

May 24, 2021

Via U.S. Mail and E-mail

The Honorable Dr. Miguel A. Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Discrimination in School Discipline

Dear Secretary Cardona and Attorney General Garland:

We, the Attorneys General of Michigan, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin write to request that your departments jointly reinstate and expand a 2014 guidance package designed to help public elementary and secondary schools meet their obligations under federal law to administer student discipline equitably. Exclusionary discipline remains prevalent across the country and continues to disproportionately impact students of color and students with disabilities. In addition, data is now emerging that LGBTQ students may also be targeted more frequently with exclusionary and other more severe forms of discipline.

In 2014, the Department of Education (ED) and the Department of Justice (DOJ) jointly issued a guidance package that explained federal law prohibits school discipline that either intentionally discriminates or unintentionally results in a disparate impact based on a student's race, color, or national origin.¹ Four years later, ED and DOJ withdrew this guidance, backtracking on the important work of ensuring all students can access public education without fear of racial discrimination through student discipline. To get back on track, the 2014 guidance should be reissued. Additionally, in keeping with the Biden Administration's push to prevent discrimination in education, including discrimination against students based on their sex, sexual orientation, gender identity, and disability,² we urge you to expand the 2014 guidance to include these additional forms of discrimination.

¹ The 2014 Guidance Package is available at <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

² See, e.g., Exec. Order No. 14021, *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender*

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

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

In 2014, the Department of Education and the Department of Justice jointly issued a guidance package designed to “help public elementary and secondary schools administer student discipline in a manner that does not discriminate on the basis of race.”³ The package included a Dear Colleague Letter,⁴ a guiding principles report,⁵ a directory of federal school climate and discipline resources,⁶ and a compendium of the school discipline laws and regulations by state.⁷

Identity, 86 Fed. Reg. 13,803 (Mar. 11, 2021); Exec. Order No. 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7,023 (Jan. 25, 2021).

³ U.S. Dep't of Educ. & U.S. Dep't of Justice, *Joint Dear Colleague Letter* (Jan. 8, 2014), at 2, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (hereinafter “2014 Dear Colleague Letter”).

⁴ *Id.*

⁵ U.S. Dep't of Educ., *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

⁶ U.S. Dep't of Educ., *Appendix 1: Directory of Federal School Climate and Discipline Resources* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf>.

⁷ U.S. Dep't of Educ., *Appendix 2: Compendium of School Discipline Laws and Regulations for the 50 States, Washington, D.C., and Puerto Rico* (2014), available at <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-2-compendium-of-laws-and-regulations.pdf>.

The 2014 Dear Colleague Letter provided a framework for the Departments' investigations of racial discrimination related to student discipline.⁸ The Letter defines unlawful discrimination to include (1) "if a student is subjected to *different treatment* based on the student's race" or (2) "if a policy is neutral on its face – meaning that the policy itself does not mention race – and is administered in an evenhanded manner but has a *disparate impact*, i.e., a disproportionate and unjustified *effect* on students of a particular race."⁹ This definition is crucial for students across the country because, while the first form of discrimination—intentional discrimination based on a student's race—has long been recognized as unlawful, the second form of discrimination—disparate impact discrimination—was less well recognized and not often prioritized before 2014.¹⁰ By including disparate impact discrimination within the Letter, the Departments sent a strong message to schools that both the discipline and the effect of the discipline on students are subject to review when evaluating if the school engaged in racial discrimination.¹¹

The companion publication, *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, provided schools a path to creating safe and supportive conditions for learning.¹² The three guiding principles to creating a productive learning environment were identified as (1) creating a positive school climate; (2) creating a school discipline policy that is clear and consistently implemented to provide the school community with clear expectations and consequences; and (3) continually monitoring the school's disciplinary policies and

⁸ 2014 Dear Colleague Letter, *supra* note 3.

⁹ *Id.* at 7.

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

¹¹ See Daniel Losen, et al., *Are We Closing the School Discipline Gap* (Feb. 2015), at 11 ("The clear message presented in the [2014] guidance is that school administrators must examine their data and discipline policies and practices, and undertake efforts to close the discipline gap where unjustifiable disparities are found. While this legal and moral obligation to eliminate racial disparities is not new, this guidance is the first joint federal effort to explicitly call upon school leaders to take immediate action.") (internal citation omitted), available at https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf.

¹² U.S. Dep't of Educ., *Guiding Principles*, *supra* note 5.

practices to ensure they are equitably implemented.¹³ The *Guidance Principles* publication emphasizes the use of restorative justice practices and other problem-solving and constructive remedies instead of costly and disruptive suspensions and expulsions.¹⁴ Importantly, despite what many critics of the *Guidance Principles*—and the 2014 guidance package more broadly—wrongly proclaim,¹⁵ the *Guidance Principles* do not instruct schools to *never* utilize exclusionary disciplinary practice, but simply recommend that disciplinary practices that remove a student from the classroom be utilized as a “last resort” and only for “serious infractions.”¹⁶

In June of 2017, under a new administration, the Department of Education’s Office of Civil Rights (OCR) sent an internal memorandum to its regional offices, instructing the offices to limit the “scope of the investigation of all OCR cases.”¹⁷ The internal memorandum directed that OCR investigators should “no longer follow the existing investigative rule” requiring investigators to collect the past three years of complaints from the school under investigation “to assess [the school]’s compliance.”¹⁸ Functionally, this memorandum instructed regional offices to stop investigating systemic discrimination practices, including those evidenced by disparate impact, unless the “individual complaint allegations themselves raise

¹³ *Id.* at 2-5.

¹⁴ *Id.* at 12-15.

¹⁵ See U.S. Comm’n on Civil Rights, *Beyond Suspensions, Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* (2019), at 133-49, available at <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> (summarizing and debunking talking points that the 2014 guidance package restricts the use of exclusionary disciplinary practices and noting that “[c]ritics incorrectly assert that the guidance instructs teachers and administrators not to suspend students who are misbehaving . . .”); see also U.S. House of Representatives Comm. on Educ. & the Workforce Democrats, *School Discipline Guidance: Debunking Myths*, available at <https://edlabor.house.gov/imo/media/doc/School%20Discipline%20Guidance%20Fact%20Sheet.pdf> (“The 2014 guidance does not require a reduction in suspension and expulsion if no inequities are present.”).

¹⁶ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 5, at 14-16.

¹⁷ Memorandum from Candice Jackson, OCR Acting Assistant Secretary for Civil Rights, to Regional Managers, *OCR Instructions to the Field re Scope of Complaints*, at 1, available at <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>; see also Erica L. Green, *Education Dept. Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES (June 16, 2017), available at <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html>.

¹⁸ Memorandum from Candice Jackson, *supra* note 17, at 1.

systemic or class-wide issues.”¹⁹ As a result of this change in policy, ProPublica reported a year later that OCR had “scuttled more than 1,200 civil rights investigations that were begun under the Obama administration and lasted at least six months”—indicating that these investigations were likely systemic in nature or based on allegations of disparate impact discrimination.²⁰

On December 21, 2018, ED and DOJ withdrew the entirety of the 2014 guidance package, largely without explanation.²¹ The 2018 Dear Colleague Letter withdrawing the guidance package suggested that, because education policy is primarily set by states and local school districts, the *federal* government’s investigative role in enforcing *federal* civil rights statutes against racial discrimination was somehow not needed.²² In a companion Question and Answer document published with the 2018 Dear Colleague Letter, ED and DOJ made clear they no longer considered statistical evidence of a disparate impact to constitute discrimination.²³ According to a report by the U.S. Commission on Civil Rights, this approach “narrows the[] investigations of allegations of race discrimination in school discipline, including limiting proactive identification of systemic patterns.”²⁴

The extent to which the long-lasting effects of this decision will be felt are still not fully understood. Some state governments, like Michigan,²⁵ New York,²⁶

¹⁹ *Id.*; see also U.S. Comm’n on Civil Rights, *supra* note 15, at 167.

²⁰ Annie Waldman, *DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited From Obama*, PRO PUBLICA (June 21, 2018), available at <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>.

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

²² See *id.* at 2.

²³ U.S. Dep’t of Educ., Office of Civil Rights, *Questions & Answers on Racial Discrimination and School Discipline* (Dec. 21, 2018), at 2, n.6, available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf>.

²⁴ U.S. Comm’n on Civil Rights, *supra* note 15, at 167.

²⁵ See Resolution on Dignity in School, Mich. State Bd. of Educ. (Mar. 12, 2019), available at https://www.michigan.gov/documents/mde/Resolution_on_Dignity_in_Schools_final_649233_7.pdf.

²⁶ New York has continued to address racial disparities in discipline through agreements between the State and districts.

and California,²⁷ have affirmatively stated their continued commitment to eliminating discriminatory school discipline practices that manifest through a disparate impact against a particular race of students. However, given the resources available to the federal government and the investigative structures already in place, like the OCR, the federal government remains the most viable body to enforce federal civil rights statutes and ensure that schools do not discriminate against students using school discipline.

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

The 2014 Dear Colleague Letter correctly identified racial discrimination in school discipline as “a real problem.”²⁸ The history of racial discrimination in school discipline is long and well documented.²⁹

Since 2014, the disparity in the use of suspensions and expulsions against Black students has only continued. Black students remain 3.9 times more likely to be suspended compared to White students across the country.³⁰ The OCR’s 2015-2016 Civil Rights Data Collection (CRDC) determined that “Black male students represented 8 percent of enrolled students and accounted for 25 percent of students who received an out-of-school suspension.”³¹ Similarly high suspension rates follow for Black female students (8% percent of students enrolled and 14% of out-of-school suspensions), and expulsion rates for all Black students mirror these disparities (16% of students enrolled and 33% of expulsions).³² Analysis of the 2015-2016 CRDC data by the UCLA’s Center for Civil Rights and Remedies determined that

²⁷ See Guidance letter from Xavier Becerra, Attorney General of California, *Oversight and Enforcement of Laws Related to Discrimination in School Discipline in California* (Feb. 4, 2019), available at <https://oag.ca.gov/system/files/attachments/press-docs/bcj-school-discipline-letter.pdf>.

²⁸ 2014 Dear Colleague Letter, *supra* note 3, at 4.

²⁹ See *id.* at 3-4, n.7 (citing a variety of studies documenting the disproportionate use of exclusionary discipline against students of color); see also Guidance letter from Xavier Becerra, *supra* note 27, at 3-4 (same).

³⁰ Lena V. Groefer, et al., *Miseducation: Is There Racial Inequality at Your School?*, PROPUBLICA (Oct. 16, 2018), available at <https://projects.propublica.org/miseducation/>.

³¹ U.S. Dep’t of Educ., OCR, *2015-16 Civil Rights Data Collection: School Climate and Safety* (updated May 17, 2019), at 13, available at <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

³² *Id.* at 13, 15.

these broader statistics mask even higher racial disparities at the secondary school level.³³ For example, “at the secondary level, Black students lost 103 days per 100 [students] enrolled. For White students, the corresponding rate was 21 days lost per 100.”³⁴

Preliminary statistical analysis of the recently released 2017-2018 CRDC data shows a continuation of these disparate trends.³⁵ For example, approximately 35% of students who received at least one suspension and 36% of students who received at least one expulsion were Black students, despite Black students representing only about 15% of total students.³⁶

Crucially, this disparity is solely based on students’ race—not on other societal factors. In a recent report, the U.S. Commission on Civil Rights found that:

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

³³ Daniel J. Losen & Paul Martinez, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* (Oct. 2020), available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>.

³⁴ *Id.* at 6; *see also id.* at 21-26.

³⁵ The 2017-2018 CRDC data was released in October of 2020, after significant delay, and included no statistical analysis related to school discipline. *See* U.S. Dep’t of Educ., *Civil Rights Data Collection (CRDC) for the 2017-2018 School Year* (Oct. 14, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html>; *see also, e.g.*, Statement from Deborah Delisle, President and CEO of the Alliance for Excellent Education, on the New Federal Civil Rights Data Collection (Oct. 19, 2020), available at <https://all4ed.org/press/statement-from-deborah-delisle-president-and-ceo-of-the-alliance-for-excellent-education-on-the-new-federal-civil-rights-data-collection/>. In fact, OCR only released raw data for the 2017-2018 CRDC related to school discipline, which could take researchers years to fully digest. To encourage transparency and allow the public to understand this trove of data, as soon as able, OCR should publish some statistical analysis of the 2017-2018 CRDC data related to school discipline (e.g., total suspension and expulsion rates by race, sex, and disability, etc.).

³⁶ Based on 2017-2018 CRDC raw data, available at <https://www2.ed.gov/about/offices/list/ocr/docs/2017-18-crdc-data.zip>.

[W]hite peers and receive harsher and longer punishments than their [W]hite peers receive for like offenses.³⁷

This widely accepted finding is represented in numerous peer-reviewed social-science studies.³⁸

The costs of these continued disparities are equally well documented. Study after study demonstrates the adverse educational outcomes and lifelong impacts on students who are subjected to exclusionary discipline practices.³⁹ Most directly, there is a clear connection between exclusionary school discipline and an increased rate of incarceration—the phenomenon often referred to as the “school-to-prison pipeline.”⁴⁰ Quantifying the connection between exclusionary school discipline and future incarceration, the Nation Bureau of Economic Research recently found that

³⁷ U.S. Comm’n on Civil Rights, *supra* note 15, at 161.

³⁸ See Kent McIntosh, et al., *Education not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5:2 JOURNAL OF APPLIED RSCH. ON CHILD.: INFO. POLICY FOR CHILD. AT RISK 2-3 (2014) (“[T]here is no published research demonstrating that students of color—and African American students in particular—have higher base rates of problem behavior.”); see also, e.g., Kate M. Wegmann & Brittanni Smith, *Examining Racial/Ethnic Disparities in School Discipline in the Context of Student-Reported Behavior Infractions*, 103 CHILD. AND YOUTH SERVS. REV. 18 (2019); Paul L. Morgan, et al., *Are Students With Disabilities Suspended More Frequently Than Otherwise Similar Students Without Disabilities?*, 72 J. SCH. PSYCHOLOGY 1-13 (Feb. 2019); Russell J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 335 (2002).

³⁹ See, e.g., Russell W. Rumberger & Daniel J. Losen, *The Hidden Costs of California’s Harsh School Discipline: And the Localized Economic Benefits From Suspending Fewer High School Students* (Mar. 8, 2017), available at <http://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-hidden-cost-of-californias-harsh-discipline>; Losen & Martinez, *supra* note 33.

⁴⁰ U.S. Commission on Civil Rights, *supra* note 15, at 37-42; Andrew Bacher-Hicks, et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2019) (working paper), available at https://www.nber.org/system/files/working_papers/w26257/w26257.pdf; McIntosh, *supra* note 38, at 1; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1064-65 (2016); Tony Fabelo, et al., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, NEW YORK: COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (July 2011), available at https://knowledgecenter.csg.org/kc/system/files/Breaking_School_Rules.pdf.

attending a school with an above average use of suspension increases a student's future chances of being incarcerated by 17%.⁴¹ If the student is minority, the chance of incarceration increases by an additional 3.1%.⁴²

Alternative school disciplinary practices—like those recommended in the 2014 *Guiding Principles*, including restorative justice practices and positive school climates—are likewise shown to both reduce the use of exclusionary discipline generally and also to reduce the disparate rates at which Black students are subject to such discipline.⁴³ Reissuing and updating the *Guiding Principles* based on the latest research is crucial to provide schools with guidelines to implement these effective strategies. Particularly now, as students return to the classroom after a year of learning interruptions, the last thing students need is to be excluded from school yet again.⁴⁴ Thus, the Departments' issuance of an updated *Guiding Principles* is urgent. Reissuing the *Guiding Principles* will further encourage

⁴¹ Bacher-Hicks, *supra* note 40, at 19-20.

⁴² *Id.* at 20. A similar study estimated that the suspension of approximately 9,618 Black 10th grade students in California in 2011-2012 cost the state \$418 million in social losses and \$126 million in fiscal losses. Rumberger & Losen, *supra* note 39, at 14-15.

⁴³ See, e.g., Catherin H. Augustine, et al., *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District* (2018), available at https://www.rand.org/pubs/research_reports/RR2840.html; Nance, *supra* note 40, at 1070-71; McIntosh, *supra* note 38, at 11-13; Tex. Juvenile Justice Dep't, *Effectiveness of Positive Behavioral Interventions and Supports* (2012), available at <https://www2.tjtd.texas.gov/publications/reports/PBISLegislativeReport2012-12.pdf>.

⁴⁴ Federal education grants, under the American Rescue Plan Act, may provide schools with resources to hire counselors, social workers, and other staff who can help to implement restorative justice programs and positive behavioral models. See American Rescue Plan Act of 2021, Pub. L. 117-2, §§ 2001(e)(2)(L), (R), 135 Stat. 4 (2021); American Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21,1197 (Apr. 22, 2021) (“An LEA may also use the ARP ESSER funds to address the academic, social, emotional, and mental health needs of its students by, for example, hiring additional personnel such as school counselors, psychologists, and nurses and implementing strategies to accelerate learning and to make investments in teaching and learning that will result in lasting improvements in the LEA.”).

schools to embrace positive behavior models and restorative justice programs,⁴⁵ and reduce racial disparities and the adverse impacts wrought on students of color.⁴⁶

As the 2014 Dear Colleague Letter identified, the federal government’s “guidance is critically needed to ensure that all students have an equal opportunity to learn and grow in school.”⁴⁷ Ongoing federal enforcement of federal civil rights statutes is necessary and appropriate. By reissuing the 2014 guidance package, OCR will again be able to initiate investigation based on systemic disparate treatment against students of color. Without the guidance, students of color will be left to continually suffer the undeniable effects of disparate treatment.

III. Expansion of the 2014 Guidance to Address Discrimination in School Discipline Based on Sex, Sexual Orientation, Gender Identity, and Disability.

Disparities in school discipline are not limited to those based on race. CRDC data has long documented disparities based on sex, with male students facing exclusionary discipline at significantly higher rates than female students.^{48 49}

⁴⁵ Many states have enacted statutes encouraging the use of restorative justice practices in lieu of exclusionary discipline. For example, in Michigan, school districts must consider using restorative practices—defined as “practices that emphasize repairing the harm to the victim and the school community caused by a pupil’s misconduct”—as an alternative to expulsions and long-term suspensions. Mich. Comp. L. § 380.1310c.⁴⁶ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 5, at 12-15.

⁴⁶ U.S. Dep’t of Educ., *Guiding Principles*, *supra* note 5, at 12-15.

⁴⁷ 2014 Dear Colleague Letter, *supra* note 3, at 5.

⁴⁸ U.S. Dep’t of Educ., *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 30, at 13, 15; U.S. Dep’t of Educ., *2013-2014 Civil Rights Data Collection: A First Look* (revised Oct. 28, 2016), at 3-4, available at <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>; U.S. Dep’t of Educ., *Data Snapshot: School Discipline* (March 2014), at 3, 5, available at <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>; U.S. Dep’t of Educ., *Gender Equity in Education: A Data Snapshot* (June 2012), at 4, available at <https://www2.ed.gov/about/offices/list/ocr/docs/gender-equity-in-education.pdf>. The 2017-2018 CRDC data reflects a continuation of this sex-based disparity, with male students representing 70% of the students who served at least one suspension or expulsion and similarly serving approximately 70% of total suspension days. *See* 2017-2018 CRDC raw data, *supra* note 35.

⁴⁹ Notably, when race is taken into account, disparities for female Black students are particularly stark vis-à-vis their White counterparts. *See* Erica L. Green, et al., ‘A Battle for the Souls of Black Girls’, THE NEW YORK TIMES (Oct. 1, 2020), available

Similarly, disparities between students with disabilities and students without disabilities are well documented both in CRDC’s data and in a litany of academic studies.⁵⁰ Notably, this disparity is even higher for Black students with disabilities.⁵¹ And, more recently, data has emerged that LGBTQ students—who already face significantly higher rates of bullying in schools⁵²—are also subjected to more severe discipline than heterosexual and cisgender students.⁵³

at <https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html>. We recommend that expanded guidance address the need for schools to consider intersectionality in analyzing the impact of their policies and practices.

⁵⁰ U.S. Dep’t of Educ., *2015-16 Civil Rights Data Collection: School Climate and Safety*, *supra* note 31, at 14, 16; U.S. Dep’t of Educ., *2013-2014 Civil Rights Data Collection: A First Look*, *supra* note 48, at 4 (“Students with disabilities served by IDEA (12%) are more than twice as likely to receive one or more out-of-school suspensions as students without disabilities (5%).”); U.S. Dep’t of Educ., *Data Snapshot: School Discipline*, *supra* note 48, at 3 (same, for 2011-2012 CRDC data); 2014 Dear Colleague Letter, *supra* note 3, at 3 n.6; U.S. Comm’n on Civil Rights, *supra* note 15, at 162; Morgan, *supra* note 38; Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School* (August 2012), at 7, 16-18, available at <https://files.eric.ed.gov/fulltext/ED534178.pdf>. The 2017-2018 CRDC data continues to show that students with disabilities are approximately twice as likely to face exclusionary discipline compared to students without disabilities. *See* 2017-2018 CRDC raw data, *supra* note 36.

⁵¹ Daniel J. Losen, et al., *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* (March 2021), at 6, available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf>; *see also* U.S. Dep’t of Educ., 2013-2014 Civil Rights Data Collection: A First Look, *supra* note 48, at 4; U.S. Dep’t of Educ., *Data Snapshot: School Discipline*, *supra* note 48, at 4; U.S. Comm’n on Civil Rights, *supra* note 15, at 170;.

⁵² *See, e.g.*, Mariella Arredondo, et al., *Documenting Disparities for LGBT Students: Expanding the Collection and Reporting of Data on Sexual Orientation and Gender Identity* (March 2016), available at <https://vtechworks.lib.vt.edu/bitstream/handle/10919/86981/DisparitiesLGBTStudents.pdf?sequence=1&isAllowed=y>; Sandra Koepels & Megan S. Paceley, *Reducing Bullying Toward LGBTQ Youths in Schools*, 37 SCH. SOCIAL WORK JOURNAL 96-111 (2012).

⁵³ GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* (2016), available at https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf;

Discrimination, whether based on race, sex, sexual orientation, gender identity, or disability, is simply wrong. Federal civil rights statutes provide the Departments monitoring and enforcement abilities against all such discrimination. As noted on OCR’s website, Title IX prohibits discrimination based on sex, sexual orientation, or gender identity in any education program that received federal financial assistance.⁵⁴ For discrimination based on a student’s disability, a host of civil rights statutes broadly protect students, including the IDEA, ADA, and Section 504.⁵⁵ It is incumbent on ED and DOJ to ensure that all forms of discrimination through school discipline are prohibited.

Moreover, expanding the 2014 guidance package to address discrimination based on sex, sexual orientation, gender identify, and disability would be directly in line with many of President Biden’s earliest executive orders. On his first day in office, President Biden signed Executive Order No. 13,985, which defines “equity” to mean:

the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved

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

⁵⁴ See U.S. Dep’t of Educ., *Resources for LGBTQ Students*, <https://www2.ed.gov/about/offices/list/ocr/lgbt.html> (last modified Feb. 24, 2021); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Attorney General, to Federal Agency Civil Rights Directors and General Counsels, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), available at <https://www.justice.gov/crt/page/file/1383026/download>; see also *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020); 2014 Dear Colleague Letter, *supra* note 3, at 2 n.4 (noting that the “analytical framework laid out in the [2014 Dear Colleague Letter] also applies to discrimination on other prohibited grounds” and specifically referencing discrimination based on sex as prohibited by Title IV and Title IX).

⁵⁵ See 2014 Dear Colleague Letter, *supra* note 3, at 2-3 n.4 (describing that discrimination based on a student’s disability is prohibited by Section 504, the ADA, and the IDEA).

communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; **lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities**; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.⁵⁶

Days later, in Executive Order No. 13,988, the President directed all federal agencies to expand their anti-discrimination efforts to address discrimination based on sexual orientation and gender identity.⁵⁷ President Biden followed soon after with another order specifically addressing disparities in education.⁵⁸ Executive Order No. 14,021 directs the Department of Education, with consultation from the Department of Justice, to review its regulations and policies to ensure that they are consistent with the Biden Administration’s policy “that all students should be guaranteed an educational environment free from discrimination on the basis of sex, . . . and including discrimination on the basis of sexual orientation or gender identity.”⁵⁹ Expanding the 2014 guidance responds directly to this Executive Order.

IV. Conclusion and Request

Secretary Cardona recently stated that “[b]uilding educational environments free from discrimination where our nation’s students can grow and thrive is a top priority of the Biden-Harris Administration.”⁶⁰ Reissuing and expanding the 2014 guidance package would provide a clear step in this direction.

⁵⁶ Exec. Order No. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7,009 (Jan. 20, 2021) (emphasis added).

⁵⁷ Exec. Order No. 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7,023 (Jan. 25, 2021).

⁵⁸ Exec. Order No. 14021, *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, 86 Fed. Reg. 13,803 (Mar. 11, 2021).

⁵⁹ *Id.* § 1.

⁶⁰ Press Release, *Department of Education’s Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden’s Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination* (Apr. 6, 2021), available at <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>.

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

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

Sincerely,



Dana Nessel
Attorney General of Michigan



Rob Bonta
Attorney General of California



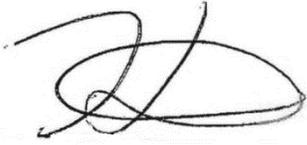
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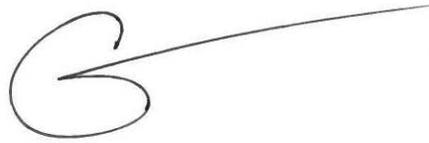
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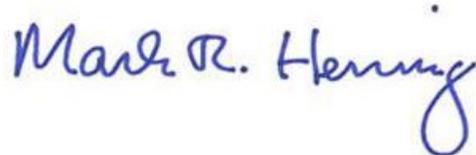
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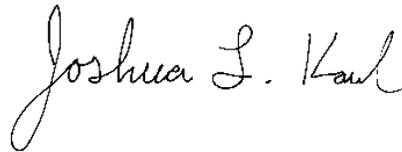
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