



July 22, 2021

**United States Department of Education
Office for Civil Rights
The Honorable Miguel Cardona
Secretary of Education
400 Maryland Avenue SW
Washington, D.C. 20202
Via <https://www.federalregister.gov>**

Appleseed respectfully submits this comment in response to the Office for Civil Rights (OCR), U.S. Department of Education's Request for Information Regarding the Nondiscriminatory Administration of School Discipline, Docket ID ED-2021-OCR-0068.

Appleseed Network

Appleseed is a network of 16 justice centers across the United States and Mexico working together to reduce poverty, combat discrimination, and advance the rule of law. Appleseed Centers unite research, organizing, policy advocacy, and impact litigation to build systemic solutions for their communities' most pressing problems. These comments are submitted by Texas Appleseed, Massachusetts Appleseed, South Carolina Appleseed, and Kansas Appleseed and are based on those centers' considerable expertise in the nondiscriminatory administration of school discipline.

Introduction

This call for public comments on the state of school discipline in the United States comes at the perfect time. In such a volatile political climate, where the coronavirus pandemic still rages and objective tenets of U.S. history are up for debate, the prospect of harsh discipline looms large in the lives of millions of American schoolchildren as they prepare to return to school. Our organizations fight across the United States for equal educational opportunities and to dismantle the school-to-prison pipeline; in 2021, as the Biden Administration considers the possibility of vigorous civil rights enforcement in our nation's schools, we acknowledge how pivotal this moment is.

Throughout this document, our organizations note, through empirical and anecdotal evidence, that racial disparities in school discipline have persisted and intensified since the Obama Administration released guidance on the nondiscriminatory administration of school discipline in 2014. Even considering the impact of the COVID-19 pandemic and mass social movements for racial justice, too many schools districts are poised to continue business as usual when the 2021-2022 academic year begins in a few weeks; in this regard, it means that school policing and exclusionary discipline will be treated as the panacea for issues with student behavior.

With this background and context, we offer these public comments and urge the U.S. Department of Education to vigorously enforce Titles IV and VI of the Civil Rights Act of 1964 to vindicate the civil rights of millions of young people in schools across the country. Considering the breadth of our expertise and advocacy, we decided to respond to questions 1, 2, 5, and 9 posed by the U.S. Department of Education in this call for public comments.

1. What are your views on the usefulness of current and previous guidance OCR and CRT have issued on school discipline? We would appreciate your comments on the guidance documents described above, including the 2014 guidance, the 2018 Dear Colleague letter, and the 2018 Questions & Answers on Racial Discrimination and School Discipline guidance.

The United States Department of Education (DOE) and the United States Department of Justice, through its Office of Civil Rights (OCR) and Civil Rights Division (CRT), have issued various guidance for schools on racial discrimination and school discipline: namely, the 2014 guidance, the 2018 Dear Colleague letter, and the 2018 Questions and Answers. While each document was well-intentioned to provide some value under its respective administration, individually and collectively they did not sufficiently tackle matters central to racial discrimination in the administering of school discipline. And without concentrated emphasis on these issues, any supplementary guidance will prove inadequate in addressing the real issues and thus remedying discriminatory discipline prevalent in American schools.

If “[t]he Departments are firmly committed to vigorously enforcing civil rights protections on behalf of all students” as expressed in the 2018 Dear Colleague letter, then developing practical guides is imperative to ensuring that administration of school discipline is free from race, color, or national origin bias and free from unlawful discrimination in violation of Title IV and Title VI. To be effective and functional for schools to remedy discriminatory discipline, we respectfully submit that guidance on this subject must do the following:

1. Deliver evidenced-based, intervention-focused behavior management strategy tool kits, videos, fact sheets, and/or other resources while requiring their use in lieu of punitive systems that rely on exclusionary discipline and involvement of law enforcement;
2. Develop a system for the identification of racial discrimination in school discipline and compel school officials and their school police to self-evaluate, examine, and identify root causes of racial discrimination in school discipline;
3. Establish and require annual evidenced-based professional growth and training with advancing concepts for teachers, school administrators, school police, and education leadership on awareness of implicit bias and dismantling deficit thinking;
4. Require transparency and access to data collection, analysis, and measured outcomes of school discipline as an organization and as individuals for every individual involved in the student discipline process - i.e., districts, schools, teachers, school police, community police officers, and school administrators;
5. Enforce answerability by holding parties accountable and applying significant sanctions to institutions and individuals for unlawful discriminatory discipline in violation of Title IV and Title VI.

System practices in public education perpetuate racial inequality and discriminatory application of school discipline. For many schools, data show that school discipline policies and practices disproportionately impact students of color, compromising their educational outcomes. The data show Black and Brown students continue to be overrepresented and disproportionately removed from the traditional classroom environment in the administering of exclusionary discipline tools to in-school suspension (ISS), out-of-school suspension (OSS), a discipline alternative education program (DAEP), and expelled to a juvenile justice alternative education program (JJAEP). Of equal concern is where data shows Black and Brown students receive harsher discipline when compared to their peers. Recognizing that this is the current state of affairs in many schools and a reality for many students of color, it is incumbent upon the Departments to take immediate action to elevate the dimension of school discipline applied in schools and compel that systems advance from punitive and harmful to intervention-based and restorative.

Accordingly, rather than simply ejecting students from the traditional classroom setting and referring them to school police, meaningful, multi-dimensional, intervention-focused approaches are needed to assess the causal nature of the student behavior and provide the needed support to

help guide the student back on track. Effective and evidenced-based behavior management programs are inclusive, restorative, supportive, serve to educate, and provide students an opportunity for ascension. Some of these programs include: restorative practices, trauma-informed practices and referral for services as necessary, social and emotional learning, and positive behavioral intervention and support (PBIS) strategies. The Departments ought to provide guidance and resources to schools surrounding these programs and require their adoption and implementation in lieu of exclusionary discipline and referrals to law enforcement. Resources may include tool-kits, videos, facts sheets, and other resources. Intervention-based school discipline alternatives are urgently needed, especially as students transition back into the brick- and-mortar classrooms, many still struggling to deal with the trauma of the last 18 months.

In addition to receiving harsh, punitive educational consequences at school, Black and Brown students are referred to school police for criminal penalties with greater frequency when compared to their peers, further strengthening the school-to-prison pipeline. This zero-tolerance, penalizing process serves to further “harden” schools and criminalize routine, age-appropriate behavior with utter disregard to providing meaningful intervention. This overreliance on school police officers, not only pushes students into the criminal legal system, but manifests into emotional, psychological, and physical abuse for students. In a recently published Texas Appleseed report - [Education Transformed](#),¹ the authors contend that racist actions and implicit biases that pervade our policing institutions also materialize within the walls of our public schools culminating in police misconduct and excessive force directed at our students - resulting in disastrous outcomes. With the intention of providing a safe learning environment, most school districts contract with local law enforcement departments or elect to hire their own police force with licensed peace officers or resource officers. However, as discussed in Question 5 later in this document, these police officers have little to no training on how to effectively work with young people and frequently monitor the halls of school buildings as if patrolling within the walls of an unruly prison. [Education Transformed](#) cites several cases of maltreatment of students at the hands of school police exposing the abuse that young people endure within American schools each day.

Inspired by Mr. George Floyd’s death, there continues to be a call for needed reform requiring implicit bias training for many professions. Public education is very much part of the discussion for needed training involving implicit bias.² In the wake of the police-led killings of Mr. Floyd and others, and the disproportionate effects of COVID-19 on the communities of color, there has been a harsh look at the reality that schools perpetuate systemic racism.³ Educators are just as likely to

¹ ANDREW R. HAIRSTON, DR. VICKY L. SULLIVAN & DR. ELLEN STONE, TEXAS APPLESEED, EDUCATION TRANSFORMED: THE K-12 EXPERIENCE IN TEXAS DURING THE CORONAVIRUS PANDEMIC (2021), https://www.texasappleseed.org/sites/default/files/EducationTransformed_Report032921-Fin.pdf.

² E.g., Sarah D. Sparks, *Training Bias Out of Teachers: Research Shows Little Promise So Far*, EDUC. WK. (Nov. 20, 2020), <https://www.edweek.org/leadership/training-bias-out-of-teachers-research-shows-little-promise-so-far/2020/11>.

³ *Id.*

show racial biases as any other American adult.⁴ Unfortunately, the research is unclear as to how best to train staff to avoid racial and other biases that affect their relationships with students.⁵ One thing is certain: without acceptance and understanding that systemic racism exists within schools, there is little hope of achieving education justice.

A transformational paradigm shift is needed in the world of public education, as it relates to student discipline. One that acknowledges and confronts the ingrained inequities and systemic barriers that result in further marginalizing some students. In order to achieve school discipline that is free from racial discrimination, it is essential that the Departments require schools and educational leaders to self-evaluate, examine, identify, and dismantle core systemic barriers that oppress and to activate needed equitable reforms within their school institutions.

Most disciplinary systems involve educators assessing the student conduct and determining whether to address the conduct educationally through school administration or criminally involving school police, or both such that the student receives dual consequences. This process permits discretion and invites subjective interpretation based on subjective standards of the educator, be it a teacher or a school administrator or district leaders. Educators often have different life experiences, cultural backgrounds, and philosophies than those of the students or communities they serve, resulting in the inability to comprehend the complexities of the lives of their students and be compassionate and sympathetic to their struggles. Seldom do educators receive evidenced-based, reflective professional development or training to address this very real concern. The reality is that unlawful discrimination, in violation of Title IV and Title VI, is occurring every day in our schools in the application of different treatment and policies or practices resulting in disparate impact. Statistical analysis may provide an accurate picture of the problem and where investigations and deliberate effort must be focused, but the resolution requires a more in-depth inquiry beyond the quantitative data - accounts that cannot be properly captured by numbers. Simply stated, we cannot give school administrators unchecked power whose subjective application can turn on the whim of the individual school administrator given their experiences and perspectives. This disciplinary student process stands to deepen the discipline racial disparities precisely because they depend on subjective judgments, producing the same discriminatory and uneven effects on student discipline.

To begin to remedy the racism ingrained in public education requires a re-training and re-tooling of policies and practices. Educator training and professional development is urgently needed on the awareness of implicit biases and its impacts on the administering of school discipline and the dismantling of deficit thinking policies and practices. While the Departments' documents reference the need for training of school officials in select circumstances, the training seems to be on Title IV and Title VI and discipline policies or rules. This education does little to nothing to

⁴ *Id.*

⁵ *Id.*

inform the educator on how to eradicate the harmful effects of discriminatory policies and practices. In addition to learning the laws related to discrimination and related policies, educators ought to be educated on the awareness of implicit bias and how to examine, identify, and dismantle deficit thinking. Because growth and development in this area is a process and not just a one-time training, and because such training will facilitate the prevention of racial discrimination, the training with advancing concepts ought to be conducted on an annual basis with current and future educators.

Deficit thinking is the dominant paradigm that largely shapes American educators' perspectives for the widespread and persistent failure among historically underserved students. It cites internal deficits in students that manifest in limited intellectual abilities and other shortcomings, resulting in lack of motivation and immoral behavior.⁶ Schools produce failures among economically disadvantaged students and students of color and then use these failures as evidence that the problem lies with the students, their families, their genetics, their culture, and their neighborhoods, rather than the educational system and its deficit assumptions.⁷ This self-perpetuating cycle is commonplace in today's public schools.⁸ It is pervasive and implicit and is nothing short of dehumanizing.

Deficit thinkers treat people as the problem and, rather than focusing on remedying oppressive and disabling systems, they focus on "fixing" people.⁹ The responses of school districts have exacerbated injustices suffered by students of color. Under the guise of better understanding poverty, school leaders offer damaging professional development riddled with deficit thinking, further perpetuating the cycle of deficit thinking and promoting a culture of oppression by "blaming the victim."¹⁰ To achieve school discipline that is free from racial discrimination, there must be a call to examine core systemic barriers that oppress and a heroic attempt to dismantle deficit thinking in public schools. Accordingly, it is incumbent upon school leaders and administrators to develop a tool-box with positive behavioral strategies underscored with an awareness of implicit bias and deficit thinking to help train, or retrain, current and future educators.

Ultimately, the usefulness of the Departments' documents can be properly assessed or judged by whether it accomplishes what it sets out to do. For that reason, guidance must contain clear instruction or direction for all relevant stakeholders, consist of measured outcomes that are routinely monitored, and hold schools, school officials, and supervising agencies accountable,

⁶ See RICHARD R. VALENCIA, *THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 2* (1997).

⁷ See, e.g., *id.*

⁸ See, e.g., *id.*

⁹ E.g., Lori Patton Davis & Samuel D. Museus, NAT'L CTR. FOR INSTITUTIONAL DIVERSITY, *Identifying and Disrupting Deficit Thinking*, MEDIUM (July 29, 2019), <https://medium.com/national-center-for-institutional-diversity/identifying-and-disrupting-deficit-thinking-cbc6da326995>.

¹⁰ RICHARD R. VALENCIA, *DISMANTLING CONTEMPORARY DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 68-100* (2010).

independently and collectively where appropriate. Not only is transparency and access to all student discipline data key to the evaluation process as explained in Question 9 of this document, but so is examining every data layer of involvement in the student discipline process. Respecting Family Educational Rights and Privacy Act (FERPA) and student privacy guidelines, the Departments ought to require schools to make available student discipline data in aggregate and disaggregate form, by school, by teacher, by school administrator, by school police, with student sub-population breakdowns. This will permit all relevant student discipline data to be examined, analyzed, and outcomes measured to ensure no unlawful discrimination in violation of Title IV and Title VI. And when racial discrimination is investigated and exposed, swift and decisive action must be taken to mitigate the damage and harm caused by the institution and individuals. Moreover, the Departments must hold accountable all those responsible through sanctioning including admonishments, required racial discrimination training, revocation of certifications or licenses, and even criminal action where appropriate.

In sum, the Departments' referenced documents require reconsiderations and revisions in order to properly guide schools on how to remedy the racial disparities in the administration of student discipline. The reference documents fail to address many factors that are causal to the problem of the racial disparities in the administration of student discipline; they fail to communicate the basis of what can be done to prevent discriminatory processes from happening in schools; they fail to provide specific guidance on training involving implicit bias and deficit thinking; and they fail to provide school discipline programmatic remedies or approaches for schools to adopt and implement. To remedy racial discrimination in the administration of school discipline, it necessitates more than data collection and analysis; more than investigating disproportionate representation of students of color in exclusionary discipline and law enforcement referrals; more than implementing intervention-focused discipline strategies to avoid perpetuating the school-to-prison pipeline; it demands confronting the root causes of the discriminatory administration of the student discipline, attacking the systemic racial discrimination that occurs by implicit bias and deficit thinking in our schools, and valiantly activating a fundamental transformation that is free of racial discrimination.

2. What ongoing or emerging school discipline policies or practices are relevant to you or the communities you serve, including any that you believe raise concerns about potentially discriminatory implementation or effects on students' access to educational opportunities based on race, color, national origin, sex, or disability?

There are four major ongoing school discipline policies and practices that raise concerns about discriminatory implementation and effects. The first is the over identification of gang members and gang violence in schools. Schools use the gang identifier as an exclusionary discipline enhancer to make any violation of school rules result in a harsher, longer punishment. Some states enter students into a police database that identifies them as gang members, which causes future

adversarial interactions with police.¹¹ Schools apply the gang label disproportionately to students of color, leading to many instances of racial discrimination in school discipline discussed in the previous section. Most accusations of gang membership lack any evidentiary support, instead relying on rumors, closeness of neighborhood friends, similar haircuts and dressing in a similar style, or doodling stars on their notebooks.¹² School administrators, teachers, and staff must present definitive evidence that a student is in fact in a gang to use this enhancer for exclusionary discipline policies like suspension and expulsion.

Second is the involvement of School Resource Officers (SROs) in schools, their lack of oversight, training, and over classification of what is a crime. Despite guidance indicating that SROs are not school disciplinarians, normal childhood misbehavior is being treated as criminal behavior, from school yard fights,¹³ to throwing food in the cafeteria,¹⁴ to arguing with an adult.¹⁵ Officers are also being used to restrain students with disabilities when they are in crisis.¹⁶ News stories are riddled with SROs handcuffing students with disabilities, bragging about arresting children,¹⁷ and having inappropriate sexual relationships with high school students.¹⁸ As elaborated upon in the next section, police officers frequently operate outside the terms of memoranda of understanding

¹¹ See, e.g., Shannon Dooling, *Here's What We Know About Boston Police's Gang Database*, WBUR NEWS (July 26, 2019), <https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration>.

¹² See Carmel Ferrer, *Where Zero Tolerance Makes Zero Sense*, ACLU (May 1, 2014, 5:02 PM), <https://www.aclu.org/blog/racial-justice/affirmative-action/where-zero-tolerance-makes-zero-sense>.

¹³ E.g., Emily Wakeman, *Student at Airport HS Tased by SRO During Brawl; Family Calls for Policy Changes*, WIS NEWS (Dec. 11, 2020, 7:29 PM), <https://www.wistv.com/2020/12/11/student-airport-hs-tased-by-sro-during-brawl-family-calls-policy-changes/>; Jazmine Greene, *SRO Under Review After Discharging Taser During School Dismissal*, WIS NEWS (Apr. 21, 2021, 8:32 PM), <https://www.wistv.com/2021/04/21/sro-under-review-after-discharging-taser-during-school-dismissal/>.

¹⁴ *Student Faces Assault Charges for Throwing Baby Carrot*, FOX 5 N.Y. (Oct. 26, 2015), <https://www.fox5ny.com/news/student-faces-assault-charges-for-throwing-baby-carrot>.

¹⁵ Kat Chow, *Two Years After a Violent Altercation at a S.C. High School, Has Anything Changed?*, NPR (Oct. 24, 2017), <https://www.npr.org/sections/ed/2017/10/07/548510200/what-s-changed-in-south-carolina-schools-since-violent-student-arrest>.

¹⁶ See Laurel Mallory, *SC Elementary Student with Special Needs Handcuffed by Police, Activists Say*, WIS NEWS (May 21, 2021), <https://www.wistv.com/2021/05/20/sc-elementary-student-with-special-needs-handcuffed-by-police/>.

¹⁷ See Mihir Zaveri, *Body Camera Footage Shows Arrest by Orlando Police of 6-Year-Old at School*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/us/orlando-6-year-old-arrested.html>.

¹⁸ See, e.g., PHILIP MATTHEW STINSON & ADAM M. WATKINS, *THE NATURE OF CRIME BY SCHOOL RESOURCE OFFICERS: IMPLICATIONS FOR SRO PROGRAMS* 6 (2014), <https://journals.sagepub.com/doi/pdf/10.1177/2158244014521821>; *Former Darlington County SRO Charged with Misconduct in Office*, SC NOW (Apr. 20, 2021), https://scnow.com/news/local/former-darlington-county-sro-charged-with-misconduct-in-office/article_b7ac2582-a20f-11eb-8f14-935a0c71b9c2.html; *Sheriff: SRO at Elementary School Fired Amid Ongoing Homeland Security Investigation*, FOX CAROLINA (Mar. 16, 2021), https://www.foxcarolina.com/news/sheriff-sro-at-elementary-school-fired-amid-ongoing-homeland-security-investigation/article_d7e8ae9e-866f-11eb-a570-c353540dfd29.html; Freeman Stoddard & Amanda Shaw, *Court: Former SRO Among New Suspects Indicted in Upstate Sex Trafficking Case*, FOX CAROLINA (May 7, 2021), https://www.foxcarolina.com/news/court-former-sro-among-new-suspects-indicted-in-upstate-sex-trafficking-case/article_1a67dfea-af80-11eb-94aa-57811a88bb0d.html; Bailey Wright, *Former SRO Arrested for Inappropriate Sexual Relations with Berkeley HS Student*, ABC NEWS (June 14, 2021), <https://abcnews4.com/news/local/former-sro-arrested-for-inappropriate-sexual-relations-with-berkeley-hs-student>.

with school districts through such appalling action. The most disturbing part is that these news stories are often the only way that the public learns of gross misconduct by officers.

There is no transparent data readily available in most states to determine the full depth of this issue. Schools often do not keep track of school arrests because they see it as the police department's responsibility. This is a problem because police departments rarely keep records that accurately reflect information about school policing. There are also discrepancies in the limited data that is reported to different agencies, which leads to questions about data validity. This is why the data collection methods suggested in Question 9 are so imperative. It is well established that students of color are most likely to be arrested by SROs; in some states, Black students are 8 times more likely to be arrested than White students. If a student of color has a disability, their odds of being arrested at school increase exponentially. SROs do not understand or have the training to understand the complexity of dealing with children, much less children with disabilities. Furthermore, the number of resources that school districts are sinking into SRO programs is disturbing. SROs are a multimillion dollar drain on resources of school districts; South Carolina's state legislature added funding for 205 additional School Resource Officers totaling just over 11 million dollars in 2019.¹⁹ These funds would better benefit students by being invested in social workers, school psychologists, restorative justice programs, and better training for teachers and staff.

Third, the inappropriate restraint and seclusion of students with disabilities continues to be a major issue. Despite the U.S Department of Education issuing a report in 2010 encouraging the elimination of restraint and seclusion, 23 states have no meaningful restraint or seclusion laws. Eight states of the 23 have policy guidelines but no laws.²⁰ This is unacceptable. Lack of legislation and regulation allows abuses by SROs and abuses by school officials to occur. Improper restraint and seclusion can not only physically injure students but lead to severe trauma as well.

Fourth, is the lack of common sense that is applied to both threat assessments and items that could be considered weapons. Students may bring items to school that are inappropriate, but often they do not fully understand why an item is dangerous. For example, advocates in SC have observed school officials consider a student's crochet needle a weapon. The student used this crochet needle to create extension styles on Black hair and had no understanding of or plans to use the crochet needle as a weapon. School officials have also considered other objects, such as scissors, pencil

¹⁹ Press Release, S.C. Dep't of Educ., South Carolina Department of Education to Fund 205 New School Resource Officers (Sept. 26, 2019), <https://ed.sc.gov/newsroom/news-releases/south-carolina-department-of-education-to-fund-205-new-school-resource-officers/>.

²⁰ U.S. DEP'T OF EDUC., SUMMARY OF SECLUSION AND RESTRAINT STATUTES, REGULATIONS, POLICIES AND GUIDANCE, BY STATE AND TERRITORIES (2010).

sharpeners, water guns,²¹ and even pop-tarts²² as weapons under vague codes of conduct. Schools need meaningful common-sense policies to determine if an inappropriate item is a weapon. The age of the student, intent of the student, as well as any disability that the student has should be factors in determining if this is a teachable moment or a limited situation that calls for exclusionary discipline.

Finally, emerging discipline practices include the removal of students from in-person instruction and placing them in a virtual setting. These removals or changes in placement are not recorded or reported as suspensions or discipline infractions, leading to more data collection problems like the ones contemplated in the final section of this document. This negatively impacts students who have a disability and receive services under an Individualized Education Program (IEP) and those students with a disability that are not yet being served under Individuals with Disabilities Education Act (IDEA). A removal of a student from their in-person classroom due to behavior is a suspension and should be counted as such. Additionally, students who are still in a fully remote setting who are misbehaving would be muted by the teacher so that they can no longer meaningfully participate in instruction, or students are sent to a “breakout room” that does not allow them to hear the virtual instruction that is occurring. These events would have traditionally been recorded as discipline events, but virtually these events were not logged, tracked, or reported as discipline events. Removal from instruction and not being allowed to meaningfully participate in education should be closely tracked and reported.

5. What types of guidance and technical assistance can OCR provide to best help SEAs and LEAs create positive, inclusive, safe, and supportive school climates and identify, address, and remedy discriminatory student discipline policies and practices (for example, Dear Colleague letters, Frequently Asked Questions documents, fact sheets, tool kits, videos on the nondiscriminatory administration of school discipline or positive school climate, and guidance on returning students to in-person instruction)?

The issue of discriminatory student discipline policies and practices presents itself in unique ways both among the fifty states and within the various school districts of those states. Because there is not a single solution to this issue, one of the most effective ways that OCR can help address this matter is by issuing a model framework for the memoranda of understanding (MOU) that many school districts have with local law enforcement agencies regarding school-based referrals to law enforcement as well the roles and responsibilities of SROs. Similar agreements should be sought in the school districts that have internal school police forces, contract with security companies, or otherwise have law enforcement present at the school. MOU are agreements that establish how

²¹ ASSOCIATED PRESS, *Prattville Teen Expelled for Bringing Water Gun to School*, ADVANCE LOC. (Mar. 6, 2019), https://www.al.com/news/montgomery/2017/04/prattville_teen_expelled_for_b.html.

²² *"Pop Tart" Suspension Should Be Upheld, School Official Says*, CBS NEWS (July 1, 2014, 5:05 PM), <https://www.cbsnews.com/news/examiner-recommends-school-board-uphold-pop-tart-suspension/>.

student discipline will be conducted, but many school districts lack uniform policies in their MOU, and many of those agreements currently fail to adequately address relevant issues, such as the role a SRO should have at the school beyond the enforcement of discipline and the specific circumstances in which more severe disciplinary measures would be properly imposed. By offering a template document that incorporates the best practices that are being used by school districts with stronger MOU, OCR would be able to promote the wider adoption of those standards. The individual districts would be able to tailor OCR's model standard for MOU to address the specific discriminatory issues that are most important to them. Having guidance on this issue is critical because if school districts have more robust MOU, they will ensure that the administrators, teachers, and SROs at their schools are focusing on the right topics for student discipline and that none of those individuals has too much discretionary authority, which often contributes to discriminatory practices. Combining the change in focus on the relevant topics with better public access to the underlying disciplinary data, as discussed in the section below, will allow for substantive improvements on the long-standing disparities in student discipline.

The best practices that we have seen in current MOU²³ 1) emphasize the role of the SROs at their assigned school(s) outside of their role enforcing the law; 2) clearly delineate the circumstances in which the SRO or other school official should intervene; 3) have a graduated system for student discipline that considers the nature of the student's conduct and surrounding circumstances; 4) require school officials to be trained on issues relevant to imposing discipline including age-appropriate responses, cultural competence, restorative justice techniques, conflict resolution and verbal de-escalation techniques, bias-free policing, community and state drug and mental health treatment options, and understanding and protecting civil rights; and 5) have reporting requirements on discipline to allow for accountability.

The SRO is a law enforcement officer, but also a school employee, meaning their role should not be limited to enforcing the law as having a singular responsibility increases the tendency of the SRO to treat disciplinary matters as arrest situations. As discussed in the answer to Question 2, there are many issues with SROs having disproportionate responses to the conduct of students and strong MOU would confront that issue directly.

Identifying specific situations in which disciplinary action should be handled by a teacher or administrator versus the SRO is important because law enforcement should not be involved in routine discipline. If these parameters aren't set, abuses like the ones outlined in the previous

²³ See, e.g., Broward County Collaborative Agreement on School Discipline, <https://www.ride.ri.gov/Portals/0/Uploads/Documents/Funding-and-Finance-Wise-Investments/Funding-Sources/State-Education-Aid-Funding-Formula/SRO-Funding/MOU-Templates-SRO-Funding.pdf>; Memorandum of Understanding Between Fairfax County Public Schools and Fairfax County Police Department 1, <https://www.fcps.edu/sites/default/files/media/pdf/2018%20FCPS-FCPD%20SRO%20MOU.pdf>; Memorandum of Agreement Between Windham Public Schools and Willimantic Police Department, <https://www.cga.ct.gov/olr/documents/misc/SRO/Windham%20MOA.pdf>.

section can occur. This division of authority leaves any violations of school policy that are not illegal with the administrator or teacher, establishes certain misdemeanor offenses, such as loitering and disorderly conduct, that would also be in the purview of the administrator or teacher especially for first-time offenses, and has the SRO involvement be for felony offenses and other instances where a referral to law enforcement is legally required.

A graduated system for discipline helps ensure that students are given opportunities to improve their behavior before facing serious punishments. This method of student discipline clarifies who should be involved and what actions should be taken to best resolve the situation. It also helps provide guidance to teachers, administrators, and SROs by establishing clear standards that should be followed for the particular situation.

Trainings are crucial because educators and law enforcement officers are not necessarily experts on all of the matters that are relevant to student discipline. The areas listed above were included because they reinforce that alternatives to the most severe disciplinary action should always be considered and would help the school official responsible for imposing a disciplinary action confront any underlying bias that they may have against particular students. OCR could be further involved in this area by leading trainings for school districts on any of those listed topics or a related area that the particular district believes merits a training session.

Public access to the disciplinary data is essential because that information helps establish how well the MOU policies are addressing the discriminatory disciplinary policies and practices that they seek to address. Allowing members of the community to be able to assess the trends in their school district and act accordingly is another reason why OCR should be sharing the data discussed in the answer to Question 9.

While having a model MOU template that includes all of the areas discussed above would help improve the climate at schools and their disciplinary outcomes, it will not completely resolve this issue. Since ongoing dialogue on how to best address the underlying issues will be necessary, OCR should also foster that discussion when opportunities to do so arise so that the most comprehensive assistance can be provided to SEAs and LEAs.

9. Describe any data collection, analysis, or recordkeeping practices that you believe are helpful in identifying and addressing disparities in discipline. Conversely, describe any barriers or limitations in these areas, and any ideas you may have on how to overcome them.

A critical part of any guidance ought to include a robust component of data collection and analysis. While data collection and analysis have been part of the equation in prior guidance, many school districts do not collect vital information needed to identify disparities in school discipline. This not only hinders local advocates from being able to address disparities in school discipline but

diminishes the utility and accuracy of federal data. The OCR's discipline and arrest data are collected from local schools and districts, however, many schools do not actually collect the information requested unless required by their state legislature or state education agency.²⁴ OCR's data may therefore be underinclusive or overinclusive, depending on the reporting practices of each district. For schools and districts that are only required to report discipline data to OCR, it is difficult to obtain any information beyond the basics of student discipline data, and law enforcement or school police data is almost impossible to collect. While OCR's existing discipline data provides a valuable resource for advocates in districts with less robust reporting practices, its own practices could be improved.

National data show us that students with disabilities are disciplined at a higher rate than students without disabilities, and Black students lose more instructional days to discipline than White students.²⁵ However, these trends worsen when different aspects of a student's background combine to further disadvantage them. As discussed in the first section, race, as well as factors such as gender, sexual orientation, disability, socioeconomic status, and English proficiency, may all increase the risk of a student being disciplined and/or entering the school-to-prison pipeline. For example, a recent report from the Appleseed Network found that across Alabama, Kansas, and Massachusetts, Black female students are roughly 5.2 times more likely to be disciplined than white female students.²⁶ While the root causes of this data reflect the adultification of Black girls and histories of sexual trauma, further data is urgently needed to understand these findings.²⁷ Existing data reveal that girls are most often arrested for behavioral reactions to abuse that have been criminalized.²⁸ However, schools are not required to report similar data. Considering the discretionary nature of school discipline discussed in our first section, this is extremely worrisome. The reasons for suspensions are typically not included in schools' suspension data, and alternative forms of discipline can be unreported altogether. These deficiencies in data make it difficult to identify disparities in discipline, let alone analyze and address those disparities.

²⁴ See DANIEL J. LOSEN & PAUL MARTINEZ, CTR. FOR CIV. RTS. REMEDIES, IS CALIFORNIA DOING ENOUGH TO CLOSE THE SCHOOL DISCIPLINE GAP? 39, 52 (2020), <https://files.eric.ed.gov/fulltext/ED607056.pdf>; Daniel Defraia, *Special Feature: Bureaucratic Dysfunction & Physical Restraint in BPS*, DIGBOSTON (July 6, 2021), <https://digboston.com/special-feature-bureaucratic-dysfunction-physical-restraint-in-bps/?fbclid=IwAR3lcTCV9eKbvGsgo9EGz9yzqu2x3JFLCz9aQhyK1PlpTM14bGJcS9HJwEY>.

²⁵ DAN LOSEN ET AL., CTR. FOR CIV. RTS. REMEDIES, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? (2015), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf; Press Release, Civil Rights Project, CA Students Still Losing Over 760,000 Days of Instruction Due to Suspensions (Sept. 18, 2018), <https://www.civilrightsproject.ucla.edu/news/press-releases/2018-press-releases/ca-students-still-losing-over-760-000-days-of-instruction-due-to-suspensions>.

²⁶ APPLESEED NETWORK, PROTECTING GIRLS OF COLOR FROM THE SCHOOL-TO-PRISON PIPELINE (July 2020), <https://massappleseed.org/wp-content/uploads/2020/07/Appleseed-Multistate-Pamphlet.pdf>.

²⁷ See MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY (2015), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf>.

²⁸ *Id.* at 9-12.

Given that in some regions, OCR is the only agency collecting discipline data, it is essential that school districts be provided clear guidelines to identify and address disparities in school discipline. We recommend updating the existing guidance with instructions for school districts to require transparency of school discipline data collection and additional reporting of the following:

1. Exclusionary data, including but not limited to, any occurrence and reason for in-school suspension, out-of-school suspension, referral to a disciplinary alternative education program, referral to a threat assessment team, or referral to juvenile justice academic education program. This reporting should include information about the reason for use of exclusionary discipline, such as an incident report detailing the time and location of an offense, involved parties, and analysis of teacher and school administrator data.
2. Law enforcement or school police data, including but not limited to, arrests, use of restraints, filings-at-large, issuances of citations, and outcomes of criminal charges (i.e., how many are dismissed by court). This reporting should include any data regarding interactions with the juvenile justice system that occur at school or as a result of incidents at school, and should not be limited to incidents with school resource officers or other school-based law enforcement officials. School police officers are often charged with dispensing student discipline in the place of school administrators; however, the actual number of these episodes go largely unreported.²⁹ Without these data, it is impossible to recognize discriminatory patterns or practices occurring in our schools.
3. Cross-tabulated data,³⁰ so that all data noted above is disaggregated by sub-populations including race, gender, sexual orientation, disability, socioeconomic status, and English proficiency. Girls of color are just one subgroup that has been identified as facing over-discipline in school. Others, such as low-income students with disabilities,³¹ also face higher rates of discipline, yet there is little data that would support intervention to address these disparities. While OCR's discipline is disaggregated by race, gender, and disability, it is collected from schools and districts that may not be accurately collecting this data. Over time, cross-tabulated data will also be useful in evaluating which interventions and reforms to school discipline make a difference in reducing disparities.

While some of the information above is currently collected by OCR, it is often not reported accurately or in the level of detail which allows advocates to identify disparate discipline rates

²⁹ See, e.g., HAIRSTON et al., *supra* note 1, at 22, 29.

³⁰ Cross-tabulated data allows researchers to categorize data by multiple variables and analyze the relationship between two or more variables, which expose patterns that cannot be seen when looking at the results in aggregate. For example, in many states, the discipline rates for Black students and for male students may be available publicly, but the discipline rates for male Black students are not. With cross-tabulated data, the discipline rates for Black male students would not only be publicly available, but also discipline rates for subgroups within that category.

³¹ Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *Keeping the Needs of Students with Disabilities on the Agenda: Current Issues in Special Education Advocacy: How Idea Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U.J. GENDER SOC. POL'Y & L. 107, 110 (2011) ("Low-income students with disabilities are more frequently pushed out of public education through punitive discipline, sheer neglect, or other more subtle strategies.").

based on a wider range of demographics and types of discipline. For this to be possible, schools and districts must be held accountable for accurate reporting. Inconsistencies in reporting by district, such as one school claiming zero school-based arrests,³² should be investigated, and sanctions should be imposed by restricting funds for failing to supply the requested information. This practice will serve to motivate districts to comply and allow for more accurate data collection on a local and national scale. Furthermore, any guidance should urge schools and districts to make school discipline data collection, analysis, and recordkeeping practices public. Currently, when requests are submitted to individual schools or school districts, many resist and argue that FERPA does not permit the release of such information, which is not accurate. OCR should provide clarification about what information may be released, and additionally encourage schools to publish this data.

School discipline data should be collected and published more frequently, in a cross-tabulated format, which would allow educators, advocates, and policymakers to accurately identify the true scale of disparities and address school systems that are engaging in discriminatory practices or failing to provide quality education to their most vulnerable students.

Conclusion

2021 represents a critical juncture in the history of the United States. State legislatures across the country have demonstrated that they are largely uninterested in using their policymaking authority to provide relief for American schoolchildren and their families; critical race theory and trans sports bans dominate the conversations of these governmental bodies, as opposed to policies that would prioritize healing for young people as the coronavirus pandemic continues with its devastating impact. The Biden Administration, through the Departments of Education and Justice, can revamp vigorous civil rights enforcement to guide the nation and the globe through this epoch of extraordinary difficulty. Not only should the federal executive branch fully reinstate the provisions and effect of the 2014 Dear Colleague Letter, it must also strengthen and expand its reach.

We invite you to contact the signatories of this letter if any further questions arise, and we wish you well in your journey to secure equal educational opportunities for all children in the United States.

³² An analysis of school-based arrest data in Massachusetts found that only 11% of districts in the state reported any arrests despite there being over fifty districts with more than 3,000 students, and Boston Public Schools, a district with over 50,000 students, reported only four arrests in 2018-2019 to the Massachusetts Department of Education, “[b]ut BPS told WBUR there were 114 school arrests in that year.” Shannon Dooling, *Mass. Has Been Tracking Impact of Police in Schools for a Year, but Reporting Has Been Spotty*, WBUR (Sept. 18, 2020), <https://www.wbur.org/edify/2020/09/18/police-schools-arrest-reports-mass>.

Respectfully Submitted,



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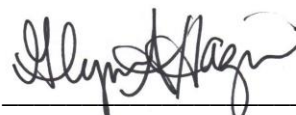
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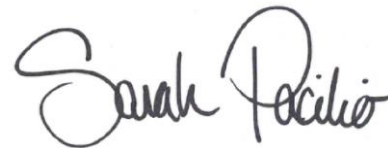
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