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School Discipline Guidance and Students' Civil Rights

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Introduction

Suspensions and expulsions, practices that remove a child from school temporarily or permanently¹ in response to alleged misbehavior, are used too often in our schools and disproportionately used against children of color, children with disabilities, and LGBTQ youth.² Researchers estimate that suspensions, most of which are for minor behaviors, result in tens of millions of days of lost instruction.³ For more than 40 years⁴ this problem has been documented and described by researchers, the U.S. Department of Education (ED), children, educators, and community advocates.

After years of advocacy, as well as groundbreaking research,⁵ the U.S. Department of Justice (DOJ) and ED jointly released⁶ a school discipline guidance⁷ package on January 8, 2014, including a “Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline.” The materials included were intended to assist states, districts, and schools in developing practices and policies to enhance school climate and comply with federal civil rights laws. Recently, consistent with other attacks on civil rights and communities of color, there have been public calls by opponents of school discipline reform to rescind this guidance and undermine the protections it describes.⁸

Harm to Children

When a child is pushed out of school they lose instructional time and are more likely to become involved with the juvenile and adult justice systems.⁹ Disproportionate suspension rates mean children of color lose more instructional time than their White peers.¹⁰ Multiple studies have shown other negative effects on suspended children¹¹ as well as harm to children when their peers are suspended.¹² As the American Academy of Pediatrics says, “out-of-school suspension and expulsion represent an enormously costly and largely unsatisfac-

tory solution to behavior problems in school, whether from the standpoint of the school district, the student, or the community.”¹³ These harms to children come with no benefit to school safety or student learning.¹⁴

The 2014 guidance documents provide important information and support for educators who want to create safer and more welcoming schools, as well as important cautions for schools where problems are not being addressed and children continue to be treated unfairly. The guidance documents themselves, however, are not enough to ensure schools are safe and fair for their students. Schools and their teachers need sufficient support and resources, and sufficient enforcement action needs to be taken, to ensure that the promise of the guidance documents and our civil rights laws really result in improved educational opportunity for children.

Advocacy Leads to Federal Action

Students, parents, educators, and civil rights advocates asked ED and DOJ for years to get involved and address the overuse and discriminatory use of suspension and expulsion. The disproportionate use of exclusionary discipline could not be explained by differences in child behavior, and so it was clear that action was needed to change the policies and practices of adults throughout the educational system.¹⁵ The guidance documents were created to help schools serve students more effectively by:

- explaining the harms of pushing children out of school;
 - reminding them that racial discrimination is illegal, including discrimination in school discipline; and
 - providing recommendations and practical resources to reduce disparities in exclusionary discipline and improve school climate.
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The guidance package is a resource resulting from a collaborative project—the Supportive School Discipline Initiative (SSDI)—between ED and DOJ. The SSDI, launched in 2011, addresses the school-to-prison pipeline and the disciplinary policies and practices that can push children out of school and into the justice system. Prior to the release of the guidance documents, there were extensive meetings, convenings, and conversations with children, parents, educators, advocates, and researchers to hear a diversity of perspectives on the issue of school discipline.

ED and DOJ are responsible for implementing and enforcing federal civil rights laws, including Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin. An important component of that role is to issue regulations and guidance explaining states’ and districts’ obligations under those laws. Regulations generally go through a “notice and comment” period where the public has the formal opportunity to provide input on the proposed regulations. Guidance must also follow an established process and explain or clarify existing laws and regulations, but it does not require a formal notice and comment period.

The Guidance Package

There are four different components included in the guidance package:

- The **Dear Colleague**¹⁶ guidance letter on civil rights and discipline describes how schools can meet their legal obligations under federal law to administer student discipline without discriminating against students on the basis of race, color, or national origin;¹⁷
- The **Guiding Principles**¹⁸ document draws from emerging research and best practices to describe key principles and related action steps that can help guide state and local efforts to improve school climate and school discipline;
- The **Directory of Federal School Climate and Discipline Resources**¹⁹ indexes the extensive federal technical assistance and other resources related to school discipline and climate available to schools and districts; and
- The **Compendium of School Discipline Laws and Regulations**,²⁰ is an online catalogue of the laws and regulations related to school discipline in each of the 50 states, the District of Columbia, and Puerto Rico, and compares laws across states and jurisdictions.

The Guidance Under Threat

In line with many other attacks on civil rights protections, there have been some public calls to rescind the school discipline guidance.²¹ Recently, officials at ED met with a group calling for the rescission of the guidance.²² Having already rescinded guidance clarifying protections for transgender students and survivors of sexual assault, it is rumored that Secretary Betsy DeVos may attempt to rescind the discipline guidance documents important for protecting children of color. The recent reversals of federal guidance affirming protections in schools undermined the settled expectations and protections afforded by federal law, hurt transgender students and sexual assault survivors, and impeded the progress made in creating safer and more inclusive learning environments for all students. Withdrawing additional guidance that outlines fair treatment for children would only reinforce these previous attacks on school climate and safety.

If the Guidance Were Rescinded

Rescinding the school discipline guidance would send the message that DeVos is not concerned about the overuse and discriminatory use of suspension and expulsion in our schools. It could also have a chilling effect on important progress being made at the state and local level. However, just as the guidance did not create or change law, rescinding the guidance would have no effect on the law. Schools would still be prohibited from discriminating against students and ED would still be obligated to act when they do. Thankfully, the materials and resources provided in the guidance package are now widely available and shared by educators who are leading the way to create more equitable school climates. At such a tenuous time, when progress on school discipline has been too slow and too limited, rolling back this much needed guidance would hamper progress and undermine children’s pursuit of their education.

Intentional Discrimination and Disparate Impact

Title VI of the Civil Rights Act, as mentioned above, prohibits states, districts, and public schools²³ from discriminating on the basis of race, color, or national origin. This discrimination includes policies and practices that intentionally discriminate (such as a policy that says Latino students and English learners are not allowed to enroll in STEM programs), as well as discrimination through policies and practices that have an unjustifiable, adverse, and unlawful disparate impact²⁴ (such as those that result in underrepresentation of Latino and English learner students in STEM programs and are not justified by educational necessity).²⁵

As the school discipline guidance says,

The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to different treatment based on the student's race, and second, 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. Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations. In all cases, however, the Departments will investigate all relevant circumstances, such as the facts surrounding a student's actions and the discipline imposed.²⁶

In a California school district, for example, the Department of Education's Office for Civil Rights (OCR) found that a Black child received a harsher punishment than a White child when the district identified the behaviors as having similar consequences. In that same district, schools were allowed to deviate from district-wide conduct policies that led to inconsistency across schools and some schools imposing discipline that was not in compliance with California law. OCR found that the deviations from law and policy had a disparate impact on Black children in violation of Title VI.²⁷

Disability, Gender, and Immigration Status

There is widespread evidence that children with disabilities, both White children and children of color, are disciplined more often than their peers without disabilities.²⁸ The 2014 Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline is focused on Title VI of the Civil Rights Act, which protects children of color, including children of color with disabilities, from racial discrimination. There are other laws, including Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act,²⁹ which prohibit discrimination against people with disabilities (regardless of their race). Discriminating against a student on the basis of their disability in the context of school discipline would be a violation of those laws.³⁰

There are also requirements in the Individuals with Disabilities Education Act (IDEA) that protect children with disabilities from being suspended or expelled because of their disability,³¹ as well as a requirement that school districts address significant disproportionality in the disciplining of children of color with disabilities.³² Recently, the Center for Civil Rights Remedies testified that, nationally, Black children with disabilities lost 119 days of instruction per 100 students enrolled, which was 75 more days than their White peers.³³ The Gov-

ernment Accountability Office (GAO) found in 2013 that states were not doing enough to address significant disproportionality³⁴ and new IDEA regulations were issued in 2016 meant to strengthen the federal oversight to ensure more was done.³⁵ ED has recently issued a notice in the Federal Register seeking comment on their plan to delay implementation of this important regulation.³⁶

Too often girls experience discrimination in school discipline based on both their gender and their race. Girls of color are protected from discrimination based on race, color, and national origin under Title VI of the Civil Rights Act. Girls of color are also protected from discrimination based on sex (which includes sexual orientation and gender identity) under Title IX of the Education Amendments of 1973.³⁷ Too often girls experience discrimination in school discipline based on both their gender and their race.³⁸

For children without legal status, suspension and expulsion can have additional negative effects. Immigrant children are protected from discrimination based on their status as immigrants under the Civil Rights Act's prohibitions against discrimination based on national origin (students of color who are also immigrants are also protected based on race and color).³⁹ Additionally, the 14th Amendment, as described in the Supreme Court case *Plyler v. Doe*, protects children's access to public education regardless of their immigration status or that of their parents.⁴⁰ For children who are undocumented, disciplinary actions that lead to contact with law enforcement can place them on a path to deportation.⁴¹

More Just – and More Effective - Alternatives

Suspensions and expulsions are not the only way of responding to child misbehavior and have frequently been shown to be counterproductive. Evidence-based strategies for building positive school climates that prevent misbehavior, and restorative approaches that address the underlying problems that lead to misbehavior, more effectively achieve the educational mission of schools and more consistently comply with federal nondiscrimination law. The National Center on Safe Supportive Learning Environments⁴² and the Discipline Disparities Research to Practice Collaborative⁴³ both offer resources and research about building positive school climates and responding to child behavior.

Conclusion

Every child deserves and should be included in a warm, welcoming, and responsive school that provides them the education they need to be ready for college, career, and life. Suspension and expulsion, especially when used in a discriminatory manner, undermine that goal



and deny children the education they need. The federal government's role in ensuring schools are free from discrimination has been articulated by the Supreme Court of the United States in the *Brown v. Board of Education (1954)* decision, by Congress in the Civil Rights Act of 1964, and by the Department of Education in regulations and guidance – including the 2014 school discipline guidance – implementing that law. It is incumbent upon children, families, educators, advocates, researchers, and policymakers to ensure that progress continues, equal educational opportunity is real, and those who would seek to turn back the clock and undermine progress are stopped. The urgency is real, and the responsibility is great.

Endnotes

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