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Sent: Thu, 4 Feb 2021 17:33:19 +0000
To: Goldberg, Suzanne;Cardichon, Jessica;Rosenblum, Ian;donna.harris-aiken@ed.gov
Subject: Sharing School Discipline Memo from Ed Trust, NWLC, GFI
Attachments: Feb 2021 School Discipline Guidance Memo.pdf

Hi Jessica, Donna, Ian, and Suzanne,

Hope you're all well! We wanted to reach out to share a non-public strategic memo written by the National Women's Law Center, Governing for Impact, and Ed Trust on how the Biden administration can best reinstate and strengthen guidance on school discipline and resource equity. Please don't hesitate to reach out with questions or concerns, and let us know how we can best work alongside you as you begin any internal processes in this space!

Best,

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PROPOSED ACTION
MEMORANDUM

Reinstating & Strengthening Obama-era Guidance
on School Discipline and Resource Equity

Department of Education, Department of Justice
February 2021

I. Summary

Inequities have long been ingrained and still exist in our nation’s public school systems. Specifically, Black, Native, and immigrant children are more likely to attend schools in which resources are spent enforcing harsh, punitive discipline policies, and employing law enforcement and surveillance mechanisms, instead of investing in the academic, social, and emotional supports every child needs to succeed. These last few months, the COVID-19 pandemic has further exposed these inequities.

At the same time, the country continues to reckon with race and police violence, and budget shortfalls at every level of government during the pandemic. Given the risk that millions of students could be left behind in the wake of these crises, now is the time for the federal government to encourage schools to focus resources on research-based supports that keep students engaged and on track both during and after the pandemic.

As first steps in this initiative, the Biden administration should take several executive actions, including:

- (1) issuing an executive order that directs relevant agencies to build useful institutional infrastructure to facilitate discipline reform, including collecting and releasing data on school-level complaints against school-based police, and creating an interagency task force focused on school discipline inequities;
- (2) immediately revising and reissuing Obama-era guidance under Title VI of the Civil Rights Act of 1964 (“Title VI”), updating it to incorporate how decisions related to school-based police and resource equity may violate civil rights law, and outlining intersectional discrimination claims;
- (3) commencing rulemaking under Title VI, Title IX of the Education Amendments of 1972 (“Title IX”), and Section 504 of the Rehabilitation Act of 1973 (“Section 504”) to allow students to enforce prohibitions against discriminatory school discipline policies and practices as articulated in guidance documents.

II. Justification

Students of color—particularly Black, Native American, and immigrant students—face fewer opportunities and more barriers to critical educational opportunities that lead to college and career success. Some of the largest barriers to education due to racial and gender biases are embedded in school discipline policies and practices, codes of conduct, or dress code policies. These biases not only harm the social-emotional well-being of students, but also have a negative effect on academic performance.¹ Systemic and individual biases may lead an educator to see a particular behavior as inappropriate for Black students but as something of little consequence for White students. This occurs in school discipline practices, where students of color are disproportionately punished for the same behaviors that White students exhibit or when Black students are excluded from school because of policies designed to target specific groups of students. These harmful policies are undoubtedly exacerbating the opportunity gaps that have plagued this country for many years.

Exclusionary discipline is neither effective, nor improves school safety. Research shows that incidents that pose a physical threat to students and educators are rare.² Studies also show exclusionary disciplinary methods to be

¹ The Educ. Trust, *Social, Emotional, and Academic Development through an Equity Lens* 5 (2020), <https://edtrust.org/wp-content/uploads/2014/09/Social-Emotional-and-Academic-Development-Through-an-Equity-Lens-August-6-2020.pdf>.

² See Nat’l Women’s Law Ctr. & The Educ. Trust, “...and they cared”: *How to Create Better, Safer Learning Environments for Girls of Color* 4 (2020),

ineffective in improving behavior. Furthermore, evidence shows that these policies have negative effects on students and educators.³ For example, when schools have high rates of exclusion for minor offenses, students and teachers more often report feeling unsafe or unsupported in their learning environment. Contrary to common belief, studies have shown that even when taking a student's economic background into account, Black children are still more likely to be suspended than students of other races.⁴

Data from ED's Civil Rights Data Collection show persistent gaps in discipline. Black and Native students are excluded from school at rates far higher than their peers, despite no evidence that they misbehave more frequently. During the 2015-2016 school year, Black students were four times more likely and Native students were twice as likely as their White peers to be suspended out of school at least once.⁵ Students also miss critical class time when they receive in-school suspensions. In that same school year, Black students made up 15% of enrollment and 33% of students receiving an in-school suspension. The ultimate form of exclusion comes when students are kicked out of school all together; Black and Native students also face the highest rates of school expulsions. Far too many Black and Native students have their first interaction with the criminal system at school, where they are three times more likely to be arrested at school. While Black children are overrepresented in practices that exclude or remove students from school, White children are underrepresented.⁶ If this data is not enough to show that discrimination exists in American classrooms, studies have shown that Black children do not misbehave more than their White peers; rather, they are punished more.⁷ In fact, Black students are more likely than their White peers to receive a disciplinary action for a discretionary offense like talking back, violating a dress code, or being "defiant."⁸ Black children are also more likely to be suspended out of school for their first offense.

Nearly one in five Black boys are suspended at least once each year, making them the most likely group to face suspensions.⁹ While too many Black boys are suspended, the gap between Black girls and White girls is the largest of any of the gaps between students. In fact, disaggregated data shows that Black and Native girls face some of the largest barriers to educational opportunities due to the racism and sexism baked into school codes of conduct, discipline policies, or dress code policies. These policies target students' very identities and leave them missing critical class time.¹⁰ As a result of discriminatory and harmful disciplinary policies, Black girls are five times more likely and Native girls are three times more likely to be suspended from school than their White peers.¹¹ Unfortunately, these disparities begin early, when it is developmentally inappropriate and ineffective to exclude students from school. Nationally, in preschool, Black girls make up 20% of girls enrolled and 53% of out-of-school suspensions for girls.¹² Black girls are also targeted by other harmful disciplinary actions. Black girls in this country are three times more likely to receive corporal punishment¹³ and four times more likely to be arrested at school than White girls.¹⁴

https://nwlc.org/wp-content/uploads/2020/08/FINAL_NWLC_EDTrust_Guide.pdf [hereinafter "...and they cared"].

³ See Emily Morgan et al., *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System* (2014), http://knowledgecenter.csg.org/kc/system/files/The_School_Discipline_Consensus_Report.pdf.

⁴ See Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf.

⁵ This statistic was based on internal Education Trust calculations of the 2015-2016 Civil Rights Data Collection data. See CIVIL RIGHTS DATA COLLECTION, <https://ocrdata.ed.gov/> (last visited Nov. 18, 2020).

⁶ K-12 EDUCATION: *Discipline Disparities for Black Students, Boys, and Students with Disabilities*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/products/GAO-18-258> (last visited Nov. 18, 2020).

⁷ See Thomas Rudd, *Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated*, KIRWANINSTITUTE.OSU.EDU, <http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/> (last visited Nov. 19, 2020).

⁸ Tony Fabelo et al., *supra* note 4, at X.

⁹ This statistic was based on internal Education Trust calculations of the 2015-2016 Civil Rights Data Collection data. See CIVIL RIGHTS DATA COLLECTION, <https://ocrdata.ed.gov/> (last visited Nov. 18, 2020).

¹⁰ Nat'l Women's Law Ctr., *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools 1* (2018), https://nwlc-ci49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf [hereinafter *Dress Coded*].

¹¹ "...and they cared", *supra* note 2, at 2.

¹² *Id.*

¹³ This statistic was based on internal Education Trust calculations of the 2015-2016 Civil Rights Data Collection data. See CIVIL RIGHTS DATA COLLECTION, <https://ocrdata.ed.gov/> (last visited Nov. 18, 2020).

¹⁴ "...and they cared", *supra* note 2, at 2.

Harmful disciplinary actions also disproportionately affect LGBTQ students and students with disabilities. For example, 60% of LGBTQ students reported being disciplined, and LGBTQ students of color are twice as likely to be suspended as their White peers.¹⁵ Similarly, Black students with disabilities are three times more likely to receive an out-of-school suspension or expulsion, and twice as likely to receive an in-school suspension as their White peers.¹⁶ This is a likely indication that these students are not receiving the services they need or are required by IDEA. It is also a sign that schools are not using evidence-based practices to improve behavior or create positive learning environments.

Since the beginning of the COVID-19 pandemic, some schools have made clear that they do not intend to reserve exclusionary discipline only for the physical classroom. In fact, many students across the country are excluded from high-quality instruction during the course of ineffective punishments, such as being sent to a virtual breakout room (either alone without a task or with other punished students), or losing complete access to online classroom platforms or even school email.¹⁷ As of now, it appears that exclusionary disciplinary trends during virtual learning will mirror or exacerbate the pre-pandemic discriminatory discipline trends. In fact, some of the most egregious cases of needlessly harsh discipline during the pandemic have involved Black children. For example, a Black fifteen-year-old girl in Michigan, under the pseudonym Grace, was sent to a juvenile detention center at the height of the pandemic's first wave for violating her parole after being found "guilty on failure to submit to any schoolwork and getting up for school."¹⁸ A Black nine-year-old boy in Louisiana was suspended—after an initial recommendation of expulsion—for having a BB gun in his room while attending school online.¹⁹ Even after the pandemic, online learning will likely remain a critical tool for education. Therefore, any measures taken to protect civil rights in school should also extend to students' civil rights online.

Disproportionate discipline has short- and long-term consequences that make real differences for students. A single suspension decreases the likelihood that a student graduates from high school, which ultimately comes with negative long-term health and economic consequences.²⁰ High-quality instruction is critical to student success, yet even before this country's students lost months of school time due to the pandemic, students annually missed eleven million school days collectively, or sixty-three years of instruction, due to exclusionary disciplinary actions.²¹ Black students face a disproportionate number of lost school days and were five times more likely to lose valuable school time than their White peers. More than missing class time, just attending a school with high suspension rates increases the likelihood of having future interactions with the criminal legal system.²² Research also shows that schools with lower suspension rates have higher rates of graduates enrolling in college.²³ Clear, appropriate, and consistent consequences and educator training—as the 2014 Title VI discipline guidance calls for—help to eliminate the discrimination and bias that fuel the disproportionate punishment of Black children.

¹⁵ *Replacing Punitive Discipline with Restorative Policies and Practices*, GLSEN, <https://www.glsen.org/activity/restorative-discipline> (last visited Nov. 18, 2020).

¹⁶ German Lopez, *Black Kids Are Way More Likely to Be Punished in School than White Kids, Study Finds*, VOX (Apr. 5, 2018), <https://www.vox.com/identities/2018/4/5/17199810/school-discipline-race-racism-gao>.

¹⁷ See Kalyn Belsha, *Virtual Suspensions. Mask Rules. More Trauma. Why Some Worry a Student Discipline Crisis is on the Horizon*, CHALKBEAT (Aug. 21, 2020), <https://www.chalkbeat.org/2020/8/21/21396481/virtual-suspensions-masks-school-discipline-crisis-coronavirus>; Joe Heim & Valerie Strauss, *School Discipline Enters New Realm with Online Learning*, WASH. POST (Sept. 15, 2020), https://www.washingtonpost.com/education/school-discipline-enters-new-realm-with-online-learning/2020/09/14/e19a395e-f393-11ea-999c-67ff7bf6a9d2_story.html.

¹⁸ Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention.*, PROPUBLICA ILLINOIS (July 14, 2020), <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention>.

¹⁹ Gisela Crespo, *4th Grader Suspended for Having a BB Gun in His Bedroom During Virtual Learning*, CNN (Oct. 4, 2020), <https://www.cnn.com/2020/09/26/us/student-suspended-gun-virtual/index.html>.

²⁰ See, e.g., Russell J. Skiba et al., *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE IN EDUC. 546 (2014), <https://eric.ed.gov/?id=EJ1045755>; Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade* (Dec. 12, 2012) (prepared for the National Conference on Race and Gender Disparities in Discipline, Johns Hopkins University), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/sent-home-and-put-off-track-the-antecedents-disproportionalities-and-consequences-of-being-suspended-in-the-ninth-grade/balfanz-sent-home-crr-conf-2013.pdf>; Jasmine Tucker & Kayla Patrick, *What Happens When Girls Don't Graduate from High School?* (2017), https://nwlw-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/final_nwlc_2017WhenGirlsDontGraduat.pdf.

²¹ Daniel Losen & Amir Whitaker, *11 Million Days Lost: Race, Safety, and Discipline at U.S. Public Schools 4* (2018), https://www.aclu.org/sites/default/files/field_document/final_11-million-days_ucla_aclu.pdf.

²² "...and they cared", *supra* note 2, at 2.

²³ *Id.*

Furthermore, Black and Latinx students are more likely to experience health and economic impacts of the pandemic that may affect their stress and anxiety levels. For example, pre-pandemic, almost half of Latina girls in high school reported feeling sad, lonely, or hopeless; one in five had contemplated suicide and one in ten attempted it.²⁴ Preliminary studies even showed that the Trump administration’s anti-immigrant policies increased anxiety and PTSD in adults, who may then pass these long-term mental health issues on to their children.²⁵ In addition, Black students are likely to be affected by the country’s reckoning on race. This moment will require students to have even more access to research-based supports. However, instead of investing in these structures, schools have invested in school police, also called school resource officers (SROs), who make Black and Latinx students less safe. Research shows that schools with a police presence are more likely to criminalize normal youthful behavior, decrease graduation and college attendance rates, and disproportionately affect Black children.²⁶ Research also shows that most school police receive little to no training in things like implicit bias, youth behavior, or de-escalation tactics. Even when the training is offered, initiatives to increase training have been ineffective, as half of SROs fail to apply their training and positively engage with children in practice.²⁷ Finally, even in instances in which training is mandated for police generally, available data indicates that this training does not correct the racial imbalances in arrests.²⁸ Thus, the best way to prevent Black and Native students from being arrested or criminalized for normal youthful behavior is to decrease their contact with school-based police.

III. Current State

In 2014, ED made strides in rectifying inequities by issuing a “Rethinking Discipline” guidance package on nondiscriminatory administration of school discipline.²⁹ In December 2018, the Trump administration rescinded the guidance package, leaving students exposed to civil rights violations and subjecting them further to criminalization.

Obama Guidance

ED promulgated the 2014 Dear Colleague Letter on Nondiscriminatory Administration of School Discipline (“2014 Dear Colleague Letter”),³⁰ the Dear Colleague Letter on resource equity obligations,³¹ and the other

²⁴ Nat’l Women’s Law Ctr. et al., *WE ARE NOT INVISIBLE: Latina Girls, Mental Health, and Philadelphia Schools* 5 (2019), <https://nwlc.org/wp-content/uploads/2019/04/We-Are-Not-Invisible-Final-Report.pdf>.

²⁵ *Id.* at 6.

²⁶ Micere Keels, *Bringing Evidence-Based Decision-Making to School Safety* (2020), https://annenbergbrown.edu/sites/default/files/EdResearch_for_Recovery_Brief_11.pdf.

²⁷ *See id.* at 6-7.

²⁸ Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> (citing how the NYPD study found “no meaningful change” from officers’ pre-training enforcement behavior to their post-training enforcement behavior).

²⁹ *Rethinking Discipline*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html> (last updated Jan. 4, 2017) [hereinafter *Rethinking Discipline*]; see also *School Climate and Discipline: Federal Efforts*, U.S. DEP’T OF EDUC., *archived at* <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance> (last updated Dec. 8, 2015).

³⁰ Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (rescinded) [hereinafter *School Discipline DCL*].

³¹ Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on resource equity obligations of school districts, States and individual schools that receive Federal funds (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (rescinded) [hereinafter *Resource Equity DCL*].

“Rethinking Discipline” materials³² regarding racially disparate discipline in order to help schools address critical issues that persist in classrooms across the country.

The 2014 Dear Colleague Letter—issued jointly with the Department of Justice (DOJ)—detailed how to identify, avoid, and remedy discriminatory discipline. Specifically, it recommended that schools not discipline students intentionally on the basis of race, and that schools be aware of discipline policies or practices that may unintentionally discriminate against certain students of a particular race³³—as both cases would constitute Title VI violations. To help schools understand how ED and DOJ might enforce these violations, the 2014 Dear Colleague Letter also provided a three-part legal framework that essentially asks: (1) whether students of a particular race were adversely impacted, either directly or indirectly through discipline policies, (2) whether the discipline policy was necessary to meet an important educational goal that was nondiscriminatory, and (3) whether the schools’ justification was pretextual.³⁴ The other “Rethinking Discipline” materials covered a range of topics, such as the ineffectiveness of corporal punishment,³⁵ recommendations on how to limit exclusionary discipline in early childhood settings,³⁶ and rubrics for schools to evaluate their partnerships with local and state law enforcement agencies.³⁷ ED under the Obama administration also investigated districts whose data showed racial disproportionality in discipline. As a result of these policies, at least fifty of the country’s largest school districts instituted changes, and half of the states revised state law to limit discriminatory disciplinary policies.³⁸

As this memorandum will detail in a subsequent section, agency guidance documents are not legally enforceable under the Administrative Procedure Act (APA). However, ED and DOJ qualified the 2014 Dear Colleague Letter as a “significant guidance document,”³⁹ meaning that the guidance was intended to assist federal funding recipients in meeting their legal obligations and to inform members of the public of their rights under Title VI.⁴⁰ Although the guidance did not add to or change civil rights law, it provided a framework that, among other relevant factors, could help the ED Office for Civil Rights (OCR) evaluate recipients, such as schools and districts, when investigating complaints or other reports of civil rights violations.

Although the 2014 Dear Colleague Letter was a step in the right direction, it ultimately fell short because it failed to address discriminatory school discipline with an intersectional lens, and to specify ways in which police presence in schools can undermine school climate efforts and constitute possible violations of Title VI.

Trump Administration

The Trump administration has taken a series of actions to erode the modest improvements to school climate created by the 2014 Dear Colleague Letter and generally signal its hostility to Black, Native, and immigrant communities—all of which have led to many students feeling unsafe at school. These actions include: ED

³² *Rethinking Discipline*, *supra* note 29.

³³ These two scenarios are also called “different treatment” and “disparate impact,” respectively. This memorandum will provide more detail on their distinctions in Section IV, A, 2.

³⁴ School Discipline DCL, *supra* note 30, at 8-9, 11.

³⁵ Letter from John B. King, Jr., U.S. Sec’y of Educ., U.S. Dep’t of Educ., to States calling for an end to corporal punishment in schools (Nov. 22, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf>.

³⁶ U.S. DEP’T OF EDUC. & U.S. DEP’T OF HEALTH & HUMAN SERVS., POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS, <https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ee-expulsions-suspensions.pdf>.

³⁷ U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Safe School-based Enforcement through Collaboration, Understanding, and Respect (SECURE): Local Implementation Rubric*, <https://www2.ed.gov/policy/gen/guid/school-discipline/files/sro-local-implementation-rubric.pdf>; U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Safe School-based Enforcement through Collaboration, Understanding, and Respect (SECURE): State and Local Policy Rubric*, <https://www2.ed.gov/policy/gen/guid/school-discipline/files/sro-state-and-local-policy-rubric.pdf>; *see also* John B. King, Jr., U.S. Sec’y of Educ., U.S. Dep’t of Educ., Dear Colleague Letter: SROs in Schools (Sept. 8, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/cd-letter-on-sros-in-schools-sept-8-2016.pdf>.

³⁸ Anya Kamenetz, *Suspensions Are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/677508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain>.

³⁹ *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

⁴⁰ School Discipline DCL, *supra* note 30, at 1, n.1.

rescinding guidance documents on the rights of students with disabilities,⁴¹ race-conscious admissions,⁴² and discriminatory discipline; Secretary DeVos testifying before Congress that schools can decide whether to call Immigration and Customs Enforcement (ICE) on undocumented students⁴³ and continually understaffing OCR despite increased appropriations;⁴⁴ the Federal School Safety Commission exploiting the Parkland shooting to release a report⁴⁵ that made no gun control recommendations, but instead called for increased militarization and law enforcement in schools; and recent executive orders advocating for the creation of a White nationalist curriculum⁴⁶ and prohibiting government contractors from providing anti-racist or anti-sexist training.⁴⁷

Safe, healthy, and inclusive school environments require students to have access to: an unbiased and culturally responsive curriculum; strong positive relationships with staff and students that foster belonging; fair and consistent rules and discipline policies that minimize lost instructional time; meaningful family engagement; and a system of supports to meet their social, emotional, and academic needs. Near the end of its term, the Trump administration ramped up actions that would engender white nationalism in schools to the detriment of historically marginalized students by issuing executive orders that discourage integrating Black history into curricula, prohibiting training on how to identify race and sex stereotypes, and penalizing institutions that acknowledge systemic racism.⁴⁸ These actions are contrary to the research that shows the importance of professional development and coaching for adults in schools to help them develop and cultivate positive, asset-based, and anti-racist mindsets, and to address implicit bias.

State Legislative Reforms

In recent years, states and districts have begun to move away from the zero-tolerance policies that swept the country in the early 90's. In the last few years, at least thirty-six states have enacted bills limiting the use of suspensions and expulsions or encouraging the use of other disciplinary strategies. These bills are most likely to limit the length of a suspension, limit suspensions for the youngest learners, or encourage the use of alternative practices.⁴⁹ While both red and blue states have shown progress, too many states still maintain policies shown to be particularly harmful to historically marginalized students. About forty states allow students to be suspended for “defiance” or “disruptive” behavior—vague standards that disproportionately lead to more Black students being suspended⁵⁰—despite research showing that schools that eliminate the use of these terms as a catchall do not experience an increase in chaos or violent behavior.⁵¹

⁴¹ Jack Moore, *Betsy DeVos Rescinds 72 Documents That Outlined Rights for Disabled Students*, GQ (Oct.23, 2017), <https://www.gq.com/story/betsy-devos-disable-rights-guidelines>.

⁴² Erica L. Green et al., *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html>.

⁴³ Luke Darby, *Betsy DeVos Says Schools Should Call ICE on Undocumented Students*, GQ (May 26, 2018), <https://www.gq.com/story/devos-schools-call-ice-on-students>. Weeks later Secretary DeVos corrected her statement after advocates pointed out that allowing school administrators to report undocumented students to ICE violates *Phyller v. Doe*, a 1982 Supreme Court case that said undocumented students have the right to a free public education.

⁴⁴ Andrew Kreighbaum, *Under DeVos, a Smaller Department of Education*, INSIDE HIGHER ED (June 13, 2018), <https://www.insidehighered.com/news/2018/06/13/education-department-staff-down-13-percent-trump-administration-began>.

⁴⁵ See Fed. Comm'n on Sch. Safety, *Final Report of the Federal Commission on School Safety* (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

⁴⁶ See Exec. Order No. 13,958, 85 Fed. Reg. 70,951 (Nov. 2, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-establishing-presidents-advisory-1776-commission/>.

⁴⁷ Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/>.

⁴⁸ See, e.g., Kery Murakami, *College Associations Urge DeVos to Drop Princeton Probe*, INSIDE HIGHER ED (Oct. 1, 2020), <https://www.insidehighered.com/quicktakes/2020/10/01/college-associations-urge-devos-drop-princeton-probe>.

⁴⁹ Alyssa Rafa, *The Status of School Discipline in State Policy* (2019), <https://www.ecs.org/wp-content/uploads/The-Status-of-School-Discipline-in-State-Policy.pdf>.

⁵⁰ For example, Black girls make up 5% of girls enrolled in school in California, but 19% of suspensions for defiance. “...and they cared”, *supra* note 2, at 9.

⁵¹ See Daniel J. Losen & Kacy Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California: What the 2016-17 Rates Tell Us about Progress* (2018),

IV. Proposed Actions

Legal Background

ED will have to take the proposed actions within the scope of these currently existing legal frameworks:

ED’s Recent Rule on Rulemaking and Guidance Procedures

In October 2020, ED published an interim final rule in the *Federal Register* on Rulemaking and Guidance Procedures⁵² and provided a thirty-day comment period before it went into effect on November 4. While it remains in place, this rule creates several new hurdles for ED in how it will issue guidance and rules going forward, including requiring: ED staff to demonstrate a “compelling operational need” to issue new guidance;⁵³ all significant guidance to undergo notice-and-comment that is usually reserved for rulemaking;⁵⁴ all newly issued guidance to be approved by the General Counsel;⁵⁵ and mandatory hearings for “high-impact” rules.⁵⁶

This new rule serves no other purpose than to make it harder for any new administration to take actions necessary to reverse the last four years of damage caused by the Trump administration’s education agenda.⁵⁷

Department Rulemaking under Title VI, Title IX, & Section 504

ED has a duty to uphold and protect students’ rights through civil rights laws, including Title VI of the Civil Rights Act of 1964,⁵⁸ which prohibits discrimination based on race, color, or national origin in federal funding recipients (and includes public schools), Title IX of the Education Amendments of 1972,⁵⁹ which prohibits discrimination based on sex (and includes sexual orientation, gender identity, sex stereotypes, and pregnancy and related conditions) in educational programs that receive federal funding, and Section 504 of the Rehabilitation Act of 1973,⁶⁰ which prohibits discrimination based on disability in federal funding recipients.

Interpretations of civil rights law vary as to what extent statutes proscribing discrimination reach policies and programs that intentionally discriminate (known as different treatment⁶¹) and those that have a disparate impact. Different treatment occurs when a policy reflects or is motivated by intentional discrimination against a legally protected class. Disparate impact refers to policies that use neutral language but disproportionately and

https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/the-unequal-impact-of-suspension-on-the-opportunity-to-learn-in-ca/Suspension_Impact_California_2018_R6.pdf.

⁵² Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597 (Oct. 5, 2020) (to be codified at 34 C.F.R. pt. 9), <https://www.federalregister.gov/d/2020-20799>.

⁵³ *Id.* at 62,608, § 9.13(c)(1).

⁵⁴ *Id.* at 62,608, § 9.14(h)(1).

⁵⁵ *Id.* at 62,608, § 9.13(d).

⁵⁶ *Id.* at 62,608, § 9.10(c)(2).

⁵⁷ Elizabeth Tang & Sabrina Bernadel, *DeVos’ Hypocritical Power Grab at the Department of Education*, NAT’L WOMEN’S LAW CTR. (Nov. 10, 2020), <https://nwl.org/blog/devos-hypocritical-power-grab-at-the-department-of-education/>. As early as possible, ED should repeal the November 4 rule on Rulemaking and Guidance Procedures. As noted above, the new rule will be a substantial roadblock in the Biden administration’s ability to quickly and effectively address school climate and any other significant education issues, especially during the COVID-19 pandemic. ED should repeal the new rule in the same way it was issued, through an interim final rule—citing the agency procedure exception to notice-and-comment rulemaking—published in the *Federal Register* that gives the public 30 days to comment before it goes into effect. (The APA requires agencies to publish a “notice of proposed rule making” in the *Federal Register* to notify the public that an agency intends to issue a new rule and provide an opportunity for public comment before the rule goes into effect. However, the APA also provides an exemption to this requirement, allowing agencies to avoid public comment for rules of agency organization, procedure, or practice.)

⁵⁸ 42 U.S.C. § 2000d (2018) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

⁵⁹ 20 U.S.C. § 1681 (2018) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”).

⁶⁰ Pub L. No. 93-113, 87 Stat. 355 (1973).

⁶¹ Different treatment is commonly called “disparate treatment” in case law and Title VI jurisprudence. The 2014 discipline guidance uses the term “different treatment,” presumably to make the term more understandable to audiences without a legal background. For consistency purposes, this memo adopts the phrasing of the 2014 guidance and uses the term “different treatment.”

unjustifiably affect a protected class of individuals in practice, even if the program is not motivated by discriminatory intent.

Title VI

Title VI contains two relevant provisions for this memo. Section 601 prohibits discrimination in any federally funded program on “the ground of race, color, or national origin.”⁶² Section 602 directs agencies to produce regulations to effectuate Section 601’s prohibition on discrimination “consistent with the objectives of the statute.”⁶³

In *Alexander v. Sandoval*, the Supreme Court ruled that individuals do not have a private right to sue on the basis of disparate impact regulations promulgated by ED.⁶⁴ In the course of that opinion, the Court held that Section 601 does not on its face prohibit disparate impact—it only outlaws different treatment.⁶⁵ In an aside, Justice Scalia, who wrote for the majority, suggested that regulations prohibiting disparate impact could not survive the logic of that decision.⁶⁶ However, the *Sandoval* Court explicitly left open the question as to whether federal agencies can promulgate and enforce regulations prohibiting disparate impact under Section 602.⁶⁷ Although the Court has yet to definitively settle the question, current practice, at least, would suggest yes: all major federal agencies have “issued rules and guidance under Title VI outlawing disparate impact discrimination”⁶⁸ under Section 602.

Title IX

With certain exceptions, Title IX prohibits discrimination “on the basis of sex” in federally funded programs⁶⁹ and, like Title VI, includes a provision (section 1682) directing federal agencies to “effectuate” this prohibition by promulgating regulations and guidance “consistent with the achievement of the objectives of the statute.”⁷⁰

Some lower courts have interpreted *Sandoval* to impose similar limitations on disparate impact claims by private litigants under Title IX’s discrimination prohibitions,⁷¹ although it is not clear this is the correct interpretation, given the statutes’ slightly different histories.⁷² Regardless, even if *Sandoval* does extend to Title IX, it likewise remains unsettled whether agencies can promulgate and enforce regulations barring disparate impact under §1682.

⁶² 42 U.S.C. § 2000d.

⁶³ See *id.* § 2000d-1; see also JD S. Hsin, CONG. RESEARCH SERV., R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964* (2019), <https://fas.org/sgp/crs/misc/R45665.pdf>.

⁶⁴ 532 U.S. 275, 293 (2001).

⁶⁵ *Id.* at 280.

⁶⁶ *Id.* at 281-82 (“. . . we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601. Though no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions . . . and dictum in *Alexander v. Choate* is to the same effect These statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination . . . but petitioners have not challenged the regulations here. We therefore assume for the purposes of deciding this case that the DOJ and DOT regulations proscribing activities that have a disparate impact on the basis of race are valid.”).

⁶⁷ *Sandoval*, 532 U.S. at 278.

⁶⁸ Hsin, *supra* note 63, at 10; see, e.g., 6 C.F.R. § 21.5 (2021) (Homeland Security); 7 C.F.R. § 15.3 (2021) (Agriculture); 10 C.F.R. § 1040.13 (2021) (Energy); 15 C.F.R. § 8.4 (2021) (Commerce); 22 C.F.R. § 141.3 (2021) (State); 24 C.F.R. § 1.4 (2021) (Housing and Urban Development); 29 C.F.R. § 31.3 (2021) (Labor); 31 C.F.R. § 22.4 (2021) (Treasury); 32 C.F.R. § 195.4 (2021) (Defense); 34 C.F.R. § 100.3 (2021) (Education); 38 C.F.R. § 18.3 (2021) (Veterans Affairs); 40 C.F.R. § 7.35 (2021) (Environmental Protection Agency); 43 C.F.R. § 17.3 (2021) (Interior); 45 C.F.R. § 80.3 (2021) (Health and Human Services); 49 C.F.R. § 21.5 (2021) (Transportation). Along with these Cabinet-level departments, several other agencies have also issued disparate impact rules pursuant to Section 602 of Title VI. See, e.g., 14 C.F.R. § 1250.103-2 (2021) (NASA); 18 C.F.R. § 1302.4 (2021) (Tennessee Valley Authority); 41 C.F.R. § 101-6.204-2 (2021) (General Services Administration); 44 C.F.R. § 7.5 (2021) (FEMA); 45 C.F.R. § 1203.4 (2021) (Corporation for National and Community Service).

⁶⁹ 20 U.S.C. § 1681.

⁷⁰ See 20 U.S.C. § 1682.

⁷¹ See, e.g., *Clyburn v. Shields*, 33 Fed. App’x. 552, 555 (2d Cir. 2002); *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F. 3d 685, 692 (6th Cir. 2000); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1065 (S.D. Ohio 2017); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 363 (S.D.N.Y. 2016); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184-85 (D.R.I. 2016); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 367 (S.D.N.Y. 2015); *Doe v. Rector and Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 732 (E.D. Va. 2015); *Ludlow v. Northwestern Univ.*, 125 F. Supp. 3d 783, 793 (N.D. Ill. 2015); *Xiaohu Peter Yu v. Vassar College*, 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015).

⁷² See Nat’l Women’s Law Ctr., *Selected Title IX Practice Issues: Breaking Down Barriers* 100 n.406 (2007), https://nwlc.org/wp-content/uploads/2015/08/BDB07_Ch6.pdf.

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in federal funding recipients and also directs agencies to “effectuate” that prohibition through regulation.⁷³

Recommended Actions

Upon taking office, the Biden administration should aggressively embark on undoing the Trump administration’s actions that have eroded student civil rights—including by increasing the capacity of OCR to comprehensively investigate systemic allegations of discrimination by at least doubling the budget and staff of the office. Additionally, the next administration should take several executive actions to minimize the administration of discriminatory discipline, invest in social-emotional and academic supports, and foster positive school climate nationally, including the following.

The President Should Issue an Executive Order

The President should issue an executive order within the first 100 Days to set the tone of the administration’s stance on school climate and put students’ civil rights at the forefront. The President’s executive order should accomplish the following measures:

- (a) Direct the Department of Education to revise and reissue the Title VI guidance documents on the equitable distribution of resources and discriminatory discipline jointly with the Department of Justice, draft and release guidance on identifying intersectional claims of discrimination under Title VI, Title IX, and Section 504, and initiate rulemaking to codify the effect of these guidance documents.
- (b) Direct the Departments of Education and Justice to collect and publicly release data related to the prevalence of SROs in schools and reports of SRO misconduct.
- (c) Create an interagency task force that includes the Departments of Education, Justice, Homeland Security, and Health and Human Services with the goal of creating schools that are safe, healthy, and inclusive of historically marginalized students.

First, the executive order should direct ED to immediately revise and reissue guidance on administration of nondiscriminatory discipline, as outlined in Sections IV.B 3 & 4.

Second, the executive order should require ED and DOJ to collect and release data on the prevalence of SROs in schools and on school-level complaints against SROs, through the Civil Rights Data Collection or a new collection.⁷⁴ Currently, no one database exists where the public may access information about SROs, such as how many are in the United States⁷⁵ or what enforcement actions they have taken in a given school year. Nationally, neither police departments nor school systems are required to report how many SROs they

⁷³ 29 U.S.C. § 794(a) (2018).

⁷⁴ To establish a new collection of information, ED must meet the requirements set forth in the Paperwork Reduction Act (PRA). Under the PRA, ED must first conduct an internal evaluation of its plan for the proposed SRO information collection, specifically determining the need for the information and the possible burden the collection would impose on respondents. Next, ED must publish a 60-day notice in the *Federal Register* that solicits public comment on the proposed collection and evaluate the comments submitted. Third, ED must submit the collection of information to the Office of Management and Budget (OMB), certifying that ED has met all statutory requirements, and submit a second notice to the *Federal Register*. Once the second comment period is complete, the Office of Information and Regulatory Affairs (OIRA), an office of OMB, may approve or deny the proposed collection of information. To ensure full compliance with the PRA in initiating a new collection of information on SROs, refer to 44 U.S.C. §§ 3501-3520 (2018).

⁷⁵ See *Frequently Asked Questions*, NAT’L ASS’N OF SCH. RES. OFFICERS, <https://www.nasro.org/faq/> (last visited Nov. 11, 2020) (“Nobody knows how many SROs there are in the U.S., because SROs are not required to register with any national database, nor are police departments required to report how many of their officers work as SROs, nor are school systems required to report how many SROs they use.”).

employ.⁷⁶ Although localities may delegate reporting duties to the school district or the local law enforcement office, the lack of nationally uniform data reporting diminishes transparency about how SROs are being distributed among schools, the expenditure of school resources required to hire them, and how their prevalence impacts students' access to education across the country.

To fill this gap, the executive order should direct the Assistant Secretary of the Office for Civil Rights to exercise authority under the Department of Education Organization Act⁷⁷ and to collaborate with the Attorney General to create a uniform, national database collecting information, including: the number of SROs stationed at each school; types and number of school-level complaints against SROs; and the number of students who have been referred to law enforcement or arrested at school, disaggregated and cross-tabulated by gender, race, and disability.

Third, the executive order should announce an interagency task force to create safe, healthy, and inclusive schools, which would focus on creating anti-racist schools and dismantling practices that push historically marginalized students out of school from preschool through high school. The task force should be staffed by the Attorney General and the Secretaries of Education, Homeland Security, and Health and Human Services and their designees. The work of this task force should include eliminating criminalization/harsh discipline responses (including excessive exclusionary discipline, corporal punishment, school-based arrest and referral to law enforcement) by, for example:

- pending the collection and release of data on the prevalence of and incidents of SRO misconduct, initiating investigations by DOJ's Civil Rights Division to uncover whether there is racial or gender bias in SRO placement and misconduct (e.g., excessive force complaints, sexual harassment, concentration in schools with majority students of color)
- re-releasing "Rethinking Discipline" documents⁷⁸ with updates to remove recommendations that allow police in schools to routinely discipline, surveil, or interact with students
- de-emphasizing the role of SROs in school, including support of legislation that encourages divestment from cops in school and investment in student supports, mental health and trauma-informed resources; and releasing model MOUs for local educational agencies to have with local law enforcement agencies outlining the limited instances in which police should respond to emergency situations in school
- removing the presence of ICE agents from communities with high populations of undocumented families or students
- prioritizing under competitive grant programs (such as ESSA-Part IV) applications that boost culturally responsive student and mental health supports & trauma-informed care in historically under-resourced schools (i.e., tribal schools and schools with high proportions of Native, Black, Latinx and undocumented youth)

⁷⁶ *Id.*

⁷⁷ 20 U.S.C. § 3413(c)(1) (2018) (authorizing the Assistant Secretary for Civil Rights "to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights").

⁷⁸ *Rethinking Discipline*, *supra* note 29.

The Department of Education, Office for Civil Rights (OCR) Should Update and Reissue Civil Rights Guidance on School Discipline and Climate⁷⁹

In the short-term, ED and DOJ should update and reissue the 2014 Dear Colleague Letter and “Rethinking Discipline” guidance package. The 2014 Dear Colleague Letter is particularly strong for its explanation of the legal framework that applies to school discipline under Title IV and Title VI.⁸⁰ Both ED and DOJ should put state educational agencies (SEAs) and local educational agencies (LEAs) on notice as soon as possible that they intend to resume three-prong inquiries for investigating both different treatment and disparate impact claims.

Generally, agencies may issue “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”⁸¹ to better inform regulated entities of their legal obligations and parties protected by agency regulations of their legal rights. These agency actions are often referred to as “guidance” or “guidance documents” and do not require notice and comment because they are not considered substantive rules. Because guidance documents are not substantive rules that follow APA rulemaking procedure, they do not carry the force of law and cannot be used by agencies as grounds in their own right to initiate legal action against regulated entities. In reissuing the 2014 Dear Colleague Letter and the “Rethinking Discipline” guidance package (with the updates recommended below) after the November 4 rule is repealed, ED must use language that makes clear that the guidance is not amending civil rights laws but rather clarifying how ED and DOJ interpret them. Also, this set of guidance will likely still qualify as “significant guidance documents” and may need to be reviewed by OMB before posting the guidance on the ED website.⁸²

Updates should include: deeming police involvement in non-violent school discipline as a potential civil rights violation; counting social-emotional supports in school resource equity; and adopting an intersectional approach to discrimination.

Deeming Police Involvement in Non-violent School Discipline as a Potential Civil Rights Violation

One of the key updates OCR should incorporate in the guidance package is further instruction on how police involvement in non-violent school discipline may violate civil rights law. The 2014 Dear Colleague Letter laid a modest foundation for this notion, maintaining that schools may be liable under Title VI for discriminatory administration of school safety measures and student discipline by “school resource officers, school district police officers, contract or private security companies, security guards or other contractors, or law enforcement personnel,”⁸³ even if they are contractual agents of the school rather than school employees.⁸⁴ OCR’s updated guidance should go farther by outlining how police presence in schools—particularly when they are tasked with routine discipline or concentrated in schools with high enrollment of Black or Native students—may constitute a Title VI violation.

SROs are overwhelmingly placed in schools whose student populations significantly consist of low-income students of color,⁸⁵ and studies have shown that when controlling for school poverty rate, SRO presence in a

⁷⁹ Although it is beyond the scope of this memo, ED should also repeal the Trump administration’s recent Rule on Rulemaking and Guidance Procedures as early as possible. The new rule will substantially limit the new administration’s ability to quickly and effectively address school climate and many other significant education issues, especially during the COVID-19 pandemic.

⁸⁰ School Discipline DCL, *supra* note 30.

⁸¹ 5 U.S.C. § 553(b)(A).

⁸² See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 1, 2007).

⁸³ *Id.*

⁸⁴ *Id.* (citing e.g., 34 C.F.R. § 100.3(b)(1), (2) (2020)).

⁸⁵ See, e.g., 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* 45 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>. (“Schools where at least half of the student population is nonwhite, as well as high-poverty schools (i.e., where at least 75 percent of students are eligible for free or reduced-price lunches), have the highest percentages of law enforcement officers on campus.”); Bayliss Fiddiman et al., *Smart Investments for Safer Schools* 6 (2018), https://cdn.americanprogress.org/content/uploads/2018/12/18112919/121918_SchoolSafety-report.pdf.

school increased the possibility of arrest by 402%.⁸⁶ Increasingly, students have received criminal charges at the hands of school police for normal, childlike or adolescent behavior, such as “wearing too much perfume, eating chicken nuggets from a classmate’s lunch tray, throwing Skittles at another student on the school bus, doodling on a desk, and performing a science experiment without teacher approval.”⁸⁷ In the 2015–2016 school year, Black girls were less than 16% of the female student population but 39% of arrests and 33% of girls referred to law enforcement.⁸⁸ These rates demonstrate the impact of SROs’ discriminatory discipline and arrests of Black and brown students for minor infractions just because SROs happen to be in the building. To encourage schools to divest resources from school policing programs, the updated guidance must be explicit that school police presence and involvement in everyday student discipline can itself constitute a denial of a student’s access to education in violation of Title VI.

As noted above, Section 601 of Title VI prohibits discrimination in any federally funded program on “the ground of race, color, or national origin.”⁸⁹ Section 602 directs agencies to produce regulations to effectuate Section 601’s prohibition on discrimination “consistent with the objectives of the statute.”⁹⁰ Federal agencies regularly promulgate and enforce regulations prohibiting disparate impact under Section 602.

While the Supreme Court has never addressed this issue squarely, Justice Potter Stewart, writing a concurring opinion in *Lau v. Nichols*, stated that in reviewing regulations prohibiting disparate impact, all courts would require, as a formal matter, is that any rules issued under Section 602 be “reasonably related” to the anti-discriminatory ambitions of the statute.⁹¹ As Justice Stewart noted in *Lau*, the Court has generally accorded considerable latitude to agencies authoring rules pursuant to generic rulemaking provisions, on the assumption that Congress intended to defer more particular legislative decisions to their expert judgment.⁹² That latitude would arguably authorize an agency to issue “broad prophylactic rules,” so long as they “realiz[e] the vision laid out in” Section 601—as arguably would a rule outlawing policies with racially disparate impacts.⁹³

Here, the presence of police in schools clearly has a disparate impact based on race. As such, OCR should incorporate into the guidance package how police presence in schools may constitute a Title VI violation.

The majority in *Sandoval* seemed to signal its dissatisfaction with the “reasonably related” test endorsed by Justice Stewart’s concurrence in *Lau*. Under this narrower view, regulations under Section 602 must fit more closely with the particular purpose of Section 601: ridding federally funded programs of intentional discrimination. The Court has yet to resolve squarely which of these views of agencies’ rulemaking authority under Section 602 is the right one.

However, even if Section 602 is construed narrowly to permit only regulations that address intentional discrimination, it may still be argued that Title VI allows agencies to promulgate regulations addressing disparate impact, depending on how it styles its enforcement under that regulation. As Justice Stevens pointed out in his *Sandoval* dissent, one way of looking at Title VI disparate impact regulations is as an indirect rule against intentional discrimination—only intentional discrimination in a “more subtle form[],” masked by an “ostensibly race-neutral” policy but with “the predictable and perhaps intended consequence of materially benefitting some races at the expense of others.”⁹⁴ Styled that way, many federal agencies have qualified their disparate impact

⁸⁶ 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* 45 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

⁸⁷ Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & LAW 147, 154 (2015).

⁸⁸ Misha N. Inniss-Thompson, *Summary of Discipline Data for Girls in U.S. Public Schools: An Analysis from the 2015-2016 U.S. Department of Education Office for Civil Rights Data Collection*, National Black Women’s Justice Institute 7 (2018), https://docs.wixstatic.com/ugd/0c71ee_9506b355e3734ba791248c0f681f6d03.pdf.

⁸⁹ 42 U.S.C. § 2000d.

⁹⁰ See 42 U.S.C. § 2000d-1.

⁹¹ *Lau v. Nichols*, 414 U.S. 563, 571 (Stewart, J., concurring).

⁹² See *Lau*, 414 U.S. at 571 (Stewart, J., concurring) (citing *Mourning v. Family Publ’ns Serv.*, 411 U.S. 356 (1973)).

⁹³ *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting).

⁹⁴ *Id.* at 306.

rules as a means of “counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”⁹⁵ In that sense, those rules are still directed at “uncovering discriminatory intent,” even if only in subtler forms, such as “covert and illicit stereotyping.”⁹⁶ And, for that reason, those rules arguably also comply with *Sandoval*’s more exacting standard for Section 602 regulations despite their formal focus on racial disparities.

Counting Social-Emotional Supports in Resource Equity

In the updated school discipline guidance package, ED should also update its Title VI guidance on equitable distribution of resources, with an emphasis on replacing those that criminalize students with those that support student mental health. As set out in the Dear Colleague Letter on resource equity obligations of federal funding recipients, resource equity refers not only to funding, but also to “access to rigorous courses, academic programs, and extracurricular activities; stable workforces of effective teachers, leaders, and support staff; safe and appropriate school buildings and facilities; and modern technology and high-quality instructional materials.”⁹⁷ The updated guidance should make clear that resource equity also includes access to adequate social-emotional supports, such as school counselors, psychologists, and trauma-informed practices based in evidence. In 2016, researchers found that the estimated cost of employing about 19,088 SROs through 2007 was \$619 million per year.⁹⁸ In the 2015-2016 school year, the National Center for Education Statistics estimated that there were about 52,100 SROs employed,⁹⁹ no doubt making up more than a one-billion-dollar industry today as SRO numbers have increased during the Trump administration.

Money spent on SROs combined with an abundance of other school surveillance mechanisms has meant that millions of students—mostly Black and brown students—attend schools that lack resources for mental health and other student supports, such as counselors, nurses, psychologists, and social workers.¹⁰⁰ In 2018, the Center for American Progress found that “schools where the nonwhite population was greater than 50 percent of the school population were two to 18 times more likely to use a mix of metal detectors, school police and security guards, locked gates, and random sweeps than schools where the nonwhite population was less than 20 percent.”¹⁰¹ Many of these schools with heavy surveillance and criminalization mechanisms are the same ones that do not employ even one school nurse.¹⁰² This inequitable distribution of school resources reflects a bias deeply ingrained in our national consciousness: that White students are more deserving of care and support than Black and brown students. Mental health resources allow students the social and emotional wellbeing to focus on and benefit from their classes. Without them, LEAs and SEAs are effectively denying Black and brown students’ access to the public education guaranteed to them under Title VI. This is particularly true in the wake of the disruptions, death, and economic loss ravaging Black and brown communities across the nation during the COVID-19 pandemic. For these reasons, the updated guidance should inform LEAs and SEAs of how OCR may interpret inequitable distribution of resources that disproportionately criminalize Black and brown students as a violation of Title VI and other civil rights laws.

⁹⁵ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015).

⁹⁶ *Id.*

⁹⁷ Resource Equity DCL, *supra* note 31.

⁹⁸ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. L. REV. 919, 947 (2016); see also Nathan James & Gail McCallion, CONG. RESEARCH SERV., R43126, *School Resource Officers: Law Enforcement Officers in Schools* 20 (2013), archived at <http://perma.cc/5BJX-M43Z>.

⁹⁹ National Center for Education Statistics, *Crime and Safety Surveys, Multi-year Table 1. Number of school resource officers, number of public schools, and the number of public schools with school resource officers, by full- and part-time school resource officer status: 2003–04 through 2015–16*, https://nces.ed.gov/surveys/ssocs/tables/tab_my01_2016_all.asp (last visited Nov. 12, 2020).

¹⁰⁰ See American Civil Liberties Union, *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 18 (2019), https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [hereinafter *Cops and No Counselors*]; see also 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* 50 (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (finding that students of color are approximately 20-40% more likely to lack access to a school counselor).

¹⁰¹ Fiddiman, *supra* note 85, at 6.

¹⁰² See *Cops and No Counselors*, *supra* note 100, at 13.

Adopting an Intersectional Approach to Discrimination

Finally, OCR should issue guidance outlining protections provided not only by Title VI, but also by Title IX and Section 504 (alone and in combination with Title VI) against intersectional discrimination, specifically including discriminatory discipline policies and practices. Practices like enacting vague “school disturbance” laws,¹⁰³ policing girls’ bodies through dress codes,¹⁰⁴ and using restraint and seclusion on students with disabilities¹⁰⁵ have led to overly harsh and more frequent discipline of Black and brown students, as a result of unbridled administrator discretion and bias. For example, studies show that adults are likely to “adultify”¹⁰⁶ Black girls, perceiving them as loud, defiant, sexually provocative, and less innocent than their White counterparts.¹⁰⁷ This gendered racial bias combined with vague school policies that allow for broad administrator discretion in imposing discipline lead school staff to punish Black girls more often and more harshly for normal childlike behaviors, even though they are not more likely than other students to misbehave.¹⁰⁸ The 2014 Dear Colleague Letter explicitly focused on Title VI guidance yet seemed to categorize race discrimination in discipline as an issue that could and should be analyzed separately from other personal characteristics like gender and disability status.¹⁰⁹ This one-dimensional view of Title VI forces students and other potential complainants to arbitrarily exclude the ways in which bias affects them across multiple facets of their identity and often leaves the most marginalized students without adequate relief or protection.¹¹⁰ The Biden administration should instead address the issues as intersectional, with new guidance that encourages schools to consider how students may experience discrimination as the result of multiple and intersecting identities and outlines the overlapping protections provided to these students under Title VI, Title IX, and Section 504.

In the employment discrimination context under Title VII of the Civil Rights Act of 1964 (“Title VII”),¹¹¹ many courts and administrative agencies have embraced intersectional discrimination claims. For example, the Fifth Circuit recognized in a key intersectional discrimination case, *Jefferies v. Harris County Community Action Association*,¹¹² that a Black female employee may experience a form of discrimination based on her sex and race together that is prohibited under Title VII. The court held that “discrimination against [B]lack females can exist even in the absence of discrimination against [B]lack men or white women.”¹¹³ With this holding, the Fifth Circuit initiated a crucial line of cases under Title VII law, invoking an analysis that requires courts to consider such claims on the basis of race *and* sex instead of race *or* sex.¹¹⁴ Although federal courts have not yet developed extensive doctrine on intersectional discrimination claims in education, courts generally rely on Title VII

¹⁰³ See, e.g., ARK. CODE ANN. § 6-18-507(b)(2)(B) (West 2020) (allowing out-of-school suspensions and expulsions of students grades K-5 for causing a “serious disruption” that cannot be addressed through other means); FLA. STAT. ANN. § 103.31(1)(d) (West 2020) (mandating school district support of teachers’ authority to remove students from classroom for “disobedient,” “disrespectful,” or “disruptive” behavior); FLA. STAT. ANN. § 877.13 (imposing criminal misdemeanor penalty for disrupting educational institutions); S.D. CODIFIED LAWS § 13-32-6 (2020) (imposing criminal misdemeanor penalty for anyone who “intentionally disturbs a public or nonpublic school,” including through acts of “boisterous conduct”).

¹⁰⁴ See *Dress Coded*, *supra* note 10.

¹⁰⁵ U.S. Dep’t of Educ., *The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools 6-7* (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf> (finding that even though students with disabilities were only 13% of the student population in 2017-18, they comprised 80% of students who were physically restrained, 41% of students who were mechanically restrained, and 77% of students who were subject to seclusion).

¹⁰⁶ Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood* 4 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

¹⁰⁷ “...and they cared”, *supra* note 2, at 1.

¹⁰⁸ *Id.* at 2 (citing that in the 2015-16 school year, Black girls were five times more likely than White girls to be suspended at least once and that Black girls are four times more likely to be arrested at school).

¹⁰⁹ School Discipline DCL, *supra* note 30, n. 4 (“While this guidance explicitly addresses only race discrimination, much of the analytical framework laid out in this document also applies to discrimination on other prohibited grounds.”).

¹¹⁰ See Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 UNIV. OF PA. J. OF L. & SOCIAL CHANGE 1, 7-8 (2018).

¹¹¹ 42 U.S.C. §§ 2000e (2018).

¹¹² 615 F.2d 1025 (5th Cir. 1980).

¹¹³ *Id.* at 1032.

¹¹⁴ See, e.g., *Olmstead v. L.C.*, 527 U.S. 581, 598 n. 10 (1999) (citing *Jefferies* with approval); *Harris v. Maricopa Cty. Super. Ct.*, 631 F.3d 963, 976-77 (9th Cir. 2011) (holding that “gender and race could together give rise to discrimination” in a hostile work environment claim brought by a black male employee, given that “[p]rejudiced individuals have long promulgated a pernicious image of black men as sexual predators”); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that “when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex”).

employment discrimination cases as analogues for analyzing such education claims.¹¹⁵ Therefore, OCR should feel empowered to develop guidance that draws upon the intersectional discrimination analysis formed in the *Jefferies* line of cases.

One way that ED can incorporate this analysis into its updated discipline guidance includes instructing schools to use data comparators that accurately capture students' unique identities to determine whether race-based or other forms of discrimination have taken place on their campuses. For example, as noted above, Black girls often receive harsher discipline as a result of a combination of sex- and race-based stereotypes that influence school administrator decision making. However, there is a tendency to compare the experiences of all Black students to all White students to analyze whether race discrimination has occurred, or to compare the experiences of all female students to all male students to test for sex discrimination. Yet, as the Fifth Circuit put it, those experiences may be "irrelevant"¹¹⁶ to Black girls, and such one-dimensional comparisons may not accurately reflect the experiences that Black girls specifically face, which may meaningfully differ from both Black boys and White girls. Therefore, the updated guidance should include language that encourages schools to analyze discipline discrimination with an "and" instead of an "or," such as in the following ways if analyzing under Title VI: race and sex, race and (dis)ability, race and gender identity, and so on.

ED can also make clear in the updated guidance that OCR will use an intersectional lens when considering formal complaints and investigating schools for further enforcement action. For example, OCR should adopt an intersectional approach when assessing both the specific claims and the facts put forth in a complaint. This practice is not new to OCR. For example, a complainant in 2015 initially brought a claim of disability discrimination against the Los Angeles Trade-Technical College, but OCR also chose to investigate the college on grounds of national origin discrimination, finding that the college gave the complainant a failing grade both because he was "immune-suppressed" and because he spoke English with a Filipino accent.¹¹⁷ However, OCR has not been consistent with this approach to date.¹¹⁸ With its updated school discipline guidance, ED should solidify the practice of initiating investigations under all civil rights statutes implicated by the facts alleged in formal complaints to OCR, even if the complainant alleges discrimination on a single axis, such as race or sex alone.

These recommendations consist of only a few of the possible changes ED may note in the guidance that are informed by an intersectional analysis of students' civil rights. Moving forward, ED should consult with civil rights advocates and impacted communities to further develop intersectional guidance under Title VI, Title XI, and Section 504.

¹¹⁵ See, e.g., *Olmstead v. L.C.*, 527 U.S. 581, 617 n. 1 (1999) (Thomas, J., dissenting) ("This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972"); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir.2001) ("Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims"); *Tingley-Kelley v. Trustees of Univ. of Pa.*, 677 F. Supp. 2d 764 (E.D. Penn. 2010) ("Title IX does not provide an analytical framework for the evaluation of gender discrimination claims. As a result, in analyzing whether a plaintiff has presented evidence under Title IX sufficient to survive summary judgment, courts understandably often look to employment discrimination jurisprudence under Title VII.")

¹¹⁶ *Jefferies*, 615 F.2d at 1034 ("[W]hen a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.")

¹¹⁷ Resolution Letter from Office for Civil Rights, U.S. Dep't of Educ., to Los Angeles Trade-Technical College 2 (Aug. 13, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09112113-a.pdf>.

¹¹⁸ See Resolution Letter from Office for Civil Rights, U.S. Dep't of Educ., to State University of New York (SUNY) College at Brockport 6, 9 (Apr. 29, 2016), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02162004-a.pdf> (OCR failing to open Title IX investigation when student alleged discrimination on the basis of race and age but also alleged incidents that implicated her sex when her professors referred to her as a "girl" and used class materials that disparaged Black women); Resolution Letter from Office for Civil Rights, U.S. Dep't of Educ., to Antioch Unified School District. 1, 10 (Mar. 10, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131293-a.pdf> (OCR finding Title VI, Title II, and Section 504 violations but failing to open Title IX investigation even though student's complaint alleged that students called her a "black bitch" and told her she was "black, fat and ugly.").

The Department of Education, Office for Civil Rights Should Engage in Title VI, Title IX, and Section 504 Rulemaking to Solidify Its School Discipline Guidance into Enforceable Law

Immediately after updating and reissuing the school discipline guidance package, OCR should engage in Title VI and Title IX rulemaking to codify the text of the school discipline guidance package.

First, OCR should publish a notice of proposed rulemaking (NPRM) in the *Federal Register* that adds disparate impact in resource equity and school discipline as forms of prohibited discrimination. As demonstrated in the data above, school resources used for criminalization, such as employing SROs, and poured heavily into schools with a majority of Black and brown students as a vestige of racism effectively denies such students the benefits of public education in violation of Title VI. The disparate impact of discriminatory discipline on students of color leads to the same outcome. Codifying these two types of disparate impact will have several effects on protecting student rights. For example, it will further clarify Title VI duties to SEAs and LEAs, and it will help mitigate the impact of *Alexander v. Sandoval*¹¹⁹ by giving students a remedy for real discrimination they face but cannot challenge on their own in the courts. Also, it will bolster the practices recommended in the reissued discipline guidance with legal enforceability. As outlined in this memo, guidance documents are used merely to inform and do not carry the force of law. With formal regulations in place, ED will have the power to enforce noncompliance through both administrative and court-based adjudication. This rulemaking also would have the effect of making it more difficult for a future administration to roll back critical school guidance and recommended practices.

Second, since the incoming administration has already indicated possible plans for rulemaking under Title IX to address sexual harassment,¹²⁰ OCR should include in that rulemaking an explicit prohibition of disparate impact discrimination based on sex to similarly codify the school discipline guidance into Title IX.

Third, OCR should initiate rulemaking under Section 504 regulations to codify the school discipline guidance and align with the intersectional recommendations provided in this memo.

V. Risk Analysis

Legal Risks

In repealing the November 4 rule on Rulemaking and Guidance Procedures, the Biden administration risks potential legal challenges under the APA. However, the challenger must show some concrete, particularized injury to have legal standing to challenge the repeal, and it is currently unlikely that someone would meet that standard. To mitigate this risk, ED should repeal the rule as early as possible, before issuing any guidance or rules, and before providing outside parties with opportunities to accrue some actionable legal injury. Additionally, ED should allow a thirty-day comment period on the repeal to avoid challenges on grounds of a lack of public input and to ensure compliance with the APA.¹²¹

As mentioned above, guidance documents are effective but vulnerable tools for administrative agencies. Although they are quicker to issue than rulemaking, they lack the force of law behind them. In creating the new guidance documents, ED should craft careful language, such as in the 2014 Dear Colleague Letter, that alerts

¹¹⁹ 532 U.S. 275 (2001).

¹²⁰ See Tyler Kingkade, *Biden Wants to Scrap Betsy DeVos' Rules on Sexual Assault in Schools. It Won't Be Easy.*, NBC NEWS (Nov. 12, 2020), <https://www.nbcnews.com/politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472>.

¹²¹ 5 U.S.C. § 553(d) (2018).

schools and other regulated entities that no enforcement actions will be taken on the basis of guidance documents themselves. This will ensure ED avoids legal challenges to the guidance under the APA.

If planning to engage in rulemaking, ED should start the process as early as possible because the process is time consuming. For example, the Trump administration did not finalize its new Title IX rule until mere months before the 2020 election, even though efforts towards the rulemaking began in 2017. Rulemaking will also lead to significant political attention and opposition that could slow the progress of finalizing the rule. Ultimately, the goal should be to complete this rulemaking within the administration's first term to guarantee that this administration can address school climate and discipline.

In addition, even if the guidance document were to survive APA scrutiny, it could potentially provide a vehicle to challenge the authority of federal agencies to promulgate and enforce regulations prohibiting disparate impact under Section 602. The current makeup of the Supreme Court could result in the logic of *Sandoval*, as applied to a private right of action, being applied to federal rulemaking authority and entirely limiting the executive branch's ability to prohibit disparate impact discrimination.

The School Safety Narrative that More Police (and Other Strategies, such as Arming Teachers) Will Keep Schools Safe

In this era of mass school shootings, the national conversation has centered around militarizing schools with efforts such as hiring more SROs and even arming teachers.¹²² Although measures like these are extreme, they tend to be a politically palatable option for local leaders to propose as an affirmative action to show stakeholders that they are addressing the problem. However, the Biden administration must counter this dangerous narrative that more police, weapons, and surveillance in schools will help keep schools safe if it wishes to make true improvements to school climate nationwide.

To date, there is no conclusive evidence that police officers in school enhance school safety or improve school climate.¹²³ In fact, research over the last decade has found just the opposite, demonstrating how school police and other mechanisms of criminalization “create a fearful environment”¹²⁴—especially for Black children¹²⁵—and lead to several devastating collateral consequences for developing children and teens.¹²⁶ Indeed, one of the most devastating and notorious examples of how SROs are not the answer to school safety or even school shootings is that of the SRO, Scot Peterson, who was on duty and armed during the Parkland shooting but hid outside behind a stairwell wall instead of protecting students.¹²⁷

¹²² See, e.g., Gary Abernathy, *Is Arming Teachers a Good Idea? Depends on Where You Live*, WASH. POST (Dec. 20, 2018), https://www.washingtonpost.com/opinions/is-arming-teachers-a-good-idea-depends-on-where-you-live/2018/12/20/bfb3637e-047f-11e9-9122-82e98f91ee6f_story.html; T. Keung Hui, *Every NC School Should Have a Police Officer*, *Group Recommends in Report to Governor*, THE NEWS & OBSERVER (Feb. 7, 2019, 12:16 PM), <https://www.newsobserver.com/news/politics-government/article225919740.html>.

¹²³ See, e.g., Nathan James & Gail McCallion, CONG. RESEARCH SERV., R43126, *School Resource Officers: Law Enforcement Officers in Schools* 17 (2013), archived at <http://perma.cc/5BJX-M43Z> (“Data suggest that the decline in violent victimizations experienced by children at school might, in part, be the result of an overall decline in crime against juveniles and not the result of more SROs working in schools.”).

¹²⁴ Justice Policy Institute, *Education Under Arrest: The Case against Police in Schools* 19 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

¹²⁵ Micere Keels, *Bringing Evidence-Based Decision-Making to School Safety* 6 (2020), https://annenbergbrown.edu/sites/default/files/EdResearch_for_Recovery_Brief_11.pdf.

¹²⁶ Among other consequences, students who attend school with police officers are more likely to end up involved with the juvenile legal system, which can affect whether they receive federal loans and grants for higher education, make students feel “powerless and stifled,” reduce student attachment to school and educational aspirations, double the likelihood of dropout, and foreclose an entire family from receiving public housing. See, e.g., U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 26 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>; Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 788 (2017); Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-term Education Outcomes* 20 (2018), <https://strategiesforyouth.org/sitefiles/wp-content/uploads/2019/10/PatrollingPublicSchools.pdf>; American Civil Liberties Union, *Bullies in Blue: The Origins and Consequences of School Policing* 30 (2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf;

Juvenile Law Center, *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records* 9 (2016), https://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web_0.pdf.

¹²⁷ Nicole Chavez, *This is what Scot Peterson did during the Parkland school shooting*, CNN (Jun. 4, 2019), <https://www.cnn.com/2019/06/04/us/parkland-scot-peterson-actions/index.html>.

By eliminating school police programs and cutting spending on surveillance tools, such as metal detectors and face-recognition technology, schools will have more resources to focus on student social and emotional wellbeing. Plus, removing police officers from the mundane aspects of nonviolent school discipline will allow local law enforcement offices the time and availability to train to effectively respond to active shooter scenarios in schools—a practice that can take place outside of school buildings.

Thus, the Biden administration must educate the public on how police officers are not necessary to enforce classroom discipline and do not address the deeper school safety issue—student mental health. To be effective in its school climate agenda, the administration must change the national narrative to center on the safety of Black and brown children, who are the new educational majority. If Black and brown girls and LGBTQ youth feel safe in school, all students will feel safe in school.

Concerns from Teachers and Administrators that Taking SROs Away Will Be Taking Another Resource away from Them

The administration may face pushback from teachers and administrators who rely on SROs as an additional resource for security or even for dealing with difficult students. For example, in a 2013 study, 55% of surveyed SROs reported “that they had arrested students for minor offenses because teachers wanted the arrests to occur.”¹²⁸ The statistic says less about teachers and more about the lack of tools and resources they have to teach students how to productively express emotions, learn from inevitable mistakes, and peacefully resolve conflicts.¹²⁹

This administration should address teachers’ concerns by adopting school climate policies that prove to them not that they are losing a resource but that they are divesting from an ineffective resource and investing in more effective ones. Without spending on SRO contracts, schools will have opened funding streams for resources like school counselors, nurses, trainings for restorative justice programs, and trauma-informed curriculum. For example, the National Women’s Law Center and the Education Trust published a report in 2020 finding that both teachers and students felt safer at schools that invested in these resources and divested from punitive discipline.¹³⁰ Additionally, on a national level, it appears that more educators support removing police from schools—with the National Education Association joining the call to remove police from schools¹³¹ and the American Federation of Teachers formally adopting a resolution that calls on separating “school safety . . . from policing and police forces” and urging schools to replace these resources with counselors, social workers, and restorative justice practitioners.¹³²

Federalism Concerns That the Federal Government Is Taking Away State and Local Power to Make Decisions on School Safety

The administration is likely to face political pushback invoking the federalism argument that school safety decisions should rest with state and local officials. Indeed, the nation saw the impact and efficiency of state and local responses to calls for ending school police during this summer’s protests and broader racial justice reckoning.¹³³ In light of these events, states and localities may claim that the federal government’s stance and actions on school climate is infringing upon their power and undermining their expertise on school safety issues.

¹²⁸ Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 00 YOUTH VIOLENCE & JUVENILE JUSTICE 1, 6 (2013).

¹²⁹ See Justice Policy Institute, *Education Under Arrest: The Case against Police in Schools* 19 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

¹³⁰ “...and they cared”, *supra* note 2, at 4.

¹³¹ See Brenda Álvarez, *This Is No Time For Us to Look Away*, NAT’L EDUC. ASS’N (Jun. 5, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/no-time-us-look-away>.

¹³² *AFT Resolution: Confronting Racism and in Support of Black Lives*, AM. FED’N OF TEACHERS, <https://www.aft.org/resolution/confronting-racism-and-support-black-lives> (last visited Nov. 19, 2020); see also Andrew Ujifusa, *AFT Calls on Schools to Handle Security and Safety Without Police*, EDUC. WEEK (Jun. 17, 2020),

<https://blogs.edweek.org/edweek/campaign-k-12/2020/06/AFT-calls-on-schools-safety-without-police.html>; Educ. Civil Rights Alliance & Am. Fed’n of Teachers, *Police in Schools* (2020), <https://edrights.org/wp-content/uploads/2020/08/PoliceInSchools-by-ECRA-and-AFT.pdf>.

¹³³ See Moriah Balingit et al., *Fueled by protests, school districts across the country cut ties with police*, WASH. POST (Jun. 12, 2020),

The administration must make clear that its actions taken on school climate affect the funds and enforcement decisions of the federal government. States and localities remain free to spend non-federal funds how they choose, so long as state and local funding decisions do not violate students' civil rights.

Opposing Interest Groups

The administration should be aware that it will likely have to defend this proposed school climate agenda against political opposition from the following groups: members of the Republican party; members of law enforcement; superintendents' groups; and school boards. For example, although AASA, The School Superintendents Association, marked addressing educational inequities as a priority in their policy recommendations for the Biden administration, it made no mention of limiting the presence of SROs as part of the solution to that problem.¹³⁴ Additionally, the administration should remain sensitive to the opinions of teachers' unions, as they may not be in consensus about the role of police in schools. Although teachers' unions nationally have adopted broader discipline reform as an issue they support, individual local unions may remain supportive of SROs as part of school communities.¹³⁵ For example, a survey of the members of the Pittsburgh Federation of Teachers revealed that 96% of educators in the city opposed taking police out of schools.¹³⁶ The president of the union, Nina Esposito-Visgitis agreed with the survey outcome, calling SROs an "overwhelming force for good."¹³⁷ As teachers' unions can be great allies in the push for improving school climate, the administration will need to focus time and resources on public education and collaboration with local unions to align on school police, exclusionary discipline, and other matters of student civil rights.

Enforcement

Another major risk worth mentioning separately is reissuing school discipline guidance without strengthening the means of enforcement for civil rights protected by Title VI. The current state of enforcing students' civil rights under Title VI remains relatively weak. Generally, there is no enforcement mechanism for agency guidance unless the administration implements nationwide compliance reviews in districts and schools—an enforcement mechanism that was not received well when ED announced their implementation in the Title IX sexual harassment context.¹³⁸

Enforcement under the current Title VI regulations also does not meet students' needs in protecting their civil rights. Currently, enforcement under Title VI regulations relies on students, parents, or other interested parties filing complaints with OCR—a resource-consuming process that falls solely on OCR. Additionally, students remain further unprotected from disparate impact discrimination, given the *Sandoval* holding stripping victims of a private right of action from Title VI claims.¹³⁹

To mitigate this risk, the Biden administration must prioritize providing students and families more robust means of enforcing their civil rights in schools. It may do so by championing federal bills that establish additional dual enforcement mechanisms between ED and DOJ and provide private rights of action for disparate impact discrimination under civil rights law. The administration should look for effective models,

<https://www.washingtonpost.com/education/2020/06/12/schools-police-george-floyd-protests/>.

¹³⁴ AASA, The School Superintendents Association, *A New Education Vision for a New Administration 2-5* (2020), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/AASABidenRecommendations2020.pdf.

¹³⁵ For example, in a 2019 report by the American Federation of Teachers, the National Education Association, and Everytown for Gun Safety, the groups acknowledged preventing school shootings as a priority but conceded that hiring school police should be a local decision. American Federation of Teachers et al., *Keeping Our Schools Safe: A Plan to Stop Mass Shootings and End Gun Violence in American Schools* 28 (2019), <https://www.aft.org/sites/default/files/keepingourschoolssafe2019.pdf>.

¹³⁶ Mark Keierleber, *Teachers Unions Historically Supported Campus Cops. George Floyd's Death — and a Wave of 'Militant' Educator Activists — Forced Them to Reconsider*, THE 74 (Jul. 27, 2020), <https://www.the74million.org/article/teachers-unions-historically-supported-campus-cops-george-floyds-death-and-a-wave-of-militant-educator-activists-forced-them-to-reconsider/>.

¹³⁷ *Id.*

¹³⁸ See Press Release, U.S. Dep't of Educ., Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools (Feb. 26, 2020) (archived at <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools>).

¹³⁹ 532 U.S. at 293.

such as the Protecting Our Students in Schools Act,¹⁴⁰ which authorizes the Attorney General to file civil actions against violating entities like schools on behalf of parents or groups of parents, and grants students or their parents the right to file federal or state civil actions if the student was subjected to corporal punishment.¹⁴¹ Uplifting legislation that strengthens enforcement of civil rights laws for students will be critical in improving school climate for all students.

VI. Next Steps

Advocates

- **Draft proposed Executive Order and discipline guidance package.** Advocates should draft language based on the proposals in this memorandum to complete an Executive Order draft and any supporting materials. Advocates should also propose model language for the updates to the discipline guidance package.
- **Create a timeline for the proposed Title VI and Title IX regulations.** Advocates should develop a realistic but urgent timeline with which to advise the new administration on its rulemakings. Advocates should also start to create a framework for the new regulations (including brainstorming model language), which can be further developed after the inauguration.

Early Administration

- **Fill OCR staff vacancies and propose significant increases to OCR's staff and budget in the President's FY2022 Budget Request.** At a minimum, the OCR staffing level should be doubled from the size it was at the end of the Obama administration to not only ensure that ED is able to efficiently revise guidance documents and engage in rulemaking, but also to return to investigating complaints for systemic discrimination.
- **Facilitate discussions with OCR staff.** The ED Agency Review Team should discuss ambitious but realistic guidance and rulemaking deadlines with OCR career staff.
- **Facilitate discussions with DOJ.** The ED Agency Review Team should open communications with the DOJ Agency Review Team on building a coordinated agenda to protect all students' civil rights.
- **Revise and reissue school discipline guidance package.** Early ED appointees and OCR staff should immediately repeal the November 4 rule on Rulemaking and Guidance Procedures and begin the review process for issuing the updated school discipline guidance package. Early steps should include scheduling listening sessions with civil rights advocates and other impacted communities.
- **Initiate Title VI and Title IX rulemaking.** Early ED appointees should introduce these recommendations to the career OCR staff to begin the rulemaking process, especially if aiming to promulgate more than one rule within the first term.

¹⁴⁰ This bill was introduced by Congressman A. Donald McEachin and Congresswoman Suzanne Bonamici on September 30, 2020. Protecting Our Students in Schools Act, H.R. 8460, 116th Cong. (2020).

¹⁴¹ *Id.* §§ 101(b), 102.

- **Restoring dress and grooming standards regulations.** OCR should also restore regulations related to dress and grooming standards, previously rescinded in 1982.¹⁴² Dress and grooming standards disproportionately affect girls as they often serve as a means of enforcing gendered notions of attire, perpetuating racial stereotypes about cultural attire, and wrongfully putting the onus on girls for “distracting” boys with their dress.¹⁴³ For example, studies show that Black girls are more likely than other demographics of students to lose instruction time through exclusionary discipline, such as in- and out-of-school suspensions, as a result of a dress code or grooming violation.¹⁴⁴ Dress codes can also specifically harm LGBTQ students and other gender-nonconforming students. OCR should address this problem by prohibiting the use of exclusionary discipline on students based on their gender and sexist dress and grooming standards in school.

¹⁴² Prior to amendments made in 1982, 34 CFR, section 106.31 stated “. . . in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . . Discriminate against any person in the application of any rules of appearance”

¹⁴³ See Dress Coded, *supra* note 10.

¹⁴⁴ See *id.* at 16 (finding Black girls in the District of Columbia were 20.8 times more likely to be suspended than white girls, often for minor infractions of the school dress code).



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