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July 23, 2021

To: Suzanne Goldberg  
Acting Assistant Secretary  
Office for Civil Rights (OCR)  
U.S. Department of Education  
Potomac Center Plaza  
550 12th Street SW  
Washington, DC 20024

Submitted via the Internet: [www.regulations.gov](http://www.regulations.gov)

RE: Request for Information on Non-Discriminatory Administration of School Discipline  
Docket ID ED-2021-OCR-0068

Dear Acting Assistant Secretary Goldberg:

In keeping with its core mission of educational equity and justice, the Education Law Center (ELC) works diligently to establish and protect the rights and needs of NJ students in school discipline proceedings. Through litigation, regulatory and legislative advocacy, and guidance for students and families, ELC aims to reduce “zero-tolerance” punishment and removal from school, and to defend all students’ right to a quality education with dignity and due process.

The U.S. Department of Education’s 2014 *School Discipline Guidance Package* aligned with ELC’s mission to reduce the impact of harsh and exclusionary discipline on students and support the right of every child to receive a quality education and to be treated with dignity and fairness. We therefore support the strengthening and reissuing of that 2014 school discipline guidance. **Additionally, we request that the updated guidance specifically address the link between academic failure and exclusionary discipline which inevitably fuels the school to prison pipeline by pushing the most vulnerable students out of the classroom and into the juvenile justice system.**

Since 2014, our knowledge and understanding of the school-to-prison pipeline, particularly as it impacts students with disabilities, has expanded significantly. The 2014 Dear Colleague Letter acknowledged that exclusionary discipline and referral to law enforcement “creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has

been termed the ‘school to prison pipeline.’”<sup>1</sup> While the 2014 guidance also proposes mechanisms to reduce the use of exclusionary discipline, such as positive interventions and fair, age-appropriate discipline policies, these suggestions fail to acknowledge the complex relationship between behavior and unmet academic needs that often results in students with disabilities disproportionately excluded from schools and subsequently propelled into the juvenile justice system.

Exclusionary discipline frequently results when schools fail to meet the academic, social, and emotional needs of students. Academic failure and exclusionary discipline often overlap as students commonly respond to academic failure with behavioral misconduct.<sup>2</sup> When schools, in turn, respond to the behavioral misconduct with exclusionary discipline, the result is a downward spiral of continued academic failure as excluded students fall further behind academically until it reaches the point where they feel like they cannot catch up and, as a result, they may eventually drop out of school.<sup>3</sup> In fact, “gradual disengagement from the school's culture, due to lack of involvement in school activities, can begin as early as first grade for students experiencing academic and behavioral difficulties.”<sup>4</sup> One study linking academic failure and exclusionary discipline reported that sixty percent of students disciplined more than ten times failed to graduate high school while ten percent of students suspended even once between 7<sup>th</sup> and 12<sup>th</sup> grade dropped out of school.<sup>5</sup>

Additionally, students of color experience higher levels of both exclusionary discipline and academic failure. School districts suspend Black students 1.78 times more than their white counterparts.<sup>6</sup> Where race and disability intersect, the risk of suspension increases.<sup>7</sup> Nearly one

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1 “Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline,” Jan. 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

2 Amber Farn & Jill Adams, *Education and Interagency Collaboration: A Lifeline for Justice-Involved Youth*, CENTER FOR JUVENILE JUSTICE REFORM. GEORGETOWN UNIVERSITY MCCOURT SCHOOL OF PUBLIC POLICY (2016). [http://cjjr.georgetown.edu/wp-content/uploads/2016/08/Lifeline-for-Justice-Involved-Youth-August\\_2016.pdf](http://cjjr.georgetown.edu/wp-content/uploads/2016/08/Lifeline-for-Justice-Involved-Youth-August_2016.pdf).

3 Elizabeth D. Cramer, Liana Gonzalez & Cynthia Pellegrini-Lafont, *From Classmates to Inmates: An Integrated Approach to Break the School-to-Prison Pipeline*, 47(4) J. EQUITY & EXCELLENCE IN EDUC., 461, 464 (Nov. 14, 2014).

4 *Id.* at 462.

5 Tony Fabelo, et al, *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, Justice Center, The Council of State Governments & Public Policy Research Institute, July 2011, 41-43.

6 *Id.*, noting that “each African-American student who passes through the halls of a middle or high school in the fall has nearly a one-in-four chance of being suspended or expelled by the spring.” (citing U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., CIV. RTS DATA COLLECTION, DATA SNAPSHOT: SCH. DISCIPLINE 2 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-DisciplineSnapshot.pdf> [<https://perma.cc/MH78-N72B>]).

out of every four Black students with disabilities in grades K-12 was suspended at least one time in 2009-2010, sixteen percentage points more than white students with disabilities.<sup>8</sup> The 2016 Civil Rights Data shows a similarly stark picture of disproportionate suspension rates with thirty-two percent of Black students with disabilities suspended at least once and almost forty percent suspended repeatedly, creating a suspension rate for Black students that is three times higher than that of white students with disabilities.<sup>9</sup> While it is more difficult to quantify academic challenges experienced by students of color, one measure is the rate at which students drop out of school or fail to graduate. Here, as with exclusionary discipline, students of color, specifically Black students, are disproportionately impacted, as evidenced by their lower graduation rates relative to the U.S. average.<sup>10</sup>

Students most likely to experience school failure as well as any resulting exclusionary discipline are those who require more supports such as students from high poverty neighborhoods,<sup>11</sup> students who have experienced trauma<sup>12</sup> and students with disabilities.<sup>13</sup> Poverty and trauma represent risk factors that reside squarely in the individual and community domains, domains where schools may have little control. However, courts interpreting state constitutional

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7 DANIEL J. LOSEN & TIA ELENA MARTINEZ, *OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS*, CTR. FOR CIV. RGTS. REMEDIES, 1, 20 (Apr. 3, 2013), <https://files.eric.ed.gov/fulltext/ED541735.pdf>. ; see also Motoko Rich, *Suspensions Are Higher for Disabled Students, Federal Data Indicate*, N.Y. TIMES (Aug. 7, 2012), <https://www.nytimes.com/2012/08/08/education/analysis-examines-disabled-students-suspensions.html> (Reporting that Illinois suspended 42% of Black students with disabilities compared with 8% of white students. In Henrico County Public Schools in Virginia, 92 % of “black males with disabilities had been suspended one or more times during 2009-10, compared with just over 44 [%] of white males with disabilities.”).

8 *Id.*

9 U.S. Dep’t of Education, Office for Civil Rights, *2015-2016 Civil Rights Data Collection: School Climate and Safety*, 2018, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

10 Jinghong Cai, *Black Students in the Condition of Education 2020*, National School Boards Association (Jun. 23, 2020) <https://www.nsba.org/Perspectives/2020/black-students-condition-education>.

11 Russell Rumberger, *Poverty and High School Dropouts*, AMERICAN PSYCHOLOGICAL ASSOCIATION (May 2013) <https://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts>.

12 Amanda Rumsey & Amy Milsom, *Dropout Prevention and Trauma: Addressing a Wide Range of Stressors that Inhibit Student Success*, A National Dropout Prevention Center/Network White Paper ((Oct. 2017). [https://www.researchgate.net/publication/324678501\\_Dropout\\_Prevention\\_and\\_Trauma\\_Addressing\\_a\\_Wide\\_Range\\_of\\_Stressors\\_that\\_Inhibit\\_Student\\_Success](https://www.researchgate.net/publication/324678501_Dropout_Prevention_and_Trauma_Addressing_a_Wide_Range_of_Stressors_that_Inhibit_Student_Success).

13 Margaret Chen, *Students with Disabilities Are Pushed Out of School in Many Ways*, AMERICAN CIVIL LIBERTIES UNION (Jul. 13, 2016). <https://www.aclu-wa.org/blog/students-disabilities-are-pushed-out-school-many-ways>.

mandates have recognized that “the goal is to ... wipe out [students’] disadvantages as much as a school district can,” and “that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution.” See, e.g., *Abbott v. Burke*, 119 N.J. 287, 369, 374 (1990). Moreover, meeting the educational needs of students with disabilities is the sole responsibility of the state and local educational agencies under the Individuals with Disabilities Education Act, 20 U.S.C. §§1401 to 1482. Studies show that failures to provide appropriate education services and supports is the leading cause of school failure for students with disabilities, leading to increased dropout rates, exclusionary discipline and delinquency.<sup>14</sup>

The school’s failure to meet the academic, social and behavioral needs of students not only results in the increased reliance on exclusionary discipline but also increased justice-involvement. Sixty-one percent of students in juvenile facilities have reported being suspended or expelled from school at least once.<sup>15</sup> Furthermore, a longitudinal study following a cohort of students in Texas from seventh to twelfth grade found that suspensions tripled a student’s chances of becoming involved in the juvenile justice system.<sup>16</sup> Additional studies show that suspended youth do not begin to engage in more serious delinquency until after their first suspension.<sup>17</sup> For students with disabilities, the link between suspensions and justice-involvement is even stronger. In fact, the students with the highest rate of suspension, those with emotional disabilities, also have the greatest likelihood of being arrested before leaving high school.<sup>18</sup>

Justice-involved youth are not only more likely to have been subjected to exclusionary discipline but are also more likely to have experienced academic failure as evidenced by the fact that many

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14 Jackie Mader & Sarah Butrymowicz, *Low academic expectations and poor support for special education students are ‘hurting their future’* HECHINGER REPORT (Nov. 11, 2017). <https://hechingerreport.org/low-academic-expectations-poor-support-special-education-students-hurting-future/>.

15 Sedlak, A. J., & McPherson, K., *Survey of youth in residential placement: Youth’s needs and services*. SYRP Report. Rockville, MD: Westat. (2010).

16 T. Fabelo, et al, *Breaking schools’ rules: A Statewide Study of How School Discipline Relates to Student’s Success and Juvenile Justice Involvement*. New York, NY: Council of State Governments Justice Center, and College Station, TX: Texas A&M University, PUBLIC POLICY RESEARCH INSTITUTE. (2011).

17 T.L. Shollenberger, *Racial disparities in school suspension and subsequent outcomes: evidence from the National Longitudinal Survey of Youth 1997*. In D. J. Losen (Ed.), *Closing the school discipline gap: Research for policymakers*. New York, NY: Teachers College Press.

18 Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special education too often leads to jail for thousands of American children* HECHINGER REPORT (Oct. 26, 2014). <https://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/>.

are illiterate or marginally illiterate, with one study suggesting that thirty-three percent of justice-involved youth were reading below the 4th grade level.<sup>19</sup> The majority of justice-involved youth identified as experiencing academic challenges are, not surprisingly, youth with disabilities.<sup>20</sup> Many of these students experienced academic failure as a result of being deprived of necessary special education services and supports. While eighty-five percent of youth in juvenile detention facilities are identified as having a disability which would make them eligible to receive special education services, only thirty-seven percent receive these services while in school.<sup>21</sup>

Through ELC's work to provide educational advocacy to justice-involved youth in Essex County, New Jersey, we have documented firsthand how the intersection of unmet academic needs, school failure and exclusionary discipline results in justice-involvement, particularly for youth with disabilities. Essex County is home to New Jersey's largest city, Newark, and the County consistently reports the second highest number of juvenile arrests in New Jersey, the majority of which involve youth of color. Since the end of April 2021, when ELC's educational advocacy project first began collecting data, two hundred and sixty-nine youths have appeared virtually before one of the two juvenile court judges. Approximately 70 of these families agreed to be interviewed regarding their child's educational background. The results of this informal survey confirm the relationship between exclusionary discipline and academic failure as it relates to the school to prison pipeline and supports the need for discipline guidance that directly addresses this nexus.

The results of our interviews confirm much of the well-established research regarding the school to prison pipeline. Key to our findings is that seventy-three percent of youth either have a diagnosed disability or a suspected disability, confirming the connection between disability and the school to prison pipeline. Furthermore, sixty percent of participating youth reported experiencing academic challenges as measured by failing grades or prior retentions. These statistics cannot begin to capture the depth of educational deprivation experienced by some of the students with disabilities in the survey. Those in which school records were requested revealed high school students reading at first and second grade levels, students with disabilities going years without an updated Individualized Education Program (IEP) or with IEPs lacking any measurable goals.

Underlying these stories of academic struggle are the stories about suspensions, with many families reporting that they lost count of the number of times their child was suspended from

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19 Peter Leone and Lois Weinberg, Addressing the Unmet Educational Needs of Children and Youth in the Juvenile Justice and Child Welfare Systems, Center for Juvenile Justice Reform, 2012.

20 BEYOND SUSPENSIONS Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, Brief Report, U.S. Commission on Civil Rights (Jul. 23, 2019) <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

21 Breaking the School-to-Prison Pipeline for Students with Disabilities, National Council on Disability (Jun. 18, 2015) [https://www.ncd.gov/sites/default/files/Documents/NCD\\_School-to-PrisonReport\\_508-PDF.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf).

school. Seventy-eight percent of youth reported having received at least one out of school suspension with the majority, sixty-two percent, having received more than four out of school suspensions. Again, these numbers do not fully explain the impact of the suspension on the individual students and their families. One student, who had spent a year in detention prior to being interviewed, reported that he dropped out of school because his mother could not take the time off work required to return him to school following his numerous suspensions.

While the onset of the pandemic certainly abated the overuse of suspensions, it also exacerbated academic failure. Of the students that were not in detention and remained engaged in their education when COVID forced the shutdown of school, nearly eighty percent reported struggling significantly with remote learning, with many failing classes or checking out of school completely. As students return to school in the fall, these most vulnerable students, those already enmeshed in the school to prison pipeline, will find that they have fallen further behind. These academic challenges will undoubtedly fuel a rise in the use of exclusionary discipline as schools struggle not only to manage the social-emotional toll that the pandemic has wrought but also to address an increase in behavioral issues that correlates with students who are struggling academically.

As the U.S. Department of Education works to update the 2014 discipline guidance, we ask that the new guidance address the issues fueling the school to prison pipeline by not only requiring the use of restorative justice programs and system-wide positive behavioral supports, but also by requiring schools address a student's unmet academic needs that could be manifesting as behavioral misconduct.

Specifically, we would make the following recommendations:

- For students with disabilities subject to exclusionary discipline, school districts and other local educational agencies (LEAs) should be required to assess not only the behavioral needs of the student, but also any academic difficulties, including, but not limited to, review of each student's IEP to ensure it is being appropriately implemented and is allowing the student to make meaningful progress towards goals and objectives.
- Similarly, for general education students subject to exclusionary discipline, school districts and other LEAs should be required to address both academic and social emotional challenges experienced by the student and implement general education supports to address each. Furthermore, general education students facing repeated disciplinary action should be referred through the response to intervention process or for special education evaluation.
- Finally, the Department of Education should require timely annual reporting and release of exclusionary discipline data through OCR's Civil Rights Data Collection (CRDC).

Thank you for your consideration of these comments.

Respectfully,  
Education Law Center

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By: Ruby Kish, Esq.  
Skadden Fellow

Handwritten signature of Elizabeth Athos in blue ink.

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Elizabeth Athos, Esq.  
Senior Attorney