



July 19, 2021

The Honorable Miguel Cardona  
U.S. Department of Education  
Office for Civil Rights  
Lyndon Baines Johnson Department of Education Bldg  
400 Maryland Avenue, SW  
Washington, DC 20202-1100

cc: Alejandro Reyes  
Director, Program Legal Group  
Office for Civil Rights  
Potomac Center Plaza (PCP), Room 6125  
550 12th Street SW Washington, D.C. 20024

RE: Docket ID number: ED-2021-OCR-0068, *Request for Information Regarding the Nondiscriminatory Administration of School Discipline*.

Thank you for the opportunity to inform the Education Department's forthcoming guidance and technical assistance on how PreK-12 schools can improve school climate and safety in a manner that is consistent with civil rights laws and ensures equal access to education.

For over 10 years, New America's Education Policy program has used original research, policy analysis, and a host of new media platforms to help solve critical education problems. We combine a steadfast concern for historically disadvantaged populations with a belief that better information about education can vastly improve both the policies that govern educational institutions and the quality of learning itself. Over the last year, our PreK-12 team has been closely documenting the detrimental impact punitive school discipline policies can have when used in early education and childhood spaces, particularly for historically underserved communities of students.<sup>1</sup> The COVID-19 pandemic has magnified the fragility of the very systems we work to strengthen, and students who were already marginalized, such as students of color, English learners (ELs), students with disabilities, and those experiencing economic instability, have been disproportionately affected. At the same time, education leaders across the country have recognized that the pandemic's impact on students' mental health and wellbeing may have long-term effects on behavior in school<sup>2</sup> (both remote and in-person), which means this guidance is both timely and critical.

In order to bolster equity, oversight, and accountability in school discipline policy and practice, we call on the department to ensure the following issues are addressed in the final guidance.

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<sup>1</sup>To view New America's collection of work on rethinking approaches to discipline in schools and early childhood programs, please visit: <https://www.newamerica.org/education-policy/collections/school-discipline/>.

<sup>2</sup> U.S. Department of Education, Office for Civil Rights (2021). *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*. Washington, DC, June 9, 2021, <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

## 1) Law enforcement presence on PreK-12 campuses

At present, we do not have a definitive count on how many school police officers (SPOs) or school resource officers (SROs) there are across the country, though estimates place the number somewhere between 14,000 and 20,000.<sup>3</sup> Yet, their impact on school climate reverberates through a tendency to take more punitive approaches that do not necessarily promote a safe learning environment.<sup>4</sup> Students of color have been particularly vulnerable to disproportionate referrals to law enforcement and arrests in school. According to the 2015-2016 Civil Rights Data Collection (CRDC), Black students accounted for 15 percent of enrolled students, but 31 percent of law enforcement referrals and school based arrests.<sup>5</sup> These arrests and referrals took place while the 2014 Discipline Guidance was in place. As the Department updates the guidance, we ask officials to consider the findings of a recent Brookings report that indicated, “the presence of law enforcement officers in school as a preventative measure too often runs the risk of criminal responses to delinquent behavior that administrators should handle.”<sup>6</sup>

New America would also like to call attention to the fact that students with disabilities face referral and arrest rates higher than their non-disabled counterparts. The Center for Civil Rights Remedies (CCRR) at UCLA found that some students with disabilities faced risk of arrest at rates as high as 16 percent in districts that reported data. In Los Angeles Unified District and 40 districts across Texas, for example, students with disabilities were more likely to be referred to law enforcement than to be suspended.<sup>7</sup>

In addition to the well-documented “school-to-prison pipeline” that discriminatory school discipline policies create for boys of color,<sup>8</sup> the Learning Policy Institute and CCRR have found that school discipline policies can also create a “school-to-deportation pipeline” for English learners and other immigrant students.<sup>9</sup> Specifically, their October 2020 report found that in 2015-16, English

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<sup>3</sup> Ryan King, and Marc Schindler (2021). *A better path forward for criminal justice: Reconsidering police in schools*. Washington, DC, April 2021,

<https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-reconsidering-police-in-schools/>.

<sup>4</sup> Ibid.

<sup>5</sup> U.S. Department of Education, Office of Civil Rights (2018 - 2019). *School Climate and Safety: School Climate and Safety Data Highlights on School Climate and Safety in Our Nation's Public Schools*, April 2018 - revised May 2019, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>6</sup> Ryan King, and Marc Schindler (2021). *A better path forward for criminal justice: Reconsidering police in schools*. Washington, DC, April 2021,

<https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-reconsidering-police-in-schools/>.

<sup>7</sup> Dan Losen, Paul Martinez, Grace Shin (2021). *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*. Center for Civil Rights Remedies, UCLA, March 22, 2021,

<https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>.

<sup>8</sup> Andrew Bacher-Hicks, Stephen B. Billings, & David J. Deming (2019). *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime* [working paper]. Cambridge, MA, the National Bureau of Economic Research, September 2019, <https://www.nber.org/papers/w26257>.

<sup>9</sup> Daniel J. Losen, and Paul Martinez (2020). *Lost opportunities: How disparate school discipline continues to drive differences in the opportunity to learn*. Palo Alto, CA/Los Angeles, CA: Learning Policy Institute; Center for Civil

learners were often referred to law enforcement at higher rates than Latinx students, with referral rates ranging from 10 percent in Beaver Dam Unified, Sparta and Appleton, WI and 25 percent or more in Fenton, IL and Etiwanda, CA.<sup>10</sup> As the authors of the report stated, these school-based decisions can have widespread implications off campus as SPO/SROs can set off a chain of events that can put the student and/or their families at risk of deportation because of the communication channels that exist between local police and the Department of Homeland Security.

## 2) Exclusionary disciplinary penalties and policies

Students in U.S. public schools lost over 11 million days of instruction due to out-of-school suspensions in 2015–16, a loss that was disproportionately absorbed by Black and brown students, as well as students with disabilities.<sup>11</sup> Out of school suspensions have been associated with lower academic achievement, lower grade retention, higher likelihood of dropping out, and higher instances of juvenile delinquency and adult incarceration rates.<sup>12</sup> The CCRR, for example, found that secondary students with disabilities lost as much as three times as much instructional time as their non-disabled peers as a result of out of school suspension.<sup>13</sup>

In addition, suspension rates for English learners in elementary and middle school have been identified as being 10 percent higher than their non-EL counterparts.<sup>14</sup> A recent study out of Minnesota State University found that being classified as an English learner increases a highschool student's chances of being suspended by 20 percent.<sup>15</sup> What is more, the author found that this 'EL penalty' has a disproportionate effect on different race/ethnic groups, with Asian and White ELs affected the most by the EL label.

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Rights Remedies at the Civil Rights Project, UCLA, October 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>.

<sup>10</sup> Ibid.

<sup>11</sup> Daniel J. Losen, and Paul Martinez (2020). *Lost opportunities: How disparate school discipline continues to drive differences in the opportunity to learn*. Palo Alto, CA/Los Angeles, CA: Learning Policy Institute; Center for Civil Rights Remedies at the Civil Rights Project, UCLA, October 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>.

<sup>12</sup> United States Government Accountability Office (2018). *K-12 Education Discipline Disparities for Black Students, Boys, and Students with Disabilities*. Report to Congressional Requesters, March 2018, <https://www.gao.gov/assets/gao-18-258.pdf>.

<sup>13</sup> Dan Losen, Paul Martinez, Grace Shin (2021). *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*. Center for Civil Rights Remedies, UCLA, <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>.

<sup>14</sup> Pentón Herrera LJ, McNair RL. (2021) "Restorative and community-building practices as social justice for English learners". TESOL J. 2021;12:e523. <https://doi.org/10.1002/tesj.523>.

<sup>15</sup> Serena Boyce (2020). *Disparities within school discipline: An examination of race, English language learner status, & suspension* [Master's thesis, Minnesota State University, Mankato]. Cornerstone: A Collection of Scholarly and Creative Works for Minnesota State University, Mankato, November 2020, <https://cornerstone.lib.mnsu.edu/etds/1073>.

Furthermore, in 2015 the National Center for Education Evaluation and Regional Assistance and the Regional Educational Laboratory Northwest found that not only were English learners in middle and high school across six Oregon school districts suspended at higher rates than their non-EL counterparts, but the residual impact of being shut out of school resulted in lower achievement on state assessments in reading and math compared to students who were not suspended or expelled.<sup>16</sup> And among those disciplined, aggression and insubordination and/or disruption were the most commonly-cited offenses. These studies show that students with intersecting identities have a higher risk of having a disciplinary action brought against them which limits their opportunity to learn.

While middle and high schoolers make up the bulk of students who are suspended,<sup>17</sup> our youngest students are not immune from harsh disciplinary decisions. According to a 2017 Center for American Progress report, approximately 250 prekindergarteners (in both public and private programs) are suspended or expelled each day.<sup>18</sup> And in 2019, a joint statement from the National Association for the Education of Young Children estimated that over 8,700 three- and four-year-old children are expelled or pushed out from their state-funded pre-K classrooms each year. Exclusionary disciplinary actions punish children for natural, outward expressions of trauma internalized from toxic stressors in other parts of their lives and these blunt policies do not address the underlying cause of the behavior. Often what is characterized as misbehavior or disobedience can be more accurately described as developmentally appropriate behavior or in some cases a call for help—a call that will undoubtedly be louder post-COVID.

Systemic racism combined with the fallout of the COVID-19 pandemic poses a tangible threat to equitable education. As a result, education leaders are making the case for a more restorative approach to education,<sup>19</sup> which must include a reimagining of how to build safe and inclusive school environments where all students can thrive. The Department can ensure the forthcoming guidance and technical assistance address the issues enclosed in this letter by:

1. Encouraging schools to develop a shared and clear definition of what discipline means in their school community. School climate surveys should be featured in the guidance as a tool local

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<sup>16</sup> Arthur Burke (2015). *Suspension, expulsion, and achievement of English learner students in six Oregon districts*. Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory Northwest, August 2015, <https://files.eric.ed.gov/fulltext/ED558158.pdf>.

<sup>17</sup> Lauren Camera (2020). “School Suspension Data Shows Glaring Disparities in Discipline by Race”, U.S. News, October 13, 2020, [https://www.usnews.com/news/education-news/articles/2020-10-13/school-suspension-data-shows-glaring-disparities-in-discipline-by-race?utm\\_source=ECS+Subscribers&utm\\_campaign=8e5ca7ecea-ED\\_CLIPS\\_10\\_14\\_2020&utm\\_medium=email&utm\\_term=0\\_1a2b00b930-8e5ca7ecea-53610407](https://www.usnews.com/news/education-news/articles/2020-10-13/school-suspension-data-shows-glaring-disparities-in-discipline-by-race?utm_source=ECS+Subscribers&utm_campaign=8e5ca7ecea-ED_CLIPS_10_14_2020&utm_medium=email&utm_term=0_1a2b00b930-8e5ca7ecea-53610407).

<sup>18</sup> Rasheed Malik (2017). “New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day”, Washington, DC: Center for American Progress, November 6, 2017, <https://www.americanprogress.org/issues/early-childhood/news/2017/11/06/442280/new-data-reveal-250-preschoolers-suspended-expelled-every-day/>.

<sup>19</sup> Jennifer DePaoli, Laura E. Hernández, Roberta C. Furger, & Linda Darling-Hammond (2021). *A restorative approach for equitable education*. Learning Policy Institute, March 16, 2021, <https://learningpolicyinstitute.org/product/wce-restorative-approach-equitable-education-brief>.

education leaders can use to take the pulse of their students and staff to identify issues that need to be addressed. Eight states—Idaho, Illinois, Iowa, Maryland, Montana, New Mexico, North Dakota and South Carolina—have already included school climate or engagement surveys as part of the accountability rubrics required under ESSA.<sup>20</sup> This vision-setting work should be accompanied by training on what does and does not constitute an appropriate response in certain situations/scenarios.

2. Requiring schools to track and report on SPOs/SROs assigned to their campus to bolster transparency over where school officers are actually assigned, data that is currently lacking.
3. Requiring schools with police presence on campus to clearly define the scope of work and role the SPOs/SROs are responsible for as well as the training they will be required to undertake to learn how to best interact with school-age children. This scope of work should be informed by school staff and the community.<sup>21</sup>
4. Pushing for and exploring ways to incentivize an increased presence of well-trained and qualified counselors, mental health professionals, and non-law enforcement school-based safety staff.<sup>22</sup>
5. Providing guidance and resources on how to create and evaluate school-based restorative justice and alternative dispute resolution programs.<sup>23</sup>
6. Requiring professional development for teachers and school leaders around implicit bias, culturally responsive teaching, classroom management, developmentally appropriate behavior in pre-K through 3rd grade classrooms, and social-emotional development.
7. Providing guidance and technical assistance that can be used to develop staff language, mindset, and understanding surrounding the root causes of undesirable student behavior.
8. Reinstating Section III in the Appendix of the 2014 Guidance regarding Equity and Continuous Improvement policies and practices through monitoring and self-evaluation, and data collection and responsive action plans.
9. Requiring school districts to report on how much they spend in total on discipline.
10. Promoting the use of preventative intervention measures, such as early childhood mental health consultation, to help address behaviors that may be viewed as problematic before students are referred for further disciplinary action outside the classroom.<sup>24</sup>
11. Encouraging only the use of non-exclusionary discipline approaches in at least pre-K through third grade classrooms.
12. Consulting and incorporating The National Child Traumatic Stress Network’s 10 “Essential Elements of a Trauma-Informed School” as a resource.<sup>25</sup>

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<sup>20</sup> Phyllis W. Jordan and Laura S. Hamilton, (2020). *Walking a Fine Line: School Climate Surveys in State ESSA Plans*, Georgetown University, FutureEd, January 2020,

<https://www.future-ed.org/wp-content/uploads/2020/01/FutureEdSchoolClimateReport.pdf>

<sup>21</sup> Ryan King, and Marc Schindler. 2021.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Juhi Sharma (2021). “New Study Points to Early Childhood Mental Health Consultations As An Important Tool for Addressing Challenging Behavior”, Washington, DC: New America, July 15, 2021,

<https://www.newamerica.org/education-policy/edcentral/new-study-points-to-early-childhood-mental-health-consultations-as-an-important-tool-for-addressing-challenging-behavior/>.

<sup>25</sup> To view the Network’s 10 essential elements as well as other recommendations, please visit:

<https://www.nctsn.org/trauma-informed-care/trauma-informed-systems/schools/essential-elements>.



13. Ensuring new guidelines and resources take into account teacher and student disciplinary needs both in-person and in virtual learning environments.

Research on child behavior indicates that positive reinforcement and addressing the root causes of the behavior are more likely to result in the desired change in behavior than punitive, control-based measures.<sup>26</sup> Unfortunately, the language presently used to communicate on the subject is heavily focused on the traditional sense of the term “discipline” whereby policies are focused on inflicting “control gained by enforcing obedience or order” and “punishment,”<sup>27</sup> not necessarily creating positive and safe school learning environments. We recommend that the Department consider replacing the use of the term “discipline” in its communications around creating positive and safe school learning environments with something that more clearly communicates the mindset of improving behavior that is intended (e.g., “responding to undesirable student behaviors”).

We respectfully request that these comments be taken into consideration as the Department moves forward in developing new guidance for aiding schools in creating positive and safe learning environments for all students. Please do not hesitate to reach out if you wish to discuss this comment further by contacting Leslie Villegas ([villegasl@newamerica.org](mailto:villegasl@newamerica.org)) or Jazmyne Owens ([owens@newamerica.org](mailto:owens@newamerica.org)).

Thank you for your time and consideration.

Sincerely,

The Education Policy Program at New America

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<sup>26</sup> Lori Desautels (2018). “Aiming for Discipline Instead of Punishment”, Edutopia, March 1, 2018, <https://www.edutopia.org/article/aiming-discipline-instead-punishment>.

<sup>27</sup> Please see Merriam-Webster for the complete definition of discipline, <https://www.merriam-webster.com/dictionary/discipline>.