



July 23, 2021

Submitted via <https://www.regulations.gov/>

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

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline (86 FR 30449; Docket ID ED-2021-OCR-0068)

Dear Secretary Miguel Cardona and Acting Assistant Secretary Suzanne Goldberg,

I write to you on behalf of GLSEN, the nation's leading organization on lesbian, gay, bisexual, transgender, queer, nonbinary, gender nonconforming, and intersex (LGBTQ+) issues in K-12 education, regarding the Department of Education's Request for Information (RFI) on the nondiscriminatory administration of school discipline.¹

LGBTQ+ students—particularly those who are transgender, nonbinary, Black, Indigenous, people of color, and people with disabilities—frequently face discriminatory school discipline practices. According to GLSEN's 2019 National School Climate Survey, more than one in four LGBTQ+ students (28%) reported being disciplined for public displays of affection that are not disciplined when involving non-LGBTQ+ students and 3% reported being disciplined simply for identifying as LGBTQ+.²

GLSEN's findings consistently raise concerns about the use of school discipline as a response to LGBTQ+ students experiencing anti-LGBTQ+ bullying or discrimination at school. Discipline has been used to punish LGBTQ+ students who report that they've been harassed or assaulted based on their sexual orientation or gender identity to school staff: 7.3% of LGBTQ+ students who reported their victimization to school staff were themselves disciplined.³ Among LGBTQ+ students who did not report being bullied to a school authority, nearly half (48.4%) indicated that they felt they might be blamed and/or disciplined by school staff simply for reporting the incident.⁴

Additionally, GLSEN has found that experiencing anti-LGBTQ+ discrimination at school is associated with an increased likelihood of experiencing school discipline. Compared to their LGBTQ+ peers who did not

¹ U.S. Department of Education, "Request for Information Regarding the Nondiscriminatory Administration of School Discipline," 86 Fed. Reg. §108 (June 8, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-06-08/pdf/2021-11990.pdf>.

² Joseph G. Kosciw, Caitlin M. Clark, Nhan L. Truong, and Adrian D. Zongrone, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (New York: GLSEN, 2020), p. 41. Available at <https://www.glsen.org/research/2019-national-school-climate-survey>.

³ Kosciw et al., *The 2019 National School Climate Survey*, p. 34-35.

⁴ Kosciw et al., *The 2019 National School Climate Survey*, p. 33.

experience LGBTQ+ related discrimination at school, LGBTQ+ students who experienced discriminatory policies and practices were more likely to have been disciplined at school (40.2% vs. 22.6%).⁵ In effect, schools' discriminatory policies and practices make it "against the rules" to be LGBTQ+ resulting, for example, in trans youth being disciplined for using the bathroom that aligns with their gender.⁶

Given existing findings on disparities in the use and severity of school discipline among the general student population,⁷ it is likely that LGBTQ+ young people who are Black, Indigenous, people of color (BIPOC), and people with disabilities are subjected to unfair and discriminatory discipline at higher rates than the general LGBTQ+ student population. GLSEN's research shows that Black LGBTQ+ youth were almost twice as likely to report being disciplined by removal from school (suspension or expulsion) than their white LGBTQ+ peers.⁸ Additionally, LGBTQ+ students with disabilities are more likely to have experienced school discipline than their LGBTQ+ peers without disabilities and are also more likely to have been involved in the justice system as a result of school discipline.⁹

Given these findings, GLSEN appreciates the Department's RFI on nondiscriminatory administration of school discipline. This comment speaks to questions 1-6 and 9 of the RFI.

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.

The 2014 guidance, including the Joint Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline,¹⁰ represented an important first step in addressing disparities in the use and severity of school discipline that particularly impact students who are LGBTQ+, BIPOC, and people with disabilities. The following components were particularly important and should be retained in future guidance:

- Explanation of disparate impact, including the three-part test and flow charts.
- Examples, including of disproportionality, positive climate and prevention recommendations, and selective enforcement as a potential violation.

⁵ Kosciw et al., *The 2019 National School Climate Survey*, p. 51.

⁶ Emanuella Grinberg, "Transgender teen fights back after suspension for using 'wrong' bathroom," *CNN*, April 27, 2016, <https://www.cnn.com/2016/04/26/health/sc-transgender-student-bathroom-suspension/index.html> (Accessed July 23, 2021). Transgender Law Center, "Transgender Student Files Federal Lawsuit Against Kenosha Wisconsin School District" (July 20, 2016). <https://transgenderlawcenter.org/archives/13126> (Accessed July 23, 2021).

⁷ Richard O. Welsh and Shafiqua Little, "The school discipline dilemma: A comprehensive review of disparities and alternative approaches," *Review of Educational Research* 88, no. 5 (2018): 752-794.

⁸ Kosciw et al. (2020). *The 2019 National School Climate Survey*, p. 111.

8.8% of Black LGBTQ+ students report experiencing out-of-school discipline in the past year, compared to 4.6% of white LGBTQ+ students.

⁹ Neal A. Palmer, Emily A. Greytak, and Joseph G. Kosciw, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* (New York: GLSEN, 2016). <https://www.glsen.org/research/educational-exclusion-drop-out-push-out-school-prison-pipeline>.

¹⁰ U.S. Department of Justice and U.S. Department of Education, "Dear Colleague Letter on Nondiscriminatory Administration of School Discipline" (January 8, 2014) (rescinded 2018). <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

U.S. Department of Justice and U.S. Department of Education, School Discipline Guidance package website (2014) (archived 2018). <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

- Remedies, i.e., explanations of what the U.S. Department of Education (ED) and Department of Justice (DOJ) can do.
- Descriptions of the harm of the school-to-prison pipeline and racially disproportionate discipline.
- Overview of the legal framework that supports school accountability for contractors, including school-based law enforcement and private security.
- Clear language communicating that equity and safety are not in conflict.

Unfortunately, the 2014 guidance was rescinded by ED on December 21, 2018.¹¹ While rescission of the 2014 guidance did not change the way in which civil rights laws are enforced, it did undermine the protections the guidance describes.

Future guidance should retain the components listed above and add others to advance equity in educational outcomes for students who are LGBTQ+, BIPOC, and people with disabilities, including:

- Apply an intersectional lens, communicating how students at the intersection of two or more marginalized identities, including BIPOC youth and young people with disabilities who identify as LGBTQ+, often experience compounded impacts of multiple forms of discrimination. Explicitly state that students are entitled to protection on the basis of all of their identities and describe how protections under Title VI coordinate with protections under Title IX and/or Section 504, the Americans with Disabilities Act (ADA), or the Individuals with Disabilities Education Act (IDEA) (e.g., the right to a free and appropriate education [FAPE]).
- Use gender-inclusive language instead of “both sexes.”
- Clarify the role of ED and ED’s Office for Civil Rights (OCR) by providing an overview of ED’s role in implementing and enforcing laws protecting students from discriminatory school discipline, clarifying OCR’s role in investigating claims of discriminatory school discipline practices, and describing the tools ED and DOJ will use to intervene when there is noncompliance.
- Clarify that unlawful discrimination as demonstrated through a disparate impact analysis can occur both when actions are taken (e.g., a discriminatory school policies or enforcement) and when there is a failure to act (e.g., failure to provide intervention plans or to conduct manifestation determinations).
- Clearly state that the evidence does not support placing law enforcement in schools to improve safety and that the presence of school-based law enforcement is associated with discriminatory discipline practices that are particularly severe for students who are LGBTQ+, Black, Indigenous, people of color, and people with disabilities (see Footnotes 12 through 21 of this comment).
- Clearly state the tremendous harms of corporal punishment, restraint, and seclusion and name that there is no educational justification for corporal punishment or seclusion. Given the absence of any possible educational justification, any racial disparity in these treatments of children is a violation of Title VI.
- Reinforce that alternatives to exclusionary discipline, such as a referral to mental health supports, must be nondiscriminatory, e.g., encompass adequately trained professionals with competency to meet the needs of young people from marginalized communities, including LGBTQ+ youth, youth with disabilities, BIPOC youth, undocumented youth, and young people at the intersection of these identities).

¹¹ U.S. Department of Education, Dear Colleague letter (December 21, 2018). <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>.

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?

The criminalization of youth through the use of school-based law enforcement and zero tolerance discipline policies raise concerns about potentially discriminatory implementation and the effects on LGBTQ+ students’ access to educational opportunities, particularly those who are BIPOC and people with disabilities.

The number of schools with school-based law enforcement officers—sometimes referred to as school resource officers (SROs)—has drastically increased over the past several decades. In 1975, only 1% of schools reported having school-based law enforcement officers.¹² By 2018, 58% of schools reported having at least one school-based law enforcement officer.¹³

This increase has not been driven by research on the efficacy and impacts of school-based law enforcement. A Regional Education Laboratory of ED’s Institute for Education Sciences (IES) recently concluded that “the consensus of the available evidence does not support the belief that police presence makes schools safer overall.”¹⁴ At the same time, a growing body of research shows that school-based law enforcement personnel are associated with discriminatory discipline practices that are particularly severe for students who are LGBTQ+, Black, Indigenous, people of color, and people with disabilities.¹⁵

A 2020 review of existing research found that school-based law enforcement officers were more common in schools serving a high number of students of color and were associated with higher rates of punitive discipline and school arrests, mostly for non-violent offenses, and often for vague reasons such as

¹² National Institute of Education, *Violent schools, Safe schools: The safe school study report to Congress* (Washington, DC: US Government Printing Office, 1978).

¹³ Melissa Diliberti, Michael Jackson, Samuel Correa, and Zoe Padgett, *Crime, violence, discipline, and safety in U.S. public school: Findings from the school survey on crime and safety: 2017-2018* (Washington DC: National Center for Education Statistics, 2019), p. 18. <https://nces.ed.gov/pubs2019/2019061.pdf>.

¹⁴ Anthony Petrosino, Trevor Fronius, and Darius Taylor, “Research in Brief: School-Based Law Enforcement,” Regional Education Laboratory West (2020). <https://ies.ed.gov/ncee/edlabs/regions/west/Publications/Details/283> (Accessed June 24, 2021).

¹⁵ Kenneth A. Anderson, “Does more policing make middle schools safer?” Brookings Institute, November 8, 2018, <https://www.brookings.edu/blog/brown-center-chalkboard/2018/11/08/does-more-policing-make-middle-schools-safer/> (Accessed June 24, 2021).

Amanda Merkwae, “Schooling the Police: Race, Disability, and the Conduct of School Resource Officers”, *Michigan Journal of Race & Law* 21, no. 1 (2015): 147-181.

MICH. J. RACE & L. 147 (2015).

Available at: <https://repository.law.umich.edu/mjrl/vol21/iss1/6>

Jason P. Nance, “Students, Police, and the School-to-Prison Pipeline,” *Washington University Law Review* 99, no. 4: 919-987. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577333 (Accessed June 24, 2021).

Petrosino et al., “Research in Brief: School-Based Law Enforcement.”

Tyler Whittenberg and Maria Fernandez, “Ending Student Criminalization and the School-to-Prison Pipeline,” *Advancement Project* (New York: NYU Steinhardt Metropolitan Center for Research on Equity and the Transformation of Schools, 2020).

<https://steinhardt.nyu.edu/metrocenter/ejroc/ending-student-criminalization-and-school-prison-pipeline> (Accessed June 24, 2021).
Education Week Research Center, “Policing America’s Schools,” <https://www.edweek.org/which-students-are-arrested-most-in-school-u-s-data-by-school#/overview> (Accessed June 24, 2021).

“disorderly conduct.”¹⁶ Alarming, a survey of school-based law enforcement officers found that more than 3 in 4 officers (77%) reported that they had arrested a student in order to calm them down.¹⁷

ED’s data collection has consistently demonstrated racial and other disparities in the use of school arrests and referrals to law enforcement as a tool for school discipline. As ED notes in its RFI, “in 2017-18, Black students represented only 15 percent of the total student enrollment but accounted for 29 percent of all students referred to law enforcement—almost twice their share of overall student enrollment.”¹⁸

Zero tolerance policies also contribute to the criminalization of youth. Zero tolerance policies require harsh, often pre-determined punishment, including outsourcing school discipline that used to be handled by school administrators to the juvenile justice system. These policies leave no room to consider context and have resulted in unfair discipline of LGBTQ+ young people.¹⁹

Both school-based law enforcement and zero tolerance policies are associated with a school-to-prison pipeline that disproportionately impacts students who are LGBTQ+ young people, particular those who are BIPOC and people with disabilities.²⁰ As just one example: a 2016 national survey of juvenile justice facilities across the U.S. found that 40% of girls and 20% of all detained youth identified as LGBTQ+, while LGBTQ+ youth represented 7 to 9% of the youth population at the time. Of these detained LGBTQ+ youth, 85% were youth of color.²¹

Given this growing body of research, ED should clearly state that the evidence does not support placing law enforcement in schools to improve safety, and that the presence of school-based law enforcement is associated with discriminatory discipline practices that are particularly severe for students who are LGBTQ+, Black, Indigenous, people of color, and people with disabilities.

¹⁶ Chelsea Connery, “The Prevalence and the Price of Police in Schools” (Storrs, CT: Uconn Center for Education Policy Analysis, 2020). https://cepa.uconn.edu/wp-content/uploads/sites/399/2020/10/Issue-Brief-CEPA_C-Connery.pdf (Accessed April 2, 2021).

¹⁷ Connery, “The Prevalence and the Price of Police in Schools.”

¹⁸ U.S. Department of Education, “Request for Information Regarding the Nondiscriminatory Administration of School Discipline.”

¹⁹ Preston Mitchum and Aisha C. Moodie-Mills, *Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth* (Washington DC: Center for American Progress, 2014). <https://www.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf>.

²⁰ The Advancement Project and The Alliance for Educational Justice, *We Came to Learn: A Call to Action for Police Free Schools* (2018). <https://advancementproject.org/wecametolearn/>. Mitchum and Moodie-Mills, *Beyond Bullying*.

²¹ Center for American Progress (CAP) and Movement Advancement Project (MAP), *Unjust: How the Broken Juvenile and Criminal Justice Systems Fail LGBT Youth*, p. 4 (Washington & Denver: CAP & MAP, 2016). <https://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf>.

See also: Kathryn E. W. Himmelstein and Hannah Brückner, “Criminal-justice and school sanctions against nonheterosexual youth: a national longitudinal study” *Pediatrics* vol. 127,1 (2011): 49-57. doi:10.1542/peds.2009-2306.

Development Services Group, Inc., “LGBTQ Youths in the Juvenile Justice System,” prepared for the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (cooperative agreement number 2013-JF-FX-K002) (2014). <https://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsInTheJuvenileJusticeSystem.pdf> (Accessed July 20, 2021).

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

ED should invest in and encourage states, districts, and schools to invest in restorative practices,²² trauma- and healing-informed practices,²³ mental health supports,²⁴ and positive behavior interventions²⁵ as effective alternatives to exclusionary and punitive school discipline. Specifically, ED should:

- Provide grant funding to implement, and require school personnel to be trained on, research-informed and culturally-sustaining strategies for improving school climate and reducing the use of exclusionary and punitive discipline.
- Fund research to support the implementation of effective alternatives to exclusionary and punitive discipline, especially strategies for reducing disciplinary disproportionality by race/ethnicity, sex (including, gender identity, sexual orientation, pregnancy and related conditions), and disability.
- Update guidance—including on Title I, Part A and Title IV, Part A of the Elementary and Secondary Education Act—to clearly state that the evidence does not support placing law enforcement in schools to improve safety and that school law enforcement are associated with discriminatory discipline practices and outcomes.

²² University of California at Berkeley and WestEd researchers recently found that “students with the highest levels of exposure to restorative practices experienced Black-White discipline disparities that were *five times* smaller than those experienced by students with the lowest levels of exposure to restorative practices... higher levels of exposure to restorative practices [also] predicted lower rates of exposure to discipline for American Indian, Asian, and Hispanic students” (p. 4). The authors also found that exposure to restorative practices is associated with higher academic achievement for all students, including Black, American Indian, Asian, and Hispanic students (p. 4-5). See: Sean Darling-Hammond, Lauren Trout, Trevor Fronius, and Rebeca Cerna, “Can restorative practices bridge racial disparities in schools? Evidence from the California Healthy Kids Survey” (July 2021) (forthcoming).

See also: Sean Darling-Hammond, Trevor A. Fronius, Hannah Sutherland, Sarah Guckenburger, Anthony Petrosino, and Nancy Hurley, “Effectiveness of restorative justice in US K-12 schools: A review of quantitative research,” *Contemporary School Psychology* 24 (2020): 295-308. <https://doi.org/10.1007/s40688-020-00290-0>.

Anne Gregory, Francis L. Huang, Yolanda Anyon, Eldridge Greer, and Barbara Downing, “An examination of restorative interventions and racial equity in out-of-school suspensions,” *School Psychology Review* 47, no. 2 (2018): 167-182.

Sonia Jain, Henrissa Basse, Martha A. Brown, and Preeti Kalra, *Restorative justice in Oakland schools: Implementation and impacts*, prepared for the Office of Civil Rights, U.S. Department of Education (2014). Oakland Unified School District, Data In Action.

²³ See e.g.: David Osher, Kathleen Guarino, Wehmah Jones, and Mara Schanfield, “Trauma-Sensitive Schools and Social and Emotional Learning: An Integration,” The Pennsylvania State University (2021). <https://www.air.org/sites/default/files/2021-07/Trauma-Sensitive-Schools-and-SEL-Integration-Brief-June-2021.pdf> (Accessed July 23, 2021).

Thomas, M. Shelley, Shantel Crosby, and Judi Vanderhaar, “Trauma-informed practices in schools across two decades: An interdisciplinary review of research,” *Review of Research in Education* 43, no. 1 (2019): 422-452.

²⁴ See e.g.: Kang-Yi, Christina D., Courtney Benjamin Wolk, Jill Locke, Rinad S. Beidas, Ishara Lareef, Aelesia E. Pisciella, Suet Lim, Arthur C. Evans, and David S. Mandell. “Impact of school-based and out-of-school mental health services on reducing school absence and school suspension among children with psychiatric disorders.” *Evaluation and program planning* 67 (2018): 105. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5835186/>.

²⁵ See e.g.: Nicholas A. Gage, Nicolette Grasley-Boy, Heather Peshak George, Karen Childs, and Don Kincaid, “A quasi-experimental design analysis of the effects of school-wide positive behavior interventions and supports on discipline in Florida,” *Journal of Positive Behavior Interventions* 21, no. 1 (2019): 50-61.
Nicolette M. Grasley-Boy, Nicholas A. Gage, and Michael Lombardo, “Effect of SWPBIS on disciplinary exclusions for students with and without disabilities,” *Exceptional Children* 86, no. 1 (2019): 25-39.
Ahhyun Lee and Nicholas A. Gage, “Updating and expanding systematic reviews and meta-analyses on the effects of school-wide positive behavior interventions and supports,” *Psychology in the Schools* 57, no. 5 (2020): 783-804.

- Prohibit the use of strip searches and corporal punishment, eliminate the use of seclusion, and significantly limit the use of restraint for all children.
- Support legislation that fosters better school climate, such as
 - The Counseling not Criminalization in Schools Act of 2021 (H.R. 4011, S. 2125), which creates grants for trauma-informed services, mental health supports, and social and emotional learning to foster safe schools and positive school climates, in part by repurposing federal grant programs for law enforcement in schools;
 - The Protecting Our Students in School Act of 2021 (H.R. 3836, S. 2029), which abolishes corporal punishment in federally funded schools; and
 - The Safe Schools Improvement Act of 2021 (H.R. 4022, S. 2410), which requires states to adopt a proven strategy to prevent and address bullying—enumeration of vulnerable student populations, including LGBTQ+ youth—and encourages the use of restorative, trauma-informed practices to respond to bullying and harassment.

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

(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.

LGBTQ+ students face a greater degree of exclusionary and punitive discipline than their non-LGBTQ+ peers in K-12 learning communities.²⁶

Schools should be places of liberation where every student can thrive and reach their full potential. Punitive discipline, such as the use of suspensions or expulsions, for minor, non-violent, or subjectively defined types of infractions, including “defiance” or “disrespect of authority” are at odds with this goal and perpetuate inequities touched on above and in ED’s RFI.

(c) Discipline issues relating to dress and grooming codes (including restrictions on hairstyles).

According to the 2019 National School Climate Survey, one in five transgender students (20.5%) and nearly one in four nonbinary students (24.1%) reported being prevented from wearing clothing deemed “inappropriate” based on gender.²⁷ Transgender and nonbinary students are more likely to report experiencing school discipline than their cisgender LGB peers.²⁸

Discriminatory school dress and grooming codes and discriminatory enforcement of such codes contribute to this disparity and represent a barrier to LGBTQ+ students’ equal access to education; ED should clearly communicate this.

²⁶ Emily A. Greytak, Joseph G. Kosciw, Christian Villenas, and Noreen M. Giga, *From Teasing to Torment: School Climate Revisited, A Survey of U.S. Secondary School Students and Teachers* (New York: GLSEN, 2016). https://www.glsen.org/sites/default/files/2019-12/From_Teasing_to_Tormet_Revised_2016.pdf.

²⁷ Kosciw et al., p. 100

²⁸ Kosciw et al., p. 101.

(d) Corporal punishment.

A 2019 study found that Black boys were nearly twice as likely to be hit as a punishment in school as white boys, and Black girls were over three times more likely to be hit than white girls.²⁹ The same study suggests that the prevalence of corporal punishment in the U.S. South is linked to the history of lynching.³⁰

ED should clearly state the tremendous harms of corporal punishment and clarify that there is no educational justification for corporal punishment. Given the absence of any possible educational justification, any racial disparity in these treatments of children is a violation of Title VI.³¹

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

Restraints and seclusion are disproportionately applied to students with disabilities. LGBTQ+ students with disabilities report higher rates of school discipline than their LGBTQ+ peers without disabilities.³² ED data for the 2017-2018 school year indicates that while students with disabilities make up 13% of the overall student population, they comprised 80% of students who were physically restrained, 41% of those placed in mechanical restraints, and 77% of those secluded from others in school.³³ In GLSEN's 2019 National School Climate Survey, 29.5% of LGBTQ+ students reported feeling unsafe in school because of an actual or perceived disability.³⁴

ED should clearly state that there is no educational justification for seclusion and communicate that both the use of seclusion and restraint are disproportionately used on Black and Brown youth with disabilities, which creates a disparate and discriminatory administration of discipline for students of color with disabilities.

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

As discussed above, the evidence does not support placing law enforcement in schools to improve school safety, and the presence of school-based law enforcement is associated with discriminatory discipline practices that are particularly severe for students who are LGBTQ+, Black, Indigenous, people of color, and people with disabilities.

ED should clearly communicate this to State Education Agencies (SEAs) and Local Education Agencies (LEAs), along with the following:

- Communicate that training of law enforcement officers, including school-based law enforcement officers, and Memorandum of Understanding (MOU) agreements with law enforcement

²⁹ Brittany Barbee and Cheyenne Blackburn (2019). Corporal Punishment in School Disproportionately Affects Black Students, Students with Disabilities. Southern Poverty Law Center, available at <https://www.splcenter.org/news/20190611/splc-report-corporalpunishment-in-school>.

³⁰ Barbee and Blackburn,

³¹ Corporal punishment has been most freely used in schools serving a large number of Black students. See: Gershoff, Elizabeth T. and Sarah Font, "Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy." *Social Policy Report* 30, no. 1 (2016). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/>.

³² Palmer et al.

³³ U.S. Department of Education Office for Civil Rights, *2017-18 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools* (Washington DC: 2020) p. 6. <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

³⁴ Kosciw et al., p. 16.

departments are not proven to protect students from the harms of discriminatory and racially disproportionate school discipline.

- Communicate that school-based and other law enforcement should not be involved in routine school discipline matters and such programs, if they exist, should be accompanied by extensive scrutiny and oversight.
- Clearly state that LEAs should not concentrate school-based and other law enforcement officers or surveillance technologies, including metal detectors, in schools with high proportions of Black, Indigenous, or immigrant students, and that doing so is likely a Title VI violation.
- Clearly and specifically name that the presence of, or coordination, with law enforcement, including via data sharing and referrals to law enforcement, as particularly harmful to undocumented or immigrant students or students from immigrant families, and potentially in violation of the Family Educational Rights and Privacy Act (FERPA) or *Plyler v. Doe*.
- Clearly and specifically articulate FERPA limitations on law enforcement officers' access to records and describe the potential additional harm to students if records were to be provided.
- Clearly state the obligation under FERPA to provide students and parents or guardians access to records, including video and audio recordings that are related to discipline or contact with law enforcement officers.
- Clearly describe the ways in which 287g and other agreements with immigration enforcement violate the Title VI rights of students and have no place in schools (including through the sharing of information).

(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.

ED should encourage and invest in developing and disseminating best practices that better prepare school personnel to prevent, deescalate, and otherwise effectively respond to behaviors or incidents that are all too often met with punitive disciplinary responses, particularly when they involve students who are LGBTQ+, BIPOC, and people with disabilities. Effective responses must include consideration of the role of implicit bias—including anti-LGBTQ+, racial, and ableist bias—in school personnel's assessments of behaviors that are disruptive or warrant intervention, as well as their assessments of appropriate responses.³⁵

GLSEN recommends the adoption of restorative practices and associated training to foster positive school climates and prevent discriminatory administration of school discipline.³⁶ Restorative and other alternatives to exclusionary and punitive discipline should include or be accompanied by professional development on trauma- and healing-informed practices.

Students may be impacted by traumatic experiences at home as well as at school and LGBTQ+ students experience trauma at higher rates than their non-LGBTQ+ peers.³⁷ LGBTQ+ students often face particular

³⁵ Anne Gregory, Russell J. Skiba, and Kavitha Mediratta, "Eliminating disparities in school discipline: A framework for intervention," *Review of Research in Education* 41, no. 1 (2017): 253-278, pp. 261-263.

³⁶ GLSEN (2020). Replacing Punitive Discipline with Restorative Policies and Practices https://www.glsen.org/activity/restorative-discipline#_ftn1.

³⁷ The National Child Traumatic Stress Network (2015). LGBTQ Issues and Child Trauma. <https://www.nctsn.org/resources/lgbtq-issues-and-child-trauma>.

See also: The National Resource Center for Mental Health Promotion and Youth Violence Prevention, "Adopting a Trauma-Informed Approach for LGBTQ Youth-Part 1: Why Use a Trauma-Informed Approach With LGBTQ Youth?" https://healthysafechildren.org/sites/default/files/Trauma_Informed_Approach_LGBTQ_Youth_1.pdf.

forms of childhood trauma simply for being who they are, including being targeted for bullying and harassment, subject to societal stigma and biases, and experiencing rejection from family members, peers, and institutions.³⁸ For this reason, trauma- and healing-informed practices must include consideration of trauma related to abuse, harassment, victimization, and medical trauma³⁹ experienced by LGBTQ+ and other young people who experience marginalization.⁴⁰

Unfortunately, many school mental health professionals are not receiving the training they want or deserve on supporting LGBTQ+ students. In GLSEN’s 2019 report on school counselors, social workers, and psychologists, a striking 76% reported receiving little to no preparation on working with LGBTQ+ students.⁴¹ This lack of training and support can manifest in an inability to meet the needs of LGBTQ+ youth who have experienced trauma and runs the risk of inadvertently traumatizing them further.⁴²

In promoting the use of alternatives to exclusionary discipline, such as a referral to mental health supports, ED should reinforce that such alternatives must be nondiscriminatory, e.g., encompass adequately trained professionals with competency to meet the needs of young people from marginalized communities, including LGBTQ+ youth, youth with disabilities, BIPOC youth, undocumented youth, and young people at the intersection of these identities).

(I) Discipline related to attendance and time management.

Experiencing high levels of anti-LGBTQ+ bullying and experiencing LGBTQ+ related discrimination at school are both associated with an increased absences, including for LGBTQ+ young people of color.⁴³ Simply put, students who don’t feel safe at school are more likely to avoid it. For this reason, it’s critical that ED proactively promote safe, welcoming school climates. LGBTQ+ inclusive enumerated anti-bullying policies promote positive school climates (discussed below).⁴⁴ Other supports that are associated with decreased absences for LGBTQ+ students include: affirming student groups, such as GSAs (Gender

³⁸ The National Resource Center for Mental Health Promotion and Youth Violence Prevention, “Adopting a Trauma-Informed Approach for LGBTQ Youth-Part 1.”

³⁹ National LGBT Health Education Center, “Affirming Primary Care for Intersex People” (2020). <https://www.lgbtqihealtheducation.org/publication/affirming-primary-care-for-intersex-people-2020> (Accessed July 13, 2021).

⁴⁰ National Resource Center for Mental Health Promotion and Youth Violence Prevention, “Adopting a Trauma-Informed Approach for LGBTQ Youth—Part 2: How Do You Implement a Trauma-Informed Approach With LGBTQ Youth?” (2019). https://healthysafekids.org/sites/default/files/Trauma_Informed_Approach_LGBTQ_Youth_2.pdf (Accessed July 13, 2021).

⁴¹ GLSEN, ASCA, ACSSW, and SSWAA, *Supporting safe and healthy schools for lesbian, gay, bisexual, transgender, and queer students: A national survey of school counselors, social workers, and psychologists*, p. 23 (New York: GLSEN, 2019). <https://www.glsen.org/schoolmentalhealth> (Accessed June 24, 2021).

⁴² The National Resource Center for Mental Health Promotion and Youth Violence Prevention, “Adopting a Trauma-Informed Approach for LGBTQ Youth-Part 1.”

⁴³ Kosciw et al., pp. xx-xi.

Truong, N. L., Zongrone, A. D., & Kosciw, J. G. (2020). *Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools*, pp. xvii, 15. New York: GLSEN. <https://www.glsen.org/research/aapi-lgbtq-students>.

Truong, N. L., Zongrone, A. D., & Kosciw, J. G. (2020). *Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools*, p. xvi. New York: GLSEN. <https://www.glsen.org/research/black-lgbtq-students>.

Zongrone, A. D., Truong, N. L., & Kosciw, J. G. (2020). *Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools*, p. xvi. New York: GLSEN. <https://www.glsen.org/research/latinx-lgbtq-students>.

Zongrone, A. D., Truong, N. L., & Kosciw, J. G. (2020). *Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools*, p. xvii. New York: GLSEN. <https://www.glsen.org/research/native-and-indigenous-lgbtq-students>.

⁴⁴ Kosciw et al., pp. xiv-xv.

and Sexuality Alliances or Gay-Straight Alliances), LGBTQ+ inclusive curricular resources, and school staff who are supportive of LGBTQ+ students.⁴⁵

Additionally, because absenteeism can be a symptom of hostile school climates, ED should promote mental health supports and trauma-informed school discipline practices.

(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.

LGBTQ+ young people experience higher rates of bullying than their non-LGBTQ+ peers.⁴⁶ Bullying is particularly severe for those who are transgender, nonbinary, Black, Indigenous, people of color, and people with disabilities. Among LGBTQ+ middle and high school students, GLSEN found that 68.7% were verbally harassed in the past year because of their sexual orientation.⁴⁷ The vast majority of transgender students (83.3%) reported being bullied based on their gender identity.⁴⁸ LGBTQ+ students of color commonly experience multiple forms of victimization—40.0% of both Black and Asian American/Pacific Islander students, 41.2% of Indigenous students, and 41.6% of Latinx students reported bullying based on both their sexual orientation and their race.⁴⁹

Recent studies suggest that the harm of bias-motivated harassment and bullying is especially severe.⁵⁰ GLSEN’s National School Climate Surveys have consistently found an association between anti-LGBTQ+ victimization and a range of adverse educational outcomes, including increased absences, lowered GPAs, and a decreased likelihood of pursuing post-secondary education.⁵¹ LGBTQ+ youth of color who experience both racist and anti-LGBTQ+ victimization were most likely to skip school due to feeling unsafe, report the lowest levels of school belonging, and experience the highest levels of depression, compared to those who experience one or neither form of victimization.⁵²

⁴⁵ Kosciw et al., pp. xxi-xxiii.

⁴⁶ Michelle M. Johns, Richard Lowry, Laura T. Haderxhanaj, Catherine N. Rasberry, Leah Robin, Lamont Scales, Deborah Stone, and Nicolas A. Suarez, “Trends in violence victimization and suicide risk by sexual identity among high school students—Youth Risk Behavior Survey, United States, 2015–2019.” *MMWR Supplements* 69, no. 1 (2020): 19-27.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7440203/>.

Valerie A. Earnshaw, Sari L. Reisner, Jaana Juvonen, Mark L. Hatzenbuehler, Jeff Perrotti, and Mark A. Schuster, “LGBTQ bullying: translating research to action in pediatrics,” *Pediatrics* 140, no. 4 (2017).

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5613818/>.

⁴⁷ Kosciw et al., p. xix.

⁴⁸ Kosciw et al., p. 96.

⁴⁹ Truong et al., *Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools*, p. 17.

Truong et al., *Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools*, p. 16.

Zongrone et al., *Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools*, p. 17.

Zongrone et al., *Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools*, p. 18.

⁵⁰ Stephen T. Russell, Katerina O. Sinclair, V. Paul Poteat, and Brian W. Koenig, “Adolescent Health and Harassment Based on Discriminatory Bias,” *American Journal of Public Health* 102, no. 3 (2012): 493–495.

Michelle Birkett, Michael E. Newcomb, and Brian Mustanski, “Does it get better? A longitudinal analysis of psychological distress and victimization in lesbian, gay, bisexual, transgender, and questioning youth,” *Journal of Adolescent Health* 56, no. 3 (2015): 280–285.

⁵¹ Kosciw et al., p. xviii-xix.

⁵² Truong et al., *Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools*, pp. xvii, 18.

Truong et al., *Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools*, p. 17.

Unfortunately, many schools fail to respond effectively to the victimization of LGBTQ+ students. According to GLSEN's 2019 National School Climate Survey, three in five (60.5%) LGBTQ+ students who reported harassment or assault said that school staff did nothing or told them to ignore it, one in five (20.8%) were told to change their behavior (e.g., by changing the way they dressed), and 7.3% were disciplined after reporting their victimization to school staff.⁵³

ED should promote effective, non-discriminatory responses to bullying using proven strategies, including adoption of enumerated anti-bullying policies⁵⁴ and support for school personnel in implementing these policies.⁵⁵

GLSEN's National School Climate Surveys have consistently found that LGBTQ+ students who reported having an enumerated policy at their school experienced less anti-LGBTQ+ victimization than those who reported having a generic policy or no anti-bullying policy. LGBTQ+ students who indicated that they had an enumerated anti-bullying policy were more likely to report bullying and were also far more likely to say that staff responses were effective than those in schools with only generic policies.⁵⁶ There is evidence of the positive impact of enumeration from the perspective of educators, too. Educators in schools with enumerated anti-bullying policies reported higher levels of comfort addressing bullying based on sexual orientation (77.7% v. 53.9%) and gender expression (72.3% v. 52.2%) than educators in schools with no anti-bullying policy.⁵⁷

(n) Zero tolerance or strict, three-strike policies.

As discussed above (p. 5 of this comment), zero tolerance policies contribute to the criminalization of youth. Strict, three-strike policies do the same. Both require harsh, often pre-determined punishments, including outsourcing school discipline to the juvenile justice system.⁵⁸ These policies leave no room to consider context and have resulted in unfair disciplining of LGBTQ+ young people.⁵⁹

ED should communicate this in its guidance and support schools in implementing evidence-based and equitable alternatives to zero tolerance and strict, three-strike policies. Additionally, ED should clearly state that if school districts concentrate zero tolerance policies and/or application of policies in schools with high proportions of Black, Native, or immigrant students, then this is likely a Title VI violation.

Zongrone et al., *Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools*, p. 18.

Zongrone et al., *Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools*, p. 18.

⁵³ Kosciw et al., p. 34-35.

⁵⁴ GLSEN, Enumeration of Statewide Anti-Bullying Laws and Local Policies, <https://www.glsen.org/activity/enumeration> (Accessed June 28, 2021).

⁵⁵ GLSEN, "How State Education Agencies Can Advance Implementation of Enumerated Anti-Bullying and Harassment Laws" (2020). <https://www.glsen.org/activity/state-education-agency-implementation-resources> (Accessed June 24, 2021).

⁵⁶ Kosciw et al., pp. 79-81.

⁵⁷ Greytak et al., *From Teasing to Torment: School Climate Revisited*.

⁵⁸ Preston Mitchum and Aisha C. Moodie-Mills, *Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth* (Washington DC: Center for American Progress, 2014). <https://www.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf>.

⁵⁹ Mitchum and Moodie-Mills, *Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth*.

(p) Discipline issues relating to virtual learning; (r) Discipline issues relating to activities off school campus or in virtual school settings, such as bullying through social media usage

The COVID-19 pandemic has had especially harsh impacts on marginalized students, including LGBTQ+ students. These young people often lose access to critical in-school supports, extracurricular activities, and affirming peer networks of support such as Gender-Sexuality Alliances or Gay-Straight Alliances (GSAs), and some have been isolated in unsupportive home environments. LGBTQ+ young people may also have experienced a new platform for bullying and harassments; prior to the pandemic 44.9% of LGBTQ+ youth reported experienced cyberbullying.⁶⁰

ED should communicate the positive impacts of enumerated anti-bullying policies that include expressly acknowledge that cyberbullying is bullying and support the development and dissemination of best practices to address discipline issues related to virtual learning and virtual school settings that are restorative and trauma-informed.

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)?

ED should reissue updated guidance on supporting transgender students and preventing discriminatory discipline practices, such as, disciplining students who report anti-LGBTQ+ victimization. ED recently clarified that “the Department interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity” and that it “has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination.”⁶¹

ED should issue an updated guidance letter as described in reply to question 1 (pages 2-3 of this comment).

ED and DOJ should issue joint guidance on the law enforcement in schools that provides clear and explicit guidance to SEAs and LEAs that the evidence does not support placing law enforcement in schools to improve school safety and that the presence of school-based law enforcement is associated with discriminatory discipline practices that are particularly severe for students who are LGBTQ+, Black, Indigenous, people of color, and people with disabilities. In addition to communicating specific concerns detailed in response to Question 4 (f), this guidance should direct SEAs and LEAs to resources on alternatives to exclusionary and punitive discipline, such as the Dignity in Schools Campaign’s Model Code⁶² and Model Policies to Fight Criminalization.⁶³

⁶⁰ Kosciw et al., p. 30.

⁶¹ U.S. Department of Education. (June 22, 2021). Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*. <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>. Accessed June 22, 2021.

⁶² Dignity in Schools, Model School Code on Education and Dignity (2019), https://dignityinschools.org/toolkit_resources/full-version-of-model-code-on-education-and-dignity/?toolkits=model-code (Accessed July 23, 2021).

⁶³ Dignity in Schools, “Model Policies to Fight Criminalization: A Collection of Updated Resources From Our Model Code on Education & Dignity” (October 2018). https://dignityinschools.org/wp-content/uploads/2018/10/ModelPolicies_FightCriminalization.pdf (Accessed July 23, 2021).

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?

ED should invest in and encourage states, districts, and schools to invest in restorative practices, trauma- and healing-informed practices, mental health supports, and positive behavior interventions as effective alternatives to exclusionary and punitive school discipline (see Footnotes 22 through 25 of this comment for relevant studies and reports). Additionally, ED should proactively promote safe and welcoming school climates (see pages 10 through 12 of this comment).

9. Describe any data collection, analysis, or record-keeping 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.

ED OCR's Civil Rights Data Collection (CRDC) has major gaps when it comes to the experiences of LGBTQ+ youth. Currently, the CRDC contains no demographic questions related to sexual orientation, gender identity, or variations in sex characteristics (intersex status); no questions about bullying or harassment based on gender identity or variations in sex characteristics (intersex status); and uses definitions of "sex" and "sex discrimination" that are confusing and inaccurate.

ED should strengthen the CRDC to address LGBTQ+ equity by revising definitions of "sex" and "sex discrimination"⁶⁴ and adding or expanding LGBTQ+ enumerated measures.

Beyond the CRDC, ED should consider facilitating voluntary data collection and encouraging voluntary data reporting inclusive of LGBTQ+ youth while working towards LGBTQ+ inclusive data collection standards and practices that improve accountability while protecting students' privacy.⁶⁵

Conclusion

We thank ED for considering these comments and recommendations. To discuss GLSEN's recommendations, please contact me at 202-621-5815 or aaron.ridings@glsen.org.

Sincerely,

Aaron Ridings
Interim Chief of Staff
Director of Public Policy

⁶⁴ For detailed recommendations, see: GLSEN. (August 6, 2020). Comment on FR Doc # 2020-14486, Mandatory Civil Rights Data Collection. <https://www.regulations.gov/comment/ED-2019-ICCD-0119-0936>.

⁶⁵ For example, USED guidance on state and local report cards notes that SEAs and LEAs may use disaggregated data on bullying and harassment targeting LGB students to meet ESSA reporting requirements. See: U.S. Department of Education. "Opportunities and Responsibilities for State and Local Report Cards under the ESEA of 1965, as Amended by the Every Student Succeeds Act" (September 2019). <https://www2.ed.gov/policy/elsec/leg/essa/report-card-guidance-final.pdf>.