-grooming-code--497134531.html>; *see also* Erin Donnelly, *Mom Says Elementary School is Demanding that Her First-grader Cut His Dreadlocks: 'I Won't Conform to Racist Policies'*, YAHOO LIFESTYLE (Jan. 9, 2019), <https://www.yahoo.com/lifestyle/mom-says-elementary-school-demanding-first-grader-cut-dreadlocks-wont-conform-racist-policies-120109868.html>; Jef Rounder, *Barbers Hill ISD Upholds Racist Hair Policy*, REFORM AUSTIN (Jul. 29, 2020), <https://www.reformaustin.org/education/barber-hill-isd-upholds-racist-hair-policy/>.

¹²⁶ *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 524 (S.D. Tex. 2020).

¹²⁷ *Complaints Filed Urging Federal Civil Rights Agencies to Investigate Texas School District's Discriminatory Dress Code*, ACLU TEX. (Mar. 4, 2021), <https://www.aclutx.org/en/press-releases/complaints-filed-urging-federal-civil-rights-agencies-investigate-texas-school>.



Given these challenges, we urge OCR to address intersecting issues of race and gender discrimination. Specifically, OCR should take enforce civil rights laws to eliminate intersectional race and gender discrimination in schools. This includes incentivizing schools to meaningfully address the particular challenges faced by girls of color through trauma-informed support services and restorative practices¹²⁸ and providing comprehensive regulations, guidance and technical assistance to ensure that school officials adequately support, and do not punish, girls of color who have experienced sexual harassment and assault. In addition, we recommend that OCR address the discriminatory enforcement of dress and grooming codes based on intersecting race and sex stereotypes. OCR should reinstitute the regulation, withdrawn in the 1980s, prohibiting dress and appearance codes that differentiate based on sex.¹²⁹ Further, the Department of Education should collect, analyze, and report disaggregated data on gender disparities within same-race populations, as well as racial disparities within same-gender populations, in school discipline and academic performance.

D. English Learners

We further urge OCR to address disproportionate discipline of English learner (EL or ELL) students, many of whom are also students of color and immigrants. Disproportionate discipline of EL students may violate Title VI's prohibition against discrimination on the basis of race, color, and national origin, as well as the Equal Educational Opportunities Act's (EEOA) requirement that schools affirmatively overcome language barriers that impede equal participation by students in their instructional programs.¹³⁰

Research identifies disparate discipline of EL students across the country. A recent study analyzing national data from 2009–13 found that “[t]he risk of suspension for a student with ELL status is 20% higher than a non-ELL student.¹³¹ When

¹²⁸ THALIA GONZÁLEZ & REBECCA EPSTEIN, GEORGETOWN L. CTR. POV’Y & INEQUALITY, BUILDING FOUNDATIONS OF HEALTH AND WELLBEING IN SCHOOL: A STUDY OF RESTORATIVE PRACTICES AND GIRLS OF COLOR 9–10 (2021),

https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2021/05/21_COPI_BuildingFoundations_Report_Accessible_Final.pdf.

¹²⁹ The ACLU has provided further comments and recommendations on these points in relation to the Departments’ guidance under Title IX. See ACLU, *ACLU Written Comments for Announcement of Public Hearings on Title IX of the Education Amendments of 1972* at 12–13 (Jun. 11, 2021).

¹³⁰ Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (1974) (codified at 20 U.S.C. § 1703(f)).

¹³¹ Serena Boyce, Master’s Thesis, *Disparities Within School Discipline: An Examination of Race, English Language Learner Status, & Suspension*, CORNERSTONE: A COLLECTION OF SCHOLARLY AND CREATIVE WORKS FOR MINNESOTA STATE UNIVERSITY, MANKATO. (2020),

<https://cornerstone.lib.mnsu.edu/cgi/viewcontent.cgi?article=2071&context=etds>; see also Arthur Burke, *Education Northwest, Suspension, Expulsion, and Achievement of English Learner Students in Six Oregon Districts* (2015),

https://ies.ed.gov/ncee/edlabs/regions/northwest/pdf/REL_2015094.pdf (finding that middle and high school EL students were suspended at rates disproportionate to their non-english learner classmates, resulting in lost instruction time and correlating with lower levels of academic achievement).



interacting the variables of ELL and race/ethnicity, analysis show that students in the Asian, White, and Hispanic racial and ethnic groups have an increased risk of being suspended if they have ELL status.”¹³² Similarly, a 2020 national study found high rates of referral to law enforcement for EL students in school districts across the country.¹³³ For example, in Etiwanda, CA, 27% of EL students were referred to law enforcement; in Fenton, IL, 25% of EL students were referred to law enforcement; and in Holyoke, MA, 14% of EL students were referred to law enforcement.¹³⁴ EL students are also impacted by the particular negative consequences of the school-to-deportation pipeline.¹³⁵

In light of these disparities, the discipline guidance should address the risk and impacts of disparate discipline on EL students and provide recommendations about how educators can overcome barriers to help EL students fully participate in their school’s educational programs rather than push them out through school discipline.

E. Students Experiencing Homelessness

OCR should also consider how barriers to education for students experiencing homelessness contribute to the discriminatory discipline of students of color. Disparate discipline of these students may violate Title VI as well as the McKinney Vento Act, which guarantees equal access to education for students experiencing homelessness and requires state and local education agencies to remove barriers to education for these students.¹³⁶

¹³² *Id.* at 45.; see also JENNIFER KEYS ADAIR, MIGRATION POL’Y INST., THE IMPACT OF DISCRIMINATION ON THE EARLY SCHOOLING EXPERIENCES OF CHILDREN FROM IMMIGRANT FAMILIES (Sept. 2015), <https://www.migrationpolicy.org/sites/default/files/publications/FCD-Adair.pdf>; Saunjuhi Verma, Patricia Maloney & Duke W. Austin, *The School to Deportation Pipeline: The Perspectives of Immigrant Students and Their Teachers on Profiling and Surveillance Within the School System*, 673 ANNALS AM. ACAD. POL. & SOC. SCI. 209 (2017).

¹³³ DANIEL J. LOSEN & PAUL MARTINEZ, LEARNING POL’Y INST. & UCLA CNTR. FOR CIV. RTS. REMEDIES, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN 79, (2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>.

¹³⁴ *Id.*

¹³⁵ See, e.g., Patricia Maloney et al., *Fear of a School-to-Deportation Pipeline: How Teachers, Administrators, and Students Respond to the Threat of Standardized Tests and School Discipline*, URBAN EDUC. (Jun. 2021), <https://journals.sagepub.com/doi/abs/10.1177/00420859211026403?journalCode=uexa>; Laila L. Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697 (2018); Saunjuhi Vema, et al., *The School to Deportation Pipeline: The Perspectives of Immigrant Students and Their Teachers on Profiling and Surveillance within School Systems*, 673 ANN. AMER. ACAD. POL. & SOC. SCI. 209 (2017), <https://journals.sagepub.com/doi/10.1177/0002716217724396>; Lance Tran, ACLU N. Cal., *A School-to-Deportation Pipeline?* (Sept. 20, 2018), <https://www.aclunc.org/blog/school-deportation-pipeline>; Irma Solis & J.P. Perry, NYCLU, *Why Stopping the School-to-Deportation Pipeline will Make Schools Safer for Everyone* (Feb. 13, 2019), <https://www.nyclu.org/en/news/why-stopping-school-deportation-pipeline-will-make-schools-safer-everyone>.

¹³⁶ 42 U.S.C.A. § 11431*et seq.*



Students of color are disproportionately likely to experience homelessness,¹³⁷ a disparity that is not explained by poverty alone, but rather is the product of a “pileup” of systemic discrimination.¹³⁸ In turn, the experience of homelessness places students of color at additional risk of exclusionary school discipline. Students experiencing homelessness are disciplined at a much higher rate than their economic and housing stable peers. For example, in a statewide Michigan study, 16% of students who were currently homeless and 18% who were formerly homeless were suspended or expelled from school compared to only 4% of students who were not economically disadvantaged and had never experienced homelessness.¹³⁹ Students of color who experienced homelessness were most likely to be suspended or expelled. Almost a quarter of students suspended or expelled 24% were Black and homeless, 27% were Black and formerly homeless, 12% were Latinx and homeless, and 15% were Latinx and formerly homeless¹⁴⁰ despite the fact that Black and Latinx students made up 18% and 8% of the student population respectively.¹⁴¹

In Texas, which is home to approximately 10% of the U.S.’s homeless youth population,¹⁴² students who are homeless are “twice as likely to be referred to in-school suspension, 2.5 times more likely to be suspended from school, and five times more likely to be referred to a Disciplinary Alternative Education

¹³⁷ Black people are 13% of the population, but 50% of homeless families with children. NAT’L ALLIANCE TO END HOMELESSNESS, *Racial Disparities in Homelessness* (Oct. 2020), <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/>. American Indian, Alaska Native, Native Hawaiian, and Pacific Islanders also experience homelessness at much higher rates than their percentage of the population. , NAT’L ALLIANCE TO END HOMELESSNESS, *Racial Inequities in Homelessness, by the Numbers* (Jun. 1, 2020), <https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/>. Latinx individuals experience homelessness at a rate roughly equal to their percentage of the population, although the Institute for Children, Poverty and Homelessness suggests that this may be an undercount due to issues including fears of deportation and migratory work patterns. INST. FOR CHILDREN, POV’Y & HOMELESSNESS, *Trends in Student and Family Homelessness Issue 1: Definitions and Demographics* 98 (2015), <https://www.icphusa.org/wp-content/uploads/2015/09/Trends-in-Student-and-Family-Homelessness.pdf>. Similarly, ICPHUSA reports that some Asian subgroups are likely to experience high rates of homelessness masked by the collective statistic for “asians;” these include Hmong immigrants and people from Vietnam, Cambodia, Laos, and Bangladesh. *Id.* at 99.

¹³⁸ Teresa Wiltz, ‘A Pileup of Inequities’, PEW TRUST (Mar. 29, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/03/29/a-pileup-of-inequities-why-people-of-color-are-hit-hardest-by-homelessness>.

¹³⁹ Jennifer Erb-Downward & Michael Blakeslee, *Recognizing Trauma: Why School Discipline Reform Needs to Consider Student Homelessness*, 1 POV’Y SOLUTION: UNIV. MICH. 3 (May 2021), https://poverty.umich.edu/files/2021/05/Poverty-Solutions_Recognizing-Trauma_School-Discipline-Reform_May2021-1.pdf.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; *Student Enrollment Counts Report*, MICH. SCH. DATA, <https://www.mischooldata.org/student-enrollment-counts-report/> (last visited Jun., 22, 2021).

¹⁴² *Homeless Youth*, TEX. APPLESEED, <https://www.texasappleseed.org/homeless-youth> (last visited June 22, 2021).



Program.”¹⁴³ Similarly, Indiana students who were facing homelessness were twice as likely to receive both in-school and out-of-school suspensions than housed students.¹⁴⁴ Given the disparities in experiences of homelessness, these figures almost certainly also convey a disproportionate impact on students of color.

Disparate discipline of students experiencing homelessness also uniquely impacts LGBTQ students as they make up a large portion of homeless youth.¹⁴⁵ A 2016 GLSEN report states that “LGBTQ students who were homeless were more likely to have experienced school-based discipline: 54.0% vs. 46.6% of those living with relatives and 38.5% of those living at parent/guardian’s home, perhaps due to challenges in attending school or completing schoolwork.”¹⁴⁶ Additionally, LGBTQ students with “less stable housing situations” had higher rates (9.7%) of contact with the criminal/juvenile justice system because of prior school discipline compared to “1.9% of LGBTQ students who lived in their parents or guardian’s home and 4.1% of those who lived with other relatives.”¹⁴⁷

Students experiencing homelessness face unique challenges and trauma that economic and housing stable students generally do not. The Department of Education has previously highlighted that when schools suspend or expel a student who is homeless, they are essentially stripping an already vulnerable child of a safe, stable environment and potentially forcing them to spend days without access to food that they would normally receive at school.¹⁴⁸ Certain punished behaviors are directly related to a child’s status as homeless, such as tardiness and absences tied to the lack of a stable residence or caregiver.¹⁴⁹ Others can be linked to interruptions in the child’s education often leading to “lower school achievement and increased risk of dropping out of school” all due to a higher school mobility than other students.¹⁵⁰

The Department of Education has previously advised schools to shift their approach to one that supports students experiencing homelessness, rather than punishes them for behaviors likely explained by their homeless status.¹⁵¹ OCR should address the

¹⁴³ SCHOOLHOUSE CONNECTION, *Positive School Discipline Practices for Students Experiencing Homelessness 2* (Nov. 7, 2018), <https://schoolhouseconnection.org/positive-school-discipline-practices-for-students-experiencing-homelessness/> (citing TEXAS APPLESEED AND TEXAS NETWORK OF YOUTH SERVICES, *YOUNG, ALONE AND HOMELESS IN THE LONE STAR STATE: POLICY SOLUTIONS TO END YOUTH HOMELESSNESS IN TEXAS* (Nov. 2017), https://www.texasappleseed.org/sites/default/files/YoungAloneHomeless_FullReport_fin.pdf).

¹⁴⁴ *Id.*

¹⁴⁵ PALMER, *EDUCATIONAL EXCLUSION* at 29.

¹⁴⁶ *Id.* at x.

¹⁴⁷ *Id.* at xiii.

¹⁴⁸ *See* U.S. DEP’T EDUC., *EDUCATION FOR HOMELESS CHILDREN AND YOUTHS PROGRAM: NON-REGULATORY GUIDANCE 7* (Jul. 27, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>.

¹⁴⁹ *Id.*

¹⁵⁰ U.S. DEP’T EDUC., *SUPPORTING THE SUCCESS OF HOMELESS CHILDREN AND YOUTHS: A FACT SHEET & TIPS FOR TEACHERS, PRINCIPALS, SCHOOL LEADERS, COUNSELORS, AND OTHER SCHOOL STAFF 1* (Jul. 27, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/160315ehcyfactsheet072716.pdf>.

¹⁵¹ *See* U.S. DEP’T EDUC., *EDUCATION FOR HOMELESS CHILDREN AND YOUTHS PROGRAM*.



intersecting ways in which discriminatory discipline impacts students of color and students experiencing homelessness and may violate their rights.¹⁵² Guidance addressing the unique challenges that homeless students face, including experiences of trauma, would enhance the Department’s address of discriminatory school discipline on the basis of race and LGBTQ status. Additionally, to enable the further examination of the issues facing these students, the Department of Education should report school enrollment of students experiencing homelessness disaggregated by race.

F. Foster Youth

Foster youth are disproportionately subjected to punitive school discipline policies and are particularly susceptible to school pushout because they frequently face greater challenges, including having less stable relationships at home and experiencing higher rates of abuse and trauma.¹⁵³ By way of example, a 2018 study concluded that “[y]outh in foster care . . . are at high risk of academic failure, and are more likely than their non-foster peers to be disciplined at school.”¹⁵⁴

Further, foster youth who are also students of color are among the most overly disciplined students because the discrimination they face on the basis of their multiple identities compounds. The same 2018 study found that foster youth with intersectional identities, for example foster youth of color and foster youth with disabilities, were disproportionately disciplined at even higher rates than other foster youth.¹⁵⁵ A narrower 2020 study focusing on foster youth in Los Angeles County found that “Black foster youth students disproportionately experience punitive discipline and are suspended at a rate of 17% in comparison to the overall LA County rate of 2%. Black foster youth students also have the highest representation in special education at 37% as well as the largest chronic absenteeism rate at 34%.”¹⁵⁶ A similar study conducted two years earlier similarly found that “Black male . . . [foster youth] are suspended at noticeably high rates, at 27.4%. Across all analyses, Black males who were foster youth in seventh and eighth grade represented the subgroup that had the highest percentage of Black male suspensions, at 41.0%.”¹⁵⁷

¹⁵² Students experiencing homelessness are entitled to an equal educational opportunity under the McKinney-Vento Act, which further requires state and local education agencies to identify and remove barriers to their education. 42 U.S.C.A. § 11432(g)(7)(A), (B).

¹⁵³ Diane Tate, ACLU OF N. CAL., *Schools for All Campaign: The School Bias & Pushout Problem* 6-7 (2008).

¹⁵⁴ Brianna H. Kothari et al., *A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care*. 93 CHILD. & YOUTH SERV. REV. 117, 117 (2018).

¹⁵⁵ *Id.* at 123.

¹⁵⁶ Brianna M. Harvey, Kenyon Lee Whitman, & Tyrone Howard,, *The Disenfranchisement of Black Foster Youth: An Analysis of Los Angeles County Public School Data*, UCLA BLACK MALE INST. 1 (2020) <https://blackmaleinstitute.org/the-disenfranchisement-of-black-foster-youth/>.

¹⁵⁷ *Id.* at i.

Accordingly, the discipline guidance should include guidance on addressing the particularized needs of foster youth and provide trauma-informed strategies, rather than punitive discipline, to address conflicts.

...

Thank you for the opportunity to present these comments. We would be happy to provide further information that would be helpful to the Office for Civil Rights in addressing school climate and school discipline.

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