

July 23, 2021

Via Federal eRulemaking Portal

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Office of Civil Rights
U.S. Department of Education
550 12th Street SW
Washington, DC 20024

**Re: Discrimination in School Discipline
Docket ID ED-2021-OCR-0068**

Dear Assistant Secretary Goldberg:

We, the Attorneys General of Michigan, California, Delaware, the District of Columbia, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, Washington, and Wisconsin write in response to the Request for Information Regarding the Nondiscriminatory Administration of School Discipline, dated June 8, 2021 (RFI).¹ We previously wrote to Secretary Cardona and Attorney General Garland on May 24, 2021, requesting that the Department of Education (ED) and Department of Justice (DOJ) jointly reinstate and expand a 2014 guidance package² designed to help public elementary and secondary schools meet their obligations under federal law to administer student discipline equitably.³ We submit this letter in response to the RFI to reassert our request.

Exclusionary discipline remains prevalent across the country and continues to disproportionately impact students of color and students with disabilities. In addition, data is now emerging that LGBTQI+ students may also be targeted more frequently with exclusionary and other severe forms of discipline.

¹ Department of Education, *Request for Information Regarding the Nondiscriminatory Administration of School Discipline*, 86 Fed. Reg. 30,449 (June 8, 2021).

² The 2014 Guidance Package is available at <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

³ Letter to Secretary Dr. Miguel A. Cardona and Attorney General Merrick B. Garland from 23 State Attorneys General, dated May 24, 2021, available at https://www.michigan.gov/documents/ag/School_Discipline_Multi-State_letter_Final_5.24.21_726121_7.pdf.

In 2014, ED and DOJ jointly issued a guidance package that explained federal law prohibits school discipline that either intentionally discriminates or unintentionally results in a disparate impact based on a student’s race, color, or national origin. Four years later, ED and DOJ withdrew this guidance, backtracking on the important work of ensuring all students can access public education without fear of racial discrimination through student discipline. To get back on track, the 2014 guidance should be reissued. Additionally, in keeping with the Biden Administration’s push to prevent discrimination in education, including discrimination against students based on their sex, sexual orientation, gender identity, and disability,⁴ we urge you to expand the 2014 guidance to address these additional forms of discrimination.

I. Federal Anti-Discrimination Statutes Applicable to School Discipline and the 2014 Guidance Package

As noted in the RFI, public schools that receive federal funding are subject to a host of federal anti-discrimination statutes including, among others, Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c *et seq.* (Title IV) and 42 U.S.C. §§ 2000e *et seq.* (Title VI), Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA), Title II of the Americans with Disability Act of 1990, 42 U.S.C. §§ 12133 *et seq.* (ADA), and Section 504 of the Rehabilitation Act of 1972, 29 U.S.C. § 794 (Section 504).⁵ Collectively, these statutes protect students’ rights to access public educational services free from discrimination.

In 2014, ED and DOJ jointly issued a guidance package designed to “help public elementary and secondary schools administer student discipline in a manner that does not discriminate on the basis of race.”⁶ The package included a Dear Colleague Letter,⁷ a guiding principles report,⁸ a directory of federal school climate

⁴ See, e.g., Exec. Order No. 14021, *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, 86 Fed. Reg. 13,803 (Mar. 11, 2021); Exec. Order No. 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7,023 (Jan. 25, 2021).

⁵ RFI, 86 Fed. Reg. at 30,450.

⁶ U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Joint Dear Colleague Letter* (Jan. 8, 2014), at 2, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (hereinafter “2014 Dear Colleague Letter”).

⁷ *Id.*

⁸ U.S. Dep’t of Educ., *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

and discipline resources,⁹ and a compendium of school discipline laws and regulations by state.¹⁰

The 2014 Dear Colleague Letter provided a framework for ED’s and DOJ’s investigations of racial discrimination related to student discipline.¹¹ The Letter defines unlawful discrimination to include (1) “if a student is subjected to *different treatment* based on the student’s race” or (2) “if a policy is neutral on its face – meaning that the policy itself does not mention race – and is administered in an evenhanded manner but has a *disparate impact*, i.e., a disproportionate and unjustified *effect* on students of a particular race.”¹² This definition is crucial for students across the country because, while the first form of discrimination—intentional discrimination based on a student’s race—has long been recognized as unlawful, the second form of discrimination—disparate impact discrimination—was less well-recognized and not often prioritized before 2014.¹³ By including disparate impact discrimination within the Letter, the Departments sent a strong message to schools that both the discipline and the effect of the discipline on students are subject to review when evaluating if the school engaged in racial discrimination.¹⁴

⁹ U.S. Dep’t of Educ., *Appendix 1: Directory of Federal School Climate and Discipline Resources* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf>.

¹⁰ U.S. Dep’t of Educ., *Appendix 2: Compendium of School Discipline Laws and Regulations for the 50 States, Washington, D.C., and Puerto Rico* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-2-compendium-of-laws-and-regulations.pdf>.

¹¹ 2014 Dear Colleague Letter, *supra* note 6.

¹² *Id.* at 7.

¹³ 34 C.F.R. § 100.3(b)(2) explicitly addresses disparate impact discrimination, prohibiting a school from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program [with] respect [to] individuals of a particular race, color, or national origin.”

¹⁴ See Daniel Losen, et al., *Are We Closing the School Discipline Gap* (Feb. 2015), at 11 (“The clear message presented in the [2014] guidance is that school administrators must examine their data and discipline policies and practices, and undertake efforts to close the discipline gap where unjustifiable disparities are found. While this legal and moral obligation to eliminate racial disparities is not new, th[e 2014] guidance [wa]s the first joint federal effort to explicitly call upon school leaders to take immediate action.”) (internal citation omitted), available at <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights->

The companion publication, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, provided schools a path to creating safe and supportive conditions for learning.¹⁵ The three guiding principles to creating a productive learning environment were identified as (1) creating a positive school climate; (2) creating a school discipline policy that is clear and consistently implemented to provide the school community with clear expectations and consequences; and (3) continually monitoring the school’s disciplinary policies and practices to ensure they are equitably implemented.¹⁶ The *Guiding Principles* publication emphasizes the use of restorative justice practices and other problem-solving and constructive remedies instead of costly and disruptive suspensions and expulsions.¹⁷ Importantly, despite what many critics of the *Guiding Principles*—and the 2014 guidance package more broadly—wrongly proclaim,¹⁸ the *Guiding Principles* did not instruct schools to *never* utilize exclusionary disciplinary practices. Rather, ED and DOJ recommended schools use exclusionary disciplinary practices as a “last resort” and only for “serious infractions.”¹⁹

In June of 2017, under a new administration, ED’s Office of Civil Rights (OCR) sent an internal memorandum to its regional offices, instructing the offices to limit the “scope of the investigation of all OCR cases.”²⁰ The internal memorandum

[remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf](https://www.ed.gov/ocr/remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf).

¹⁵ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 8.

¹⁶ *Id.* at 2-5.

¹⁷ *Id.* at 12-15.

¹⁸ See U.S. Comm’n on Civil Rights, *Beyond Suspensions, Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* (2019), at 133-49, available at <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (summarizing and debunking talking points that the 2014 guidance package sought to end the use of exclusionary disciplinary practices, and noting that “[c]ritics incorrectly assert that the guidance instructs teachers and administrators not to suspend students who are misbehaving . . .”); see also U.S. House of Representatives Comm. on Educ. & the Workforce Democrats, *School Discipline Guidance: Debunking Myths*, available at <https://edlabor.house.gov/imo/media/doc/School%20Discipline%20Guidance%20Fact%20Sheet.pdf> (“The 2014 guidance does not require a reduction in suspension and expulsion if no inequities are present.”).

¹⁹ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 8, at 14–16.

²⁰ Memorandum from Candice Jackson, OCR Acting Assistant Secretary for Civil Rights, to Regional Managers, *OCR Instructions to the Field re Scope of Complaints*, at 1, available at <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>; see also Erica L. Green, *Education Dept. Says It*

directed that OCR investigators should “no longer follow the existing investigative rule” requiring investigators to collect the past three years of complaints from the school under investigation “to assess [the school]’s compliance.”²¹ Functionally, this memorandum instructed regional offices to stop investigating systemic discrimination practices, including those evidenced by disparate impact, unless the “individual complaint allegations themselves raise systemic or class-wide issues.”²² As a result of this change in policy, ProPublica reported a year later that OCR had “scuttled more than 1,200 civil rights investigations that were begun under the Obama administration and lasted at least six months”—indicating that these investigations were likely systemic in nature or based on allegations of disparate impact discrimination.²³

On December 21, 2018, ED and DOJ withdrew the entirety of the 2014 guidance package, largely without explanation.²⁴ The 2018 Dear Colleague Letter withdrawing the guidance package suggested that, because education policy is primarily set by states and local school districts, the *federal* government’s investigative role in enforcing *federal* civil rights statutes against racial discrimination was somehow not needed.²⁵ In a companion Question and Answer document published with the 2018 Dear Colleague Letter, ED and DOJ made clear they no longer considered statistical evidence of a disparate impact to constitute discrimination.²⁶ According to a report by the U.S. Commission on Civil Rights, this

Will Scale Back Civil Rights Investigations, N.Y. TIMES (June 16, 2017), available at <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html>.

²¹ Memorandum from Candice Jackson, *supra* note 20, at 1.

²² *Id.*; see also U.S. Comm’n on Civil Rights, *supra* note 18, at 167.

²³ Annie Waldman, *DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited From Obama*, PRO PUBLICA (June 21, 2018), available at <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>.

²⁴ U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Dear Colleague Letter* (Dec. 21, 2018), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> (hereinafter “2018 Dear Colleague Letter”).

²⁵ See *id.* at 2.

²⁶ U.S. Dep’t of Educ., Office of Civil Rights, *Questions & Answers on Racial Discrimination and School Discipline* (Dec. 21, 2018), at 2, n.6, available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf>.

approach “narrows the[] investigations of allegations of race discrimination in school discipline, including limiting proactive identification of systemic patterns.”²⁷

The extent to which the long-lasting effects of this decision will be felt are still not fully understood. Some state governments, like Michigan,²⁸ New York,²⁹ Massachusetts,³⁰ and California,³¹ have affirmatively stated their continued commitment to eliminating discriminatory school discipline practices that manifest through a disparate impact against a particular race of students. However, given the resources available to the federal government and the investigative structures already in place, like the OCR, the federal government remains the most viable body to enforce federal civil rights statutes and ensure that schools do not discriminate against students when using school discipline.

On June 8, 2021, ED published the RFI in the Federal Register, to “solicit information on school climate and discipline practices in our nation’s schools . . . and how best to support and build schools’ capacity to promote positive, inclusive, safe, and supportive school climates in a nondiscriminatory manner.”³² As explained further below, we urge ED (along with DOJ) to reissue and expand the 2014 guidance package. Reissuing and expanding the guidance is a critical factor in ED’s efforts to support students and schools and to restrict discriminatory discipline practices.

²⁷ U.S. Comm’n on Civil Rights, *supra* note 18, at 167.

²⁸ See Resolution on Dignity in School, Mich. State Bd. of Educ. (Mar. 12, 2019), available at https://www.michigan.gov/documents/mde/Resolution_on_Dignity_in_Schools_final_649233_7.pdf.

²⁹ New York has continued to address racial disparities in discipline through agreements between the State and districts.

³⁰ See Advisory on Student Discipline under Chapter 222 of the Acts of 2012, Mass. Dep’t of Elementary and Secondary Educ. (Dec. 23, 2016), available at <https://www.doe.mass.edu/lawsregs/advisory/discipline/StudentDiscipline.html>.

³¹ See Guidance letter from Xavier Becerra, Attorney General of California, *Oversight and Enforcement of Laws Related to Discrimination in School Discipline in California* (Feb. 4, 2019), available at <https://oag.ca.gov/system/files/attachments/press-docs/bcj-school-discipline-letter.pdf>.

³² RFI, 86 Fed. Reg. at 30,451.

II. The Continued Disparate Impacts of School Discipline on Students of Color.

The 2014 Dear Colleague Letter correctly identified racial discrimination in school discipline as “a real problem.”³³ The history of racial discrimination in school discipline is long and well-documented.³⁴

Black students remain 3.9 times more likely to be suspended compared to White students across the country.³⁵ The OCR’s 2015-2016 Civil Rights Data Collection (CRDC) determined that “Black male students represented 8 percent of enrolled students and accounted for 25 percent of students who received an out-of-school suspension.”³⁶ Similarly high suspension rates follow for Black female students (8% percent of students enrolled and 14% of out-of-school suspensions), and expulsion rates for all Black students mirror these disparities (16% of students enrolled and 33% of expulsions).³⁷ Analysis of the 2015-2016 CRDC data by the UCLA’s Center for Civil Rights and Remedies determined that these broader statistics mask even higher racial disparities at the secondary school level.³⁸ For example, “at the secondary level, Black students lost 103 days per 100 [students] enrolled. For White students, the corresponding rate was 21 days lost per 100.”³⁹

The RFI provides the first analysis of the 2017-2018 CRDC data related to school discipline. Like the previous CRDCs, the 2017-2018 CRDC data demonstrates that “racial disparities persist” and that “students of color are disproportionately subjected to disciplinary actions in contrast to their White

³³ 2014 Dear Colleague Letter, *supra* note 6, at 4.

³⁴ *See id.* at 3-4, n.7 (citing a variety of studies documenting the disproportionate use of exclusionary discipline against students of color); *see also* Guidance letter from Xavier Becerra, *supra* note 27, at 3-4 (same).

³⁵ Lena V. Groefer, et al., *Miseducation: Is There Racial Inequality at Your School?*, PROPUBLICA (Oct. 16, 2018), available at <https://projects.propublica.org/miseducation/>.

³⁶ U.S. Dep’t of Educ., OCR, *2015-16 Civil Rights Data Collection: School Climate and Safety* (updated May 17, 2019), at 13, available at <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

³⁷ *Id.* at 13, 15.

³⁸ Daniel J. Losen & Paul Martinez, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* (Oct. 2020), available at <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>.

³⁹ *Id.* at 6; *see also id.* at 21-26.

peers.”⁴⁰ For example, though only representing 15.1% of overall student enrollment, Black students accounted for

- 38.8% of expulsions with educational services;
- 33.3% of expulsions without educational services;
- 31.4% of students who received one or more in-school suspensions; and
- 38.2% of students who received one or more out-of-school suspensions.⁴¹

Crucially, the disparity in the use of exclusionary discipline is solely based on students’ race—not due to Black students and other students of color committing more adverse behaviors warranting discipline. In a recent report, the U.S. Commission on Civil Rights—which is quoted in the RFI⁴²—found that:

Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their [W]hite peers—but [B]lack students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their [W]hite peers and receive harsher and longer punishments than their [W]hite peers receive for like offenses.⁴³

This widely accepted finding is confirmed in numerous peer-reviewed social-science studies.⁴⁴

⁴⁰ RFI, 86 Fed. Reg. at 30,451.

⁴¹ U.S. Dep’t of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year* (June 2021), at 12, 16, available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>; see also RFI, 86 Fed. Reg. at 30,451.

⁴² RFI, 86 Fed. Reg. at 30,450-51.

⁴³ U.S. Comm’n on Civil Rights, *supra* note 18, at 161.

⁴⁴ See Kent McIntosh, et al., *Education not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5:2 JOURNAL OF APPLIED RSCH. ON CHILD.: INFO. POLICY FOR CHILD. AT RISK 2-3 (2014) (“[T]here is no published research demonstrating that students of color—and African American students in particular—have higher base rates of problem behavior.”); see also, e.g., Kate M. Wegmann & Brittanni Smith, *Examining Racial/Ethnic Disparities in School Discipline in the Context of Student-Reported Behavior Infractions*, 103 CHILD. AND YOUTH SERVS. REV. 18 (2019); Paul L. Morgan, et al., *Are Students With Disabilities Suspended More Frequently Than Otherwise Similar Students Without Disabilities?*, 72 J. SCH. PSYCHOLOGY 1-13 (Feb. 2019); Russell J. Skiba, et al., *The*

III. Discrimination in School Discipline Based on Sex, Sexual Orientation, Gender Identity, and Disability.

Disparities in school discipline are not exclusively limited to race-based inequities. CRDC data has long documented intersectional disparities based on race and sex.⁴⁵ As described in the RFI, racial “[d]isparities worsen when you examine the intersection between race and sex.”⁴⁶ According to the 2017-2018 CRDC data:

Black girls accounted for 11.1 percent of in-school suspensions and 13.3 percent of out-of-school suspensions, which is almost two times their share of total student enrollment of 7.4 percent. Black boys accounted for 7.7 percent of total student enrollment and received both in-school suspensions and out-of-school suspensions at rates (20.1 percent and 24.9 percent, respectively) almost three times their share of total student enrollment—the largest disparity across all race/ethnicity and sex groupings.⁴⁷

The disparate use of discipline against Black girls is particularly acute as Black girls “were the only group across all races/ethnicities for girls where a disparity was observed.”⁴⁸ According to a New York Times analysis, “Black girls are over five times more likely than white girls to be suspended at least once from school, seven

Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment, 34 URB. REV. 317, 335 (2002).

⁴⁵ U.S. Dep’t of Educ., *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 36, at 13–15; U.S. Dep’t of Educ., *2013-2014 Civil Rights Data Collection: A First Look* (revised Oct. 28, 2016), at 3, available at <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>; U.S. Dep’t of Educ., *Data Snapshot: School Discipline* (March 2014), at 3, available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>; U.S. Dep’t of Educ., *Gender Equity in Education: A Data Snapshot* (June 2012), at 4, available at <https://www2.ed.gov/about/offices/list/ocr/docs/gender-equity-in-education.pdf>; U.S. Dep’t of Educ., *The Transformed CRDC: Data Summary* (March 2012), at 3, available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>.

⁴⁶ RFI, 86 Fed. Reg. at 30,451.

⁴⁷ *Id.*; *see also* U.S. Dep’t of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, *supra* note 41, at 17.

⁴⁸ U.S. Dep’t of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, *supra* note 41, at 17.

times more likely to receive multiple out-of-school suspensions than white girls and three times more likely to receive referrals to law enforcement.”⁴⁹

Similarly, disparities between students with disabilities and students without disabilities are well-documented in CRDC data and in a litany of academic studies.⁵⁰ Again, this disability-based discrimination is exacerbated when students’ race is considered: “Black students with disabilities represented 26 percent of expulsions without educational services although they accounted for only 18 percent of all students provided services under IDEA in 2017–18.”⁵¹

More recently, data has emerged that LGBTQI+ students—who already face significantly higher rates of bullying in schools⁵²—are also subjected to more severe

⁴⁹ Erica L. Green, et al., *A Battle for the Souls of Black Girls*, THE NEW YORK TIMES (Oct. 1, 2020), available at <https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html>.

⁵⁰ U.S. Dep’t of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, *supra* note 41, at 13, 18; U.S. Dep’t of Educ., *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 36, at 14, 16; U.S. Dep’t of Educ., *2013-2014 Civil Rights Data Collection: A First Look*, *supra* note 45, at 4 (“Students with disabilities served by IDEA (12%) are more than twice as likely to receive one or more out-of-school suspensions as students without disabilities (5%).”); U.S. Dep’t of Educ., *Data Snapshot: School Discipline*, *supra* note 45, at 3 (same, for 2011-2012 CRDC data); 2014 Dear Colleague Letter, *supra* note 6, at 3 n.6; U.S. Comm’n on Civil Rights, *supra* note 18, at 162; Morgan, *supra* note 44; Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School* (August 2012), at 7, 16–18, available at <https://files.eric.ed.gov/fulltext/ED534178.pdf>.

⁵¹ RFI, 86 Fed. Reg. at 30,451; *see also* Daniel J. Losen, et al., *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* (March 2021), at 6, available at <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>; U.S. Dep’t of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, *supra* note 41, at 18; U.S. Dep’t of Educ., *2013-2014 Civil Rights Data Collection: A First Look*, *supra* note 45, at 4; U.S. Dep’t of Educ., *Data Snapshot: School Discipline*, *supra* note 45, at 4; U.S. Comm’n on Civil Rights, *supra* note 18, at 170.

⁵² *See, e.g.*, Mariella Arredondo, et al., *Documenting Disparities for LGBT Students: Expanding the Collection and Reporting of Data on Sexual Orientation and Gender Identity* (March 2016), available at <https://vtechworks.lib.vt.edu/bitstream/handle/10919/86981/DisparitiesLGBTStudents.pdf?sequence=1&isAllowed=y>; Sandra Koepels & Megan S. Pacey, *Reducing*

discipline than heterosexual and cisgender students.⁵³ And, yet again, research suggests that LGBTQI+ discrimination in school discipline intersects with, and is heightened by, a student's race.⁵⁴

Discrimination, whether based on race, sex, sexual orientation, gender identity, disability, or some combination is undeniably wrong. Federal civil rights statutes provide ED monitoring and enforcement authority to address all such discrimination. As ED's recent Title IX Notice of Interpretation instructs, Title IX prohibits discrimination based on sex, sexual orientation, and gender identity in any education program that receives federal financial assistance.⁵⁵ For discrimination based on a student's disability, a host of civil rights statutes broadly protect students, including the IDEA, ADA, and Section 504.⁵⁶ To protect all students, ED must leave no room for doubt—discrimination in all forms through school discipline is prohibited and will not be tolerated.

Bullying Toward LGBTQ Youths in Schools, 37 SCH. SOCIAL WORK JOURNAL 96-111 (2012).

⁵³ GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* (2016), available at https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf; V.P. Poteat, et al., *Sexual Orientation-based Disparities in School and Juvenile Justice Discipline: A Multiple Group Comparison of Contributing Factors*, 108 J. OF EDUC. PSYCHOLOGY 229–241 (2016), available at <https://psycnet.apa.org/record/2015-30050-001?doi=1>; Arredondo, *supra* note 52, at 2; Shannon D. Snapp, et al., *Messy, Butch, and Queer: LGBTQ Youth and the — School-to-Prison Pipeline*, 30 J. OF ADOLESCENT RSCH. 57–82 (2015); Hilary Burdge, et al., *Gender Nonconforming Youth: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline* (2014), available at https://gsanetwork.org/wp-content/uploads/2014/10/GNC-Youth_ReportWEB.pdf; Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49–57 (Jan. 2011).

⁵⁴ Jennifer F. Chmielewski, et al., *Intersectional Inquiries with LGBTQ and Gender Nonconforming Youth of Color: Participatory Research on Discipline Disparities at the Race/Sexuality/Gender Nexus*, INEQUALITY IN SCHOOL DISCIPLINE, 171-188 (2016).

⁵⁵ See U.S. Dep't of Educ., *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

⁵⁶ See 2014 Dear Colleague Letter, *supra* note 6, at 2–3 n.4 (describing that discrimination based on a student's disability is prohibited by Section 504, the ADA, and the IDEA).

IV. Responses to RFI's Specific Questions

The RFI seeks comments related to a set of specific questions.⁵⁷ Below, we provide responses relevant to the reissuance and expansion of the 2014 guidance package.

Impact of Disparities in School Discipline - Disparities in school discipline have far-reaching and devastating impacts that can extend for a student's lifetime. Study after study demonstrates the adverse educational outcomes and lifelong impacts on students who are subjected to exclusionary discipline practices.⁵⁸ Most directly, exclusionary school discipline is inextricably linked to an increased rate of incarceration—the phenomenon often referred to as the “school-to-prison pipeline.”⁵⁹ Quantifying the connection between exclusionary school discipline and future incarceration, the National Bureau of Economic Research recently found that attending a school with an above average use of suspension increases a student's chances of being incarcerated by 17%.⁶⁰ If the student is a student of color, the chance of incarceration increases by an additional 3.1%.⁶¹

Promising Practices - Alternatives to traditional school disciplinary practices—like those recommended in the 2014 *Guiding Principles*, including

⁵⁷ RFI, 86 Fed. Reg. at 30,452.

⁵⁸ See, e.g., Russell W. Rumberger & Daniel J. Losen, *The Hidden Costs of California's Harsh School Discipline: And the Localized Economic Benefits From Suspending Fewer High School Students* (Mar. 8, 2017), available at <http://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-hidden-cost-of-californias-harsh-discipline>; Losen & Martinez, *supra* note 38.

⁵⁹ U.S. Commission on Civil Rights, *supra* note 18, at 37–42; Andrew Bacher-Hicks, et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2019) (working paper), available at https://www.nber.org/system/files/working_papers/w26257/w26257.pdf; McIntosh, *supra* note 44, at 1; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1064–65 (2016); Tony Fabelo, et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, NEW YORK: COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (July 2011), available at https://knowledgecenter.csg.org/kc/system/files/Breaking_School_Rules.pdf.

⁶⁰ Bacher-Hicks, *supra* note 59, at 19–20.

⁶¹ *Id.* at 20. A similar study estimated that the suspension of approximately 9,618 Black 10th grade students in California in 2011-2012 cost the state \$418 million in social losses and \$126 million in fiscal losses. Rumberger & Losen, *supra* note 58, at 14–15.

restorative justice practices and positive school climates—are shown to both reduce the use of exclusionary discipline generally and to reduce the disparate rates at which Black students are subject to such discipline, in addition to improving school climate.⁶² Reissuing and updating the *Guiding Principles* based on the latest research is crucial to provide schools with guidelines to implement these effective strategies. Particularly now, as students return to the classroom after a year of learning interruptions, the last thing students need is to be excluded from school yet again.⁶³ Thus, ED’s issuance of updated *Guiding Principles* is urgent. Reissuing the *Guiding Principles* will further encourage schools to embrace positive behavior models and restorative justice programs,⁶⁴ and reduce disparities and the adverse impacts wrought on all students subject to exclusionary discipline.⁶⁵

Data Collection - As noted above, the RFI included ED’s first publication of a statistical summary of the 2017-2018 CRDC data related to student discipline. On June 22, 2021, ED published a separate overview of the exclusionary discipline statistics for the 2017-2018 CRDC, reinstating the pre-2017 practice of publishing

⁶² See, e.g., Catherin H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District* (2018), available at https://www.rand.org/pubs/research_reports/RR2840.html; Nance, *supra* note 59, at 1070–71; McIntosh, *supra* note 44, at 11–13; Tex. Juvenile Justice Dep’t, *Effectiveness of Positive Behavioral Interventions and Supports* (2012), available at <https://www2.tjtd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>.

⁶³ Federal education grants, under the American Rescue Plan Act, may provide schools with resources to hire counselors, social workers, and other staff who can help to implement restorative justice programs and positive behavioral models. See American Rescue Plan Act of 2021, Pub. L. 117-2, §§ 2001(e)(2)(L), (R), 135 Stat. 4 (2021); American Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21,1197 (Apr. 22, 2021) (“An LEA may also use the ARP ESSER funds to address the academic, social, emotional, and mental health needs of its students by, for example, hiring additional personnel such as school counselors, psychologists, and nurses and implementing strategies to accelerate learning and to make investments in teaching and learning that will result in lasting improvements in the LEA.”).

⁶⁴ Many states have enacted statutes encouraging the use of restorative justice practices in lieu of exclusionary discipline. For example, in Michigan, school districts must consider using restorative practices—defined as “practices that emphasize repairing the harm to the victim and the school community caused by a pupil’s misconduct”—as an alternative to expulsions and long-term suspensions. Mich. Comp. L. § 380.1310c.

⁶⁵ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 8, at 12–15.

such data summaries with graphs and tables.⁶⁶ We urge OCR to continue to release similar snapshot summaries related to school discipline for all future CRDCs to improve the transparency and accessibility of CRDC's data.

Further, CRDC currently does not collect data assessing the extent to which LGBTQI+ students are disproportionately subjected to school discipline and the impacts that such discriminatory school discipline has on LGBTQI+ students. To better understand these important issues, OCR should require schools to produce this data for future CRDCs.⁶⁷

Type of Guidance ED Should Provide - As the 2014 Dear Colleague Letter identified, the federal government's "guidance is critically needed to ensure that all students have an equal opportunity to learn and grow in school." Ongoing federal enforcement of federal civil rights statutes is necessary and appropriate. Reissuing the 2014 guidance package will bolster OCR's ability to initiate investigations based on systemic disparate impacts against students of color. Expanding the guidance to also include discrimination based on sex, sexual orientation, gender identity, and disability will likewise strengthen OCR's ability to investigate discriminatory discipline practices in all forms prohibited by federal statute. Relatedly, we recommend that the expanded guidance address the need for schools to consider intersectionality in analyzing the impact of their policies and practices. Without such guidance and a dedication to monitoring and enforcement, students will be left to continually suffer the lifelong devastating effects of discriminatory exclusionary discipline.

ED should also reissue the 2014 *Guiding Principle* with further emphasis on the effectiveness of restorative justice practices and positive school climates. The reissued *Guiding Principles* would provide schools with clear pathways to reduce discriminatory disparities in school discipline, while also reducing exclusionary discipline overall and keeping students in the classroom.

⁶⁶ U.S. Dep't of Educ., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, *supra* note 41; *see also* U.S. Dep't of Educ., *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 45; U.S. Dep't of Educ., *2013-2014 Civil Rights Data Collection: A First Look*, *supra* note 45; U.S. Dep't of Educ., *Data Snapshot: School Discipline*, *supra* note 45; U.S. Dep't of Educ., *The Transformed CRDC: Data Summary*, *supra* note 45.

⁶⁷ We recognize that schools may be reluctant to collect this information because school officials may be unaware of students' identification as LGBTQI+. We recommend that OCR require schools to report the LGBTQI+ status of a student subject to school discipline when the student is known to identify as LGBTQI+ and in instances in which the student voluntarily shares that they are LGBTQI+.

V. Conclusion

Secretary Cardona recently stated that “[b]uilding educational environments free from discrimination where our nation’s students can grow and thrive is a top priority of the Biden-Harris Administration.”⁶⁸ Reissuing and expanding the 2014 guidance package would provide a clear step in this direction.

The need for this expanded guidance is urgent. Years of data and study after study demonstrate that discriminatory disparities remain prevalent across the country in the administration of school discipline based on race, sex, sexual orientation, gender identify, and disability. Strategies recommended in the 2014 guidance package, including positive school climates and restorative justice programs, can make a real difference in lessening these disparities, reducing exclusionary discipline, and fostering a positive and inclusive school environment. Likewise, exercising the Departments’ enforcement powers against both disparities and incidents of intentionally different treatment furthers the Administration’s goals of ensuring that all students are guaranteed an educational environment free from discrimination.

Accordingly, we urge ED to reissue the 2014 guidance package and expand this guidance to address discrimination in school discipline based on sex, sexual orientation, gender identity, and disability.

Sincerely,



Dana Nessel
Attorney General of Michigan

⁶⁸ Press Release, *Department of Education’s Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden’s Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination* (Apr. 6, 2021), available at <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>.

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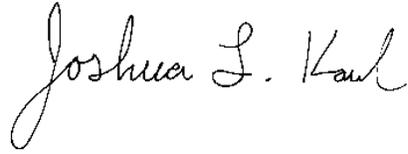
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