



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

July 23, 2021

Alejandro Reyes
Director, Program Legal Group
Office for Civil Rights
U.S. Department of Education
550 12th Street SW
Washington, DC 20024

RE: ED-2021-OCR-0068

Submitted via: www.regulations.gov

Dear Director Reyes,

The Consortium for Citizens with Disabilities (CCD) is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The Education Task Force proactively monitors federal legislation and regulations that address the educational needs of children with disabilities and their families, including the 7.7 million infants, children, youth and young adults eligible under the Individuals with Disabilities Education Act (IDEA) who must be provided a free, appropriate public education (FAPE) and maintain their rights to an individualized education program (IEP) that is implemented in the least restrictive environment (LRE). We also advocate for the 1.3 million students eligible under Section 504 of the Rehabilitation Act of 1973 (Section 504) and ensure equal access to educational opportunity for all these students under the Americans with Disabilities Act (ADA) and for equity and accountability of all students under the Every Student Succeeds Act (ESSA). The Education Task Force advocates for enhanced opportunities for children under these laws.

CCD is providing input on the U.S. Department of Education (ED), Office for Civil Rights (OCR) *Request for Information Regarding the Nondiscriminatory Administration of School Discipline*. CCD appreciates this proactive effort by the OCR to seek public comment on this important issue. We look forward to working with OCR on policy guidance, technical assistance and other resources.

DISCUSSION OF QUESTIONS POSED BY OCR

1. What are your views on the usefulness of current and previous guidance OCR and CRT have issued on school discipline? We would appreciate your comments on the guidance documents described above, including the 2014 guidance, the 2018 Dear Colleague letter, and the 2018 Questions & Answers on Racial Discrimination and School Discipline guidance.

RESPONSE: Issue guidance that includes all students and seeks to achieve equity, especially for students with disabilities and students of color.

CCD specifically asks OCR to include students with disabilities in a guidance package. While the intersections of federal civil rights, education and access laws are complex, CCD is adamant that students eligible under both the IDEA and Section 504 must be included.

CCD urges OCR to issue a new guidance package that directs states, districts and schools in the use of the evidence-based practices known to eliminate the use of any/all exclusionary disciplinary practices (i.e., suspension, expulsion, seclusion, physical and mechanical restraint). New guidance must provide the tools and evidence-based solutions that assure schools will be able to identify existing and new resources, train and support school teams, and collaborate with stakeholders to create a safe and healthy school climate for all.

A guidance package inclusive of students with disabilities is especially needed to address the well-documented disproportional, discriminatory, and negative impacts of exclusionary discipline practices known to traumatize and limit the future for students with disabilities, especially those who are students of color. OCR is well aware of the data showing that students with disabilities are suspended, expelled, secluded, physically and mechanically restrained and/or arrested at much higher rates than their general education peers. For students who are also Black, the numbers are infuriating. (See: [GAO: K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities](#); and, 2017-2018 CRDC).

The need for guidance on the nondiscriminatory administration of school discipline is also clearly demonstrated by the most recent discipline data from the 2017-2018 CRDC. Specifically, the evidence of disproportionate disciplinary actions on students of color, students with disabilities, and students of color with disabilities. Students with disabilities served under the IDEA represented 13 percent of total student enrollment but 27 percent of students referred to law enforcement. Black students with disabilities represented 18 percent of all students but 32 percent of those referred to law enforcement. Students with disabilities were also overrepresented in exclusionary disciplinary actions as shown by the 2017–18 CRDC data. Students with disabilities also represented 25 percent of all students who received one or more out-of-school suspensions and 15 percent of those who were expelled without educational services in 2017–18. Black students with disabilities represented 26 percent of expulsions without educational services although they accounted for only 18 percent of all students provided services under IDEA in 2017–18.

Finally, any new Dear Colleague Letters and accompanying guidance should be developed collaboratively by the U.S. Department of Justice Civil Rights Division, the OCR and the Office of Special Education Programs in order to address all students with disabilities, and to address intersectional discrimination in the administration of discipline, including on the bases of disability and race or ethnicity, to address the disturbing disparities in the discipline of students with disabilities, particularly those of color.

2. What ongoing or emerging school discipline policies or practices are relevant to you or the communities you serve, including any that you believe raise concerns about potentially discriminatory implementation or effects on students' access to educational opportunities based on race, color, national origin, sex, or disability?

RESPONSE: CCD is concerned about the following:

- Over-reliance and use of aversives such as seclusion and restraint which disproportionately impacts students with disabilities and students of color. See response to 4 (e).
- The referral of students with disabilities to alternative schools. See response to 4 (g).
- State and district implementation of the [Equity in IDEA regulations](#), effective in 2018. Comprehensive and effective implementation is needed to address the overuse of harsh disciplinary practices, including suspension, expulsion, on students with disabilities including students of color with disabilities.

- Students with disabilities are experiencing disproportionate rates of school removals compared to their peers. This is true for preschool-age children (See response to 7 (a)) as well as those ages 6-21. In 2018-2019, states identified 181 districts as having significant racial disproportionality for the incidence and duration of discipline. However, 28 states flagged none of their districts for this purpose. (See: UCLA Civil Rights Project, [Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies](#))

3. What promising practices for the administration of nondiscriminatory school discipline or creating positive school climates have you identified?

RESPONSE: The [2016 Dear Colleague Letter issued by the Office of Special Education and Rehabilitative Services](#) provided extensive guidance on ways to provide behavioral supports of IDEA-eligible students in lieu of harsh disciplinary measures and noted that:

In light of research about the detrimental impacts of disciplinary removals, including short-term disciplinary removals, the Department is issuing this guidance to clarify that schools, charter schools, and educational programs in juvenile correctional facilities must provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE and placement in the least restrictive environment (LRE). As a practical matter, providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.

Promising practices include:

- [Multi-tier System of Supports \(MTSS\)](#), a framework for schools and districts to focus on education and behavior prevention systems that shift the focus in providing educational or other supports to students from remediation to prevention.
- Positive Behavioral Interventions and Supports (PBIS) as led by the [Center on Positive Behavioral Interventions and Supports \(PBIS\)](#). The Center on PBIS recently released a set of recommendations on use of COVID-19 relief funds, [Leveraging Short Term Funding to Build Long Term Capacity](#).
- [Universal Design for Learning \(UDL\)](#), a set of principles and guidelines that encourages the design of flexible learning environments that anticipate learner variability and provide alternative routes or paths to success for *all* learners to access in-person, blended and online education. UDL provides a responsive framework to support educators in their professional learning and application in any teaching environment.

4. What are your views on this non-exhaustive list of disciplinary policies, practices, and other issues below?

(a) Discipline of students in pre-K through third grade, including in-school and out-of-school suspensions.

RESPONSE: CCD advocates that use of in-school and out-of-school suspension should be dramatically limited if not completely eliminated. Little evidence exists that such disciplinary actions achieve improved behavior and can, in fact, hinder [students' cognitive and social development](#), particularly in the early years. Use of multi-tiered systems of support (MTSS) to address disruptive behaviors, such as [social and emotional learning \(SEL\)](#), [positive behavioral interventions and supports \(PBIS\)](#) and [restorative justice practices \(RJ\)](#) should be encouraged. Also, the use of UDL and communication supports can break down barriers to learning and expression that result in disruptive behavior. Use of exclusionary discipline should be completely prohibited. See the [Conference of State Legislature's report on this topic](#).

(b) Use of exclusionary disciplinary penalties, such as suspensions or expulsions, for minor, non-violent, or subjectively defined types of infractions, such as defiance or disrespect of authority.

RESPONSE: CCD believes the use of suspensions and expulsions for minor, non-violent infractions should be prohibited. As the Department has recognized, suspensions and other disciplinary removals generally do not help reduce misbehavior, and may negatively affect the student. For students with disabilities, suspensions may indicate that the school is not meeting the student’s behavioral needs, and is not providing the student a free appropriate public education or equal educational opportunities. Specifically regarding students with disabilities (IDEA or Section 504), instead of suspending, the school should determine whether the infraction was a [manifestation](#) of the student’s disability and whether appropriate behavioral and academic supports are in place for the student. Behavioral supports, including in some cases proactively conducting a Functional Behavior Assessment (FBA) that includes a thorough analysis that identifies and seeks to understand behaviors not appropriate for school, and developing a [Behavioral Intervention Plan](#) (BIP) on the basis of the FBA, should be provided as an alternative to suspending or expelling the student. [The IRIS Center \(https://iris.peabody.vanderbilt.edu/\)](https://iris.peabody.vanderbilt.edu/) offers valuable resources on FBAs, BIPs and more.

(d) Corporal punishment.

RESPONSE: CCD supports the elimination of use of corporal punishment and supports [H.R. 1234/S.2029](#), the *Protecting Our Students in Schools Act* which would prohibit the use of corporal punishment in public schools and has been introduced in the 117th Congress.

(e) Inappropriate use of seclusion and restraint for disciplinary purposes.

RESPONSE: We adamantly oppose use of seclusion and inappropriate restraint in schools and support [HR 3474/S.1878](#), the *Keeping All Students Safe Act* which would prohibit the use of seclusion, mechanical, prone, supine and chemical restraint, and reduce the use of physical restraint. The bill has been introduced in the 117th Congress. Students with disabilities are 20 times more likely than peers to be restrained and/or secluded. Students with disabilities make up 13 percent of student enrollment but account for 78 percent of students secluded/restrained. In 2019, OCR and the Office of Special Education and Rehabilitative Services (OSERS) partnered to provide support and technical assistance to schools in a way that would strengthen protections for children with disabilities. A report on this initiative is [available here](#).

(f) Referrals to and the resulting interactions with school police, school resource officers, or other law enforcement.

RESPONSE: Data clearly show that the use of referrals to school police, school resource officers, or other law enforcement disproportionately impact students with disabilities, particularly students with disabilities of color. As reported in the GAO report GAO-18-258, *Discipline Disparities for Black Students, Boys, and Students with Disabilities*:

Across each disciplinary action, Black students, boys, and students with disabilities experienced disproportionate levels of discipline. Black students were particularly overrepresented among students who were suspended from school, received corporal punishment, or had a school-related arrest (see fig. 2).

(g) Referrals to alternative schools and programs.

RESPONSE: Data show that students with disabilities are disproportionately referred to “alternative” schools/programs. Importantly, such schools are found to have low graduation rates. While only 6 percent of high schools in the U.S. were classified as ‘alternative schools’ in 2017, they accounted for 30 percent of all low-graduation rate high schools. Many states have designed their ESSA accountability systems in such a manner that the performance of students in alternative schools has little if any impact. Most states do not require the performance of students in alternative schools to be assigned to the

school the student would be assigned to if not placed in the alternative school, creating a strong incentive to refer poor-performing students.

As a [2017 ProPublica report](#) found, states and school districts have created a patchwork of rules on who should attend public alternative schools and why, making it difficult to gather reliable data. Many are ‘out-of-school suspension’ by another name. Referral to/placement in alternative schools should be monitored by both OCR and the Office of Special Education (OSEP).

(i) Students bringing weapons or using them at school.

RESPONSE: While the IDEA allows for quick removal of students with disabilities in such scenarios, the IDEA requires that the student’s IEP should be revised to address his or her behavioral needs, including conducting or updating an FBA and BIP. Per OSERS’ 2016 guidance, schools should proactively respond to the behavioral needs of students with disabilities before waiting for serious disciplinary incidents to happen. We continue to raise grave concern regarding the proper identification and programming of students with disabilities who may be at risk of such behaviors, and whether appropriate preventative interventions and services were provided that would have ameliorated student behavior, preventing serious safety incidents from occurring.

(k) School policies or practices related to teacher and staff training related to discipline, the role teachers play in referrals of students for discipline, and the role of implicit bias in disciplinary decisions.

RESPONSE: CCD believes that training of school leaders, teachers and staff including specialized instructional support personnel (SISP) is woefully inadequate. As has been shown time and again, making an investment in training and support for school personnel with regard to not only alternatives to harsh discipline but also to the school’s responsibilities under Federal laws (e.g. IDEA, Section 504) will result in dramatic reductions – if not complete elimination – of the use of harsh and seclusionary discipline measures and create positive conditions for learning.

(l) Discipline related to attendance and time management.

RESPONSE: Discipline related to attendance is particularly concerning given that most states chose chronic absenteeism as a factor in the state accountability plans under the Every Student Succeeds Act (ESSA). CCD’s concern is that often, students may have particular challenges with time management and/or may miss school due to their disability, which is then dealt with through disciplinary action. It is often the case that the challenge may not have been properly identified in the student’s IEP or 504 Plan nor have the appropriate supports been put into place. To provide technical assistance on these and related issues, the National Center on Educational Outcomes published a brief, [Students with Disabilities and Chronic Absenteeism](#) which provides recommended actions for schools to take to address absenteeism of students with disabilities.

(m) Discipline of victims of race, color, or national origin harassment, sex harassment, or disability harassment for misconduct that arises as a result of such harassment.

RESPONSE: Schools have an obligation under Federal law to address harassment. Disciplining the victims is not among them. See [StopBullying.gov](#).

(p) Discipline issues relating to virtual learning.

RESPONSE: We feel that the recently released OCR document, [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#) is adequately addressing these issues.

(q) Discipline issues relating to returning to in-person instruction.

RESPONSE: CCD believes the recently released OCR document, [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#) is adequately addressing these issues. However, we have become concerned with reports that students are being moved into remote instruction as a form

of discipline, without following the IDEA process for removal from in person instruction. That issue needs to be monitored and addressed.

5. What types of guidance and technical assistance can OCR provide to best help SEAs and LEAs create positive, inclusive, safe, and supportive school climates and identify, address, and remedy discriminatory student discipline policies and practices (for example, Dear Colleague letters, Frequently Asked Questions documents, fact sheets, tool kits, videos on the nondiscriminatory administration of school discipline or positive school climate, and guidance on returning students to in-person instruction)?

RESPONSE: In addition to the urgent need to reissue an updated guidance package on school discipline, OCR should use the Civil Rights Data Collection (CRDC) to identify issues requiring additional guidance.

One such issue appears to be the identification of students as eligible under Section 504. Based on recent analysis of the 2017-2018 CRDC presented in the Center for Civil Rights Remedies report, [Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies](#), thousands of school districts fail to identify even one student as eligible under Section 504. The report found 3,434 districts (roughly 20% of all districts), serving over 1.8 million students, identified zero 504-only eligible students.

6. What promising practices that have reduced the use of discipline or the disparities in the use of discipline between different groups of students (including promising evidence-based programs and success stories from particular school districts) should OCR consider highlighting in any future guidance or resource materials?

RESPONSE: See Response to #3. Also, OCR should collaborate with the existing TA centers (i.e., the Center on PBIS, TIES Center) to provide specific guidance on fidelity of implementation of evidence-based alternative practices. For example, more information and resources should be afforded to districts to measure their fidelity of implementation of PBIS through use of instruments like the “Schoolwide Evaluation Tool” (SET). Additionally, when OCR issues findings against districts and requires corrective action, it should ensure that fidelity of implementation is addressed with whatever alternative interventions to which a district commits.

7. How do school discipline policies impact

(a) students’ opportunity to learn;

RESPONSE: As has been pointed out in reports from the [Center for Civil Rights Remedies](#), students are losing substantial amounts of instructional time (“opportunity to learn”) due to in-school and out-of-school suspensions. And since students of color and students with disabilities are disproportionately given such discipline, they disproportionately lose instructional time. Recent data also indicate that expulsions and suspensions occur at high rates in preschool settings, including for preschool-age children with disabilities. As noted by ED and the U.S. Department of Health and Human Services in a joint [Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings](#) co-released as part of the 2014 discipline guidance package:

Suspension and expulsion can influence a number of adverse outcomes across development, health, and education. Young students who are expelled or suspended are as much as 10 times more likely to drop out of high school, experience academic failure and grade retention, hold negative school attitudes, and face incarceration than those who are not...Not only do these practices have the potential to hinder social-emotional and behavioral development, they also remove children from early learning environments and the corresponding cognitively enriching experiences that contribute to healthy development and academic success later in life. Expulsion and suspension practices may also delay or interfere with the process of identifying and addressing underlying issues, which may include disabilities or mental health issues.

In addition to the “reported” discipline actions, there is evidence that substantial “off-the-books” removals (unreported) are occurring, such as dismissing or sending students with disabilities home

earlier than their classmates and/or, advising students with disabilities to take “cool-down days,” which also circumvents the Manifestation Determination Review process.

(b) academic achievement;

RESPONSE: Discipline policies have a direct and detrimental impact on academic achievement. Since students lose instructional time, negative impact on academic achievement is to be expected. Furthermore, discipline policies impact graduation rates and drop-out rates. See response above.

(d) dropout and graduation rates;

RESPONSE: See (a) and (b).

(e) school climate and safety;

RESPONSE: Harsh discipline policies, such as “zero tolerance” have not been shown to have a positive impact on school climate or safety. This finding should be communicated in OCR guidance.

(f) access to instructional time;

RESPONSE: See (a).

8. To what extent can hiring and professional development practices be designed and aligned to ensure that teachers and staff are adequately prepared to manage classrooms and work with students in a fair and equitable manner?

RESPONSE: CCD believes that all members of the school community must be adequately prepared and have access to high-quality, ongoing professional learning opportunities to implement culturally competent, proactive approaches with students that are fundamentally fair and equitable. This includes the implementation of tiered intervention models, including PBIS, MTSS - as evidence-based practices to support access to and explicit instruction in social-emotional learning and creating school-wide positive expectations, evidence-based trauma-informed teaching strategies, de-escalation techniques, conflict resolution, peer mediation, and practices of restorative justice. Professional learning opportunities should also include UDL for instruction and assessment, use of appropriate communications supports, as well as proper implementation of FBAs and BIPs to reduce the triggers for inappropriate school behavior before a problem occurs. These practices should be reflected in the systematic preparation and evaluation of administrators, teachers, and other school personnel, including specialized instructional support staff.

All educators should be fully prepared and fully credentialed before they begin teaching. As fully prepared educators, there should be an assurance – through their program requirements or state requirements – that they possess the skills to create and sustain safe and positive learning environments and that they are knowledgeable and prepared to utilize discipline practices that are socially just and research based. The current critical shortage of teachers, particularly in special education, must be addressed in order to meaningfully ensure that students receive a fair and equitable education in a safe learning environment. Finally, we endorse CCSSO’s [Advancing Inclusive Principal Leadership \(AIPL\) State Initiative](#). See also response to 3 and 4 above.

9. Describe any data collection, analysis, or recordkeeping practices that you believe are helpful in identifying and addressing disparities in discipline. Conversely, describe any barriers or limitations in these areas, and any ideas you may have on how to overcome them.

RESPONSE: CCD recommends the following additions and changes to existing data collection:

- OCR must develop monitoring policies that trigger further investigation and examination by the relevant authority to whom data is reported (ED or the state) when the zeroes are reported in discipline data categories and/or where public domain, community member complaint, and/or alternate data source (i.e., law enforcement) suggests a report of zero is untrue.

- OCR must annually collect the Civil Rights Data Collection (CRDC).
- OCR must expand the CRDC questionnaire, consistent with CCD comments made to OCR on [August 6, 2020](#). Additions include:
 - Add “disability-504” as a disaggregation category for every question that requires disaggregation by “disability-IDEA”.
 - Add disaggregated data on “disability-IDEA” for the number of English Language (EL) students enrolled in EL programs.
 - Disaggregate the number of preschool students who received one out-of-school suspension and those who receive more than one out-of-school suspension (disaggregated by race, sex, disability-IDEA, EL).
 - Add questions on whether local education agencies (LEAs) early childhood and preschool programs serve all young children; select program characteristics (free, partial/full day, partial/full charge); and disaggregation by race, sex, disability-IDEA, EL from the question on the number of students ages 3-5 years enrolled in preschool.
 - Add questions on the number of participating students in credit recovery programs that allow them to earn missed credit to graduate from high school.
 - Add questions on advanced placement (AP) courses related to “other” subjects (including world languages and cultures) and taking AP exams for each course (disaggregated by race, sex, disability-IDEA, EL).
 - Add a data item about harassment on the basis of perceived gender identity.
 - Add question on whether an LEA has a web link to policy or policies prohibiting harassment or bullying of students on the basis of all of the following: sex; race, color, or national origin; disability (LEA).
 - Add questions related to preschool through grade 12 personnel full time equivalent (FTE) positions and salaries and non-personnel expenditures at the school level.
 - Add questions on inexperienced teachers and those with high absence rates.
 - Measure experiences of children with disabilities placed by school districts in non-public schools subject to exclusionary discipline, restraint and seclusion and other adverse actions.

The CCD Education Task Force appreciates the opportunity to provide these recommendations to OCR. We look forward to working with you and the U.S. Department of Education to assure equity in education for all infants, children, youth, and young adults with disabilities. If we can provide additional information, please contact the CCD co-chairs listed below.

Sincerely,

Autism Society
 Autistic Self Advocacy Network
 American Academy of Pediatrics
 American Psychological Association
 Association of University Centers on Disabilities
 Bazelon Center for Mental Health Law
 Children and Adults with Attention-Deficit/Hyperactivity Disorder
 Center for Learner Equity
 CommunicationFIRST
 Council for Exceptional Children
 Council of Parent Attorneys and Advocates
 Disability Rights Education & Defense Fund
 Easterseals
 Higher Education Consortium for Special Education
 Learning Disabilities Association of America

National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Association of State Head Injury Administrators
National Center for Learning Disabilities
National Center for Parent Leadership, Advocacy, and Community Empowerment
National Disability Rights Network
National Down Syndrome Congress
National Parent Teacher Association
RespectAbility
Teacher Education Division of the Council for Exceptional Children
The Advocacy Institute
The Arc of the United States

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