



State of California  
Office of the Attorney General

XAVIER BECERRA  
ATTORNEY GENERAL

August 24, 2018

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

The Honorable Jefferson B. Sessions  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Via email to School Safety Commission: [safety@ed.gov](mailto:safety@ed.gov)

RE: States' opposition to withdrawal of School Discipline Guidance Package

Dear Secretary DeVos and Attorney General Sessions:

We, the undersigned Attorneys General of California, Connecticut, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, New York, Oregon, and Washington, write to express our support for the ED-DOJ School Discipline Guidance Package ("Guidance") issued in 2014<sup>1</sup> and to urge you not to rescind it.

The Department of Education is responsible for protecting students from discrimination based on, among other things, race, color, sex, disability, and national origin.<sup>2</sup> The Department of Justice has broad responsibility for civil rights enforcement, including students' civil rights, which overlap with and complement the Department of

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<sup>1</sup> US ED, US DOJ, *ED-DOJ School Discipline Guidance Package* (Jan. 8, 2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>.

<sup>2</sup> US ED's Office for Civil Rights (OCR) enforces Title VI of the Civil Rights Act (race and national origin); Title IX of the Education Amendments (sex); and Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) (disability). US ED, *About OCR* (last modified Oct. 15, 2015), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.



Education’s responsibilities.<sup>3</sup> In addition to addressing individual civil rights violations through enforcement action, your agencies regularly issue guidance to entities such as school districts that are “on the ground,” interfacing with students—and impacting their civil rights—on a daily basis.<sup>4</sup>

The Guidance is an important example of your agencies carrying out these critical responsibilities. It assists public elementary and secondary schools around the country in meeting their obligations under federal law to administer student discipline without discriminating on the basis of race, color, sex, disability, or national origin. The goals and methods outlined in the Guidance—including how schools can both avoid discriminatory application of exclusionary discipline and employ approaches to improve school climate and reduce suspensions (e.g., Positive Behavioral Interventions and Supports [PBIS] and Social-Emotional Learning)—have been proven effective<sup>5</sup> and are in the best interests of students, schools, local economies, public safety, and society at large, including our States, which have a combined affected student population of over 17 million.

Research convincingly demonstrates that school exclusion for disciplinary reasons can have negative short- and long-term impacts. According to the non-partisan Government Accountability Office (GAO) report issued in March 2018, students who are suspended from school “lose important instructional time, are less likely to graduate on time, and are more likely to repeat a grade, drop out of school, and become involved in the juvenile justice system.”<sup>6</sup> And excluded students’ life trajectories can be altered by these impacts; one study cited in the GAO report estimated that Florida students who drop out earn about \$200,000 less over their lifetimes than high school graduates.<sup>7</sup>

These severe personal harms also redound to the states where these students live. For example, the GAO report cites a study of California youth which estimated that students dropping out of high school due to suspensions would result in about \$2.7 billion in additional costs for the State, including lost wages and tax revenue, increased crime, and higher welfare and health costs.<sup>8</sup> Nationally, these costs—which are borne primarily

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<sup>3</sup> USDOJ’s Educational Opportunities Section enforces Title IV and Title VI of the Civil Rights Act (race, color, national origin, sex, and religion); Title IX; Section 504; and the ADA. USDOJ, *Educational Opportunities Section*, <https://www.justice.gov/crt/educational-opportunities-section> (last visited May 17, 2018).

<sup>4</sup> See, e.g., USDOJ, *Guidance and Resources* (updated July 28, 2017), <https://www.justice.gov/crt/guidance-and-resources>.

<sup>5</sup> See, e.g., Texas Juv. Justice Dept., *Effectiveness of Positive Behavioral Interventions and Supports* (Dec. 2012), <https://www.tjjd.texas.gov/publications/reports/pbislegislative-report2012-12.pdf>.

<sup>6</sup> Jacqueline M. Nowicki, *Discipline Disparities for Black Students, Boys, and Students with Disabilities*, GAO (March 2018), <https://www.gao.gov/assets/700/690828.pdf>.

<sup>7</sup> See Janet Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension*, Youth & Society (Jan. 17, 2018) (finding that suspended youth were less likely to have graduated from college or high school, and were more likely to have been arrested and on probation), <http://journals.sagepub.com/doi/10.1177/0044118X17752208>.

<sup>8</sup> Nowicki, *Discipline Disparities*, *supra* note 6.

by the States—are estimated to run \$65 billion.<sup>9</sup> This does not even take into account the costs of increased incarceration rates; these rates are much higher for high school dropouts. One study found that over 9 percent of young male high school dropouts are incarcerated—including 23 percent of young African-American male dropouts—versus fewer than 2 percent of high school graduates.<sup>10</sup> This increased incarceration imposes massive fiscal and social costs on the States.<sup>11</sup>

Research also has convincingly shown that reform that reduces school exclusions can yield positive outcomes not only for students who might have otherwise been suspended or expelled,<sup>12</sup> but for entire schools. A recent study of school discipline reform in Chicago found that reduction in out-of-school suspension for severe infractions was associated with higher student test scores and attendance rates, while maintaining baseline perceptions of school safety.<sup>13</sup> Teacher surveys about non-exclusionary disciplinary measures have generated similar conclusions about safety.<sup>14</sup> Secretary DeVos herself has expressed her support for “[t]ools like PBIS [which] can help improve school climate and, in turn, safety”; she also noted these techniques “help make students feel included and valued.”<sup>15</sup>

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<sup>9</sup> Russell W. Rumberger & Daniel J. Losen, *The High Cost of Harsh Discipline and Its Disparate Impact*, UCLA Civil Rights Project (June 1, 2016), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA\\_HighCost\\_6-2\\_948.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf).

<sup>10</sup> Ishwar Khatiwada, et al., *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers*, Center for Labor Market Studies at Northeastern University (Oct. 1, 2009), <https://www.issuelab.org/resource/the-consequences-of-dropping-out-of-high-school-joblessness-and-jailing-for-high-school-dropouts-and-the-high-cost-for-taxpayers.html>.

<sup>11</sup> Michael McLaughlin, et al., *The Economic Burden of Incarceration in the U.S.*, Washington University in St. Louis (July 2016) (finding aggregate cost burden of \$1 trillion, hundreds of billions of which is borne by State and local governments), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

<sup>12</sup> See, e.g., Robert H. Horner, et al., *Examining the Evidence Base for School-Wide Positive Behavior Support*, 42 *Focus on Exceptionality* 1 (2010); Brandi Simonsen, et al., *Illinois Statewide Positive Behavioral Interventions and Supports: Evolution and Impact on Student Outcomes Across Years*, 14 *J. of Positive Behavior Interventions* 5 (2011); Catherine P. Bradshaw, et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools*, 12 *J. of Positive Behavioral Interventions* 161 (2010).

<sup>13</sup> Rebecca Hinze-Pifer, *Rethinking Universal Suspension for Severe Student Behavior*, *Peabody J. of Educ.* (Feb. 28, 2018), <https://www.tandfonline.com/doi/abs/10.1080/0161956X.2018.1435051?src=recsys&journalCode=hpje20>.

<sup>14</sup> Clare Lombardo & Cory Turner, *Disparities Persist In School Discipline, Says Government Watchdog*, *National Public Radio* (Apr. 4, 2018), <https://www.npr.org/sections/ed/2018/04/04/590887226/persistent-disparities-in-school-discipline-says-government-watchdog>.

<sup>15</sup> US ED, *Federal Commission on School Safety’s First Field Visit Focuses on School Climate* (May 31, 2018), <https://www.ed.gov/news/press-releases/federal-commission-school-safety-s-first-field-visit-focuses-school-climate>.

While unnecessary exclusionary school discipline harms all students, it has a profoundly disproportionate effect based on race, disability, and gender,<sup>16</sup> as well as sexual orientation and identity.<sup>17</sup> For example, the GAO report mentioned above included an analysis of Department of Education national civil rights data, showing that African American students were disproportionately disciplined. Importantly, these disparities were found even when controlling for the school's poverty level, puncturing a myth that income, rather than race, explains these disparities. Some of these disparities are truly shocking; African American students were overrepresented in suspensions by about 23 percentage points.<sup>18</sup> The conclusions of the GAO report were affirmed by the Department of Education's 2015-16 Civil Rights Data Collection, released in April 2018, which showed that even while the overall number of suspensions declined nationally, racial disparities persisted as schools still disproportionality subjected African American students to out-of-school suspensions, expulsions and referrals to law enforcement.<sup>19</sup>

Importantly, the GAO report also found that, given the wide discretion that school officials have when imposing discipline, implicit bias may contribute to the school discipline gap by causing officials to "judge students' behaviors differently based on the students' race and sex." The report also noted a study that "found that the types of offenses that Black children were disciplined for were largely based on school officials' interpretations of behavior."<sup>20</sup> Such actions by school officials run afoul of the prohibition on race-based selective enforcement discussed in the Guidance.<sup>21</sup>

In short, exclusionary discipline harms students. Additionally, discrimination contributes to a racial gap in administration of this discipline. The Guidance was issued to help schools address just these issues, and to rescind it now despite continuing disparities and other challenges would be counterproductive and harm our students, our schools, and our States.

Thus, we were very concerned when the White House included "Repeal of the Obama Administration's 'Rethink School Discipline' policies" (of which the Guidance is a key part) in its list of the topics on which the newly created Federal Commission on

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<sup>16</sup> Nowicki, *Discipline Disparities*, *supra* note 6.

<sup>17</sup> GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* (June 2016), [http://www.glsen.org/sites/default/files/Educational%20Exclusion%20Report%206-28-16\\_v4\\_WEB\\_READY\\_PDF.pdf](http://www.glsen.org/sites/default/files/Educational%20Exclusion%20Report%206-28-16_v4_WEB_READY_PDF.pdf).

<sup>18</sup> Nowicki, *Discipline Disparities*, *supra* note 6.

<sup>19</sup> US ED, *2013-2014 Civil Rights Data Collection: A First Look* (June 7, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>; US ED, *2015-16 Civil Rights Data Collection: School Climate and Safety* (Apr. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>20</sup> Nowicki, *Discipline Disparities*, *supra* note 6.

<sup>21</sup> Lhamon & Samuels, US ED, US DOJ, *Joint "Dear Colleague" Letter* (Jan. 8, 2014) <<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>>.

School Safety is expected to make recommendations<sup>22</sup>—despite the lack of any credible evidence connecting these policies to the school shootings that led to the creation of the Commission.<sup>23</sup> Our concerns have been heightened by media reports indicating that Secretary DeVos and Attorney General Sessions are preparing to rescind the Guidance this year.<sup>24</sup> It is not surprising that numerous civil rights organizations—including the Leadership Conference on Civil and Human Rights, ACLU, Lawyers’ Committee for Civil Rights Under Law, NAACP, Disability Rights California, and almost 150 additional groups—have expressed their opposition to this threatened action.<sup>25</sup> And recently a number of school district, charter school, and other officials (including many from our States) have likewise stated their belief that the Guidance should be maintained.<sup>26</sup>

Because the Guidance provides crucial information to school officials, along with tools to help them comply with their legal obligations, and because the practices encouraged in the Guidance benefit our students, our schools, and our States, we strongly

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<sup>22</sup> White House, *President Donald J. Trump is Taking Immediate Actions to Secure Our Schools* (Mar. 12, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-immediate-actions-secure-schools/>.

<sup>23</sup> See, e.g., Marjory Stoneman Douglas High School Public Safety Commission, PROMISE Program Follow Up (July 10, 2018), <http://www.fdle.state.fl.us/MSDHS/Meetings/July-Meeting-Documents/Presentations/July-10-845am-PROMISE-Program-Follow-Up.aspx> (noting lack of evidence that “multiple PROMISE referrals has led to unintended negative consequences affecting school safety”); Alia Wong, *The Push for Harsher School Discipline After Parkland*, The Atlantic (Mar. 23, 2018), <https://www.theatlantic.com/education/archive/2018/03/harsher-school-discipline-after-parkland/556274/> (noting that “compelling evidence suggests that replacing [non-exclusionary discipline measures] with the traditional punitive approach wouldn’t do anything to prevent school shootings”).

<sup>24</sup> Paul Sperry, *Trump ‘plans to scrap’ Obama-era rule that turned schools into war zones*, New York Post (Mar. 24, 2018), <https://nypost.com/2018/03/24/trump-scrapping-obama-era-rule-that-turned-schools-into-war-zones/>.

<sup>25</sup> The Leadership Conference on Civil and Human Rights, *Letter to Secretary DeVos: Preserve the School Discipline Guidance* (Mar. 22, 2018), <https://civilrights.org/letter-to-secretary-devos-preserve-the-school-discipline-guidance/>.

<sup>26</sup> Educators for Excellence, *Letter to Secretary DeVos and Attorney General Sessions* (July 10, 2018), [https://e4e.org/sites/default/files/school\\_discipline\\_letter\\_.pdf](https://e4e.org/sites/default/files/school_discipline_letter_.pdf).

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oppose any effort to rescind or weaken the Guidance, and urge you to keep it in place. To do otherwise would be an abdication of your agencies' critical role, as established by Congress, to protect students' civil rights.

Sincerely,



XAVIER BECERRA  
California Attorney General



MAURA HEALEY  
Massachusetts Attorney General



GEORGE JEPSEN  
Connecticut Attorney General



GURBIR S. GREWAL  
New Jersey Attorney General



KARL A. RACINE  
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BARBARA D. UNDERWOOD  
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