

Trump Administration Limits Civil Rights Protections for Children and Youth of Color

Author: Civil Rights Roundtable¹
Date: November 15, 2018

Introduction

While it is not uncommon for new administrations to review policies, regulations, and guidance from previous administrations, the Trump Administration's recent actions with regard to education and justice policy have taken this to an extreme -- one clearly targeting civil rights protections for children and youth of color.

Since January 2017, the Trump Administration has formally taken a number of actions that are harming students of color, with no indication that the tide will turn. In fact, looking just at the summer of 2018, the Department of Education (ED) delayed previously approved regulations on equity for students with disabilities, rescinded guidance on the use of race in school admissions, and signaled its intent to rescind a package of guidance documents on school discipline intended to prevent discrimination that were jointly developed by ED and the Department of Justice (DOJ). Meanwhile, DOJ rescinded key guidance documents that provide protections against discrimination for youth of color in the legal system. In explaining its actions, the Trump administration has left no doubt as to its intent to roll back civil rights protections. Change is needed now, in order to prevent further harm.

Context: These Actions Are Not Happening In Isolation

¹ The Civil Rights Roundtable (CRRT) is a coalition of national organizations and academic professionals who are experts in the field of school discipline and school removal and analyze the impact of these removals on children and youth, especially those who are members of more than one protected class (for example, students of color with disabilities). The Roundtable meets regularly to make evidence-based policy recommendations designed to improve the educational services provided to these children and youth, both through commenting on proposed legislation and regulations and educating the media, policymakers, and others about these issues. We bring a unique perspective to discussions about the recent Administration's actions because we observe these changes carefully and apply our extensive expertise in the field to our analysis.

The Administration began this process by pulling back its protection of those at risk of discrimination based on sex – first in February of 2017 by withdrawing guidance issued jointly by ED and DOJ outlining protections for students who are transgender, and then in September of 2017, withdrawing ED’s Title IX guidance regarding schools’ obligations to address sexual harassment and sexual violence.

In June of 2017, ED’s Office for Civil Rights (OCR) began to cut back on investigations that would lead to systemic inquiries and the identification of broad classes of affected students.

Simultaneously, ED eliminated high-level oversight of regional office investigations of OCR complaints on “highly sensitive” issues like racial disproportionality in discipline and sexual assault.² ED also proposed reducing the staffing at the OCR by 7% ,³ (further positions may be lost through attrition as workers are not replaced.)

In the midst of these actions, the Administration proposed a budget that would have stripped \$9 billion from education while shifting money to programs that would provide public funding for private schooling. This would result in less funding and poorer quality public schools for students dependent upon them. This occurred even as research shows that public funding for private schools delivers, at best, mixed results, and in a number of states has resulted in lower academic achievement.”⁴ Moreover, private schools are not required to meet the needs of

² Erica L. Green, *Education Dept. Says it Will Scale Back Civil Rights Investigations*, N.Y. Times, June 17, 2017 at A19, and available at <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html>.

³ U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Expresses Concern Regarding Federal Civil Rights Enforcement Efficacy and Priorities,” (June 16, 2017) available at <https://www.usccr.gov/press/2017/06-16-Efficacy-of-Federal-Civil-Rights-Enforcement.pdf>.

⁴ An Indiana voucher program saw significant drops in mathematics achievement. Public school students who were able to take advantage of the voucher program in Louisiana were found to have extraordinary declines in reading and math. The voucher program in Ohio had similarly dismal findings. See, Kevin Carey, *Dismal Voucher Results Surprise Researchers as DeVos Era Begins*, N.Y. Times, Feb. 24, 2017 at A20, also available at <https://www.nytimes.com/2017/02/23/upshot/dismal-results-from-vouchers-surprise-researchers-as-devos-era-begins.html? r=0>.

See also, Ulrich Boser et al, *The Highly Negative Impacts of Vouchers*, Center for American Progress (March 20, 2018) available at <https://www.americanprogress.org/issues/education-k-12/reports/2018/03/20/446699/highly-negative-impacts-vouchers/> (using the Indiana, Louisiana, and Ohio data and adding information on the DC Opportunity Scholarship Program, which is so harmful for students, the impact is equivalent to missing 68 days of school.) .

children with disabilities, English Language Learners, or students impacted by trauma in the same manner as public schools⁵ and are subject to far less accountability for academic outcomes than public schools.

The proposed budget would have mandated significant funding cuts in student mental-health services, access to high-quality teachers and principals in all schools, and after-school programs. Although ultimately rejected by Congress, the Administration's budget proposal was designed to weaken, and in some cases dismantle the national goal of ensuring that all students can attend welcoming, supportive, and high-quality public schools. Most recently, ED stated a desire to permit public schools to siphon funds from federally funded programs, including from the Every Student Succeeds Act (ESSA), to purchase weapons for school staff.⁶ There is no research to support the premise that expenditures on additional weaponry will make schools safer, but there is evidence that the funding available under ESSA is badly needed to support children and youth from low income families and other educationally vulnerable groups.⁷

Undermining The Rights Of Migrant Students

The administration has also begun to chip away at the right to an education for migrant children and youth assured under *Plyler v. Doe*⁸ through policy changes. From October of 2017 through January of 2018, the Civil Rights Project at UCLA collected data from 5400 school personnel, administrators and educators in over 730 schools across 12 states to determine whether this Administration's immigration policy is affecting U.S. teachers and students.⁹

⁵ For example, children with disabilities who attend private schools through parental choice are not entitled to a free appropriate public education (FAPE) in the least restrictive environment or protections, which prevent students from being suspended or expelled for behavior related to their disabilities. See *Individuals with Disabilities Education Act*, 20 U.S.C. § 1400 *et seq.*

⁶ Erica L. Green, *Education Secretary Considers Using Federal Funds to Arm Schools*, N.Y. Times 8/22/18; accessed at <https://www.nytimes.com/2018/08/22/us/politics/betsy-devos-guns.html>.

⁷ Non-Regulatory Guidance: *Using Evidence to Strengthen Education Investments*, U.S. Department of Education, September 16, 2016, available at <https://www2.ed.gov/policy/elsec/leg/essa/guidanceusesinvestment.pdf>.

⁸ 457 U.S. 202 (1982) (It is a violation of the 14th Amendment of the U.S. Constitution for a government to implement policies that deny a public education to students attending public school who are not "legally admitted" to the U.S.).

⁹ Patricia Gandara & Jongyeon (Joy) Ee, "U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools," (February 28, 2018), available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/u.s.-immigration->

Almost 90% of school administrator respondents reported increases in behavioral and emotional issues in school, and 68% of administrators reported that the fear of a student's own deportation or the deportation of loved ones was leading to increased absenteeism.¹⁰

Protection and Advocacy (P&A) agencies¹¹ and others monitoring the placement of unaccompanied migrant youth and those separated from their parents, have found that children and youth are being housed in detention for longer periods of time than under previous administrations, often without appropriate educational services and with other unmet needs. This change in policy is putting children of color and other undocumented children at risk of significant harm. Most recently, a large number of children and youth, as many as 2400 by some reports, are being housed in a tent city in the desert, where they reportedly have little or no access to educational services.¹²

Our educational system is under attack – both directly through ED's actions and indirectly through the collateral consequences of administrative and regulatory changes at other agencies designed to strip rights from students of color, students with disabilities, and others who have been historically underserved by America's public education system.

Trump Administration Actions on Race in Education

This paper will focus on race related changes, first tackling issues related to reduced OCR investigation and oversight of systemic claims and the proposed rescission of the Title VI discipline guidance. Second, a review of the delay and potential rescission of the IDEA's disproportionality regulations. Unfortunately, this issue has received less media attention so we have provided an in-depth explanation of the issue and its implications here. Third, the rescission of the Juvenile Justice Delinquency Prevention Act's (J.J.D.P.A.) Disproportionate

enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools/EMBARGOED-Immigration-enforcement-on-schools.pdf.

¹⁰ *Id.*

¹¹ Press release, *Network Investigates Condition of Migrant Children in Detention Centers*, available at www.ndrn.org/en/component/content/article/22/680-network-investigates-condition-of-migrant-children-in-detention-centers.html.

¹² Manny Fernandez and Caitlin Dickerson, *Inside the Vast Tent City Housing Migrant Children in a Texas Desert*, N.Y. Times, Oct. 12, 2018, accessed at <https://www.nytimes.com/2018/10/12/us/migrant-children-tent-camp-texas.html>.

Minority Contact (DMC) guidance, and the racial implications of this Administration's support for the privatization of public education. Finally, we will explore ED policy changes that indirectly impact race, and some that directly implicate race, such as changes to the use of race in school admissions

II. Issues

The Trump Administration's ED has been using regulatory, sub-regulatory, and other processes to push back the clock on addressing deep-seated racial biases in our education system. If allowed to continue, the Administration's actions will have life-long negative effects for this generation of youth of color, and those to follow.

A) Using "Individual Decision Making" to Avoid Systemic Change

ED is moving its focus away from systemic change toward individualized case analysis and a focus on individual decision-making in discrimination cases. The result is a movement away from addressing discrimination based on race and ethnicity as a systemic and cultural problem to solve, to solutions based the actions of individuals acting alone (actions both of youth and of the adults who serve them). For example, the Department's language in general has moved toward focusing on the individual behavior choices of children and youth, rather than an analysis of factors that might lead to those behaviors. The move away from addressing systemic complaints moves the focus toward the individual decisions of school staff and administrators and away from school, district, or state-wide policies and practices, which sustain discriminatory conduct.

In ED's comments regarding the delay of the compliance date on the equity regulations (as discussed in depth below), it argued that addressing disproportionality using the 2016 method of data collection and analysis could result in quotas and numerical incentives, instead of the individualized process lead by the Individualized Education Program (IEP) team.¹³ This misperception of how the 2016 regulations work leads the Department, and therefore funds

¹³ Final Rule, Delay of Compliance Date, July 3, 2018, " Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities," *Analysis of Comments and Changes*, p. 17. <https://www.federalregister.gov/documents/2018/07/03/2018-14374/assistance-to-states-for-the-education-of-children-with-disabilities-preschool-grants-for-children>.

recipients, away from systemic analysis of the problem of disproportionality back toward individualized, child-by-child solutions. Unsubstantiated concerns about possible quotas were raised in President Bush's IDEA Amendment Act's signing statement in 2004, and have never materialized in the 14 years since.

In June of 2017, the ED imposed new limitations on its Office of Civil Rights (OCR) regarding systemic inquiries (*e.g.* systemic issues will not be considered unless specifically raised by the complainant).¹⁴ Simultaneously, ED loosened the rules regarding which issues require regional office oversight, previously required for certain "highly sensitive" issues like disproportionality in discipline and sexual assault to ensure a systemic review and effective corrective action.

ED's OCR recently revised its case processing manual¹⁵ to place new limits on multiple claims by an individual against the same defendant. ED's decision to block multiple complaints punishes the victims, not the perpetrators, of discrimination, and prevents an analysis of systemic root causes. The changes also eliminate the appeals rights of complainants. Council of Parent Attorneys and Advocates (COPAA), NAACP and National Federation for the Blind (NFB) filed a lawsuit challenging these changes. The plaintiffs argue that, at the very least, before adopting rules that limit the rights of citizens, a federal agency must provide for public notice and seek comment from affected individuals and organizations. ED provided no legal or factual basis to exclude repeat filers without considering the validity of their complaints. Individuals should be permitted to file more than one complaint when they have been subject to more than one instance of discrimination or when they have been subject to discrimination by different schools.

These actions taken together result in a move away from systemic analyses of case problems to a focus on case-by-case, individual-by-individual decisions. This approach is likely to result in

¹⁴ MEMO, *OCR INSTRUCTIONS TO THE FIELD ON THE SCOPE OF COMPLAINT*, accessed at <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html> (Document provided by Annie Waldman, Propublica.)

¹⁵ U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, *CASE PROCESSING MANUAL*, effective date, March 5, 2018, accessed at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>; See also, Jessica Huseman and Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, Propublica, June 15, 2017, accessed at <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

repetitive and ineffectual case results when the individual cases are often symptoms of a larger systemic cause, or are the result of systemic policies and practices, which will continue unchecked.

B) Proposed Revision of the Title VI guidance

In January 2014, the U.S. Departments of Education and Justice jointly published a letter to schools explaining the right of school children to be free from racial discrimination in school discipline. This guidance letter was designed to help schools understand their legal obligations and ensure discipline practices are fair for all children under the Civil Rights Act of 1964.¹⁶

According to the Departments, the purpose of the letter was to:

1. Assist schools in meeting their existing obligations under federal law to administer student discipline without discriminating on the basis of race, color or national origin.
2. Assist schools in providing all students with equal educational opportunities through guidance on how to identify, avoid, and remedy discriminatory discipline.
3. Explain OCR's [Office for Civil Rights] Title VI and DOJ's Title IV and Title VI investigative process, including the existing legal framework, evidence considered, and the types of remedies sought if violations are found.
4. Provide hypothetical examples of school discipline policies/practices that may violate civil rights laws.
5. Equip school officials with an array of tools to support positive student behavior - thereby providing a range of options to prevent and address misconduct - that will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate.¹⁷

¹⁶ U.S. DEPARTMENT OF EDUCATION, DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (January 8, 2014), accessed at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>;

¹⁷ National Center on Safe Supportive Learning Environments, *Supportive School Discipline Webinar Series Event: Understanding Schools' Legal Obligations under Titles IV & VI*, accessed at https://safesupportivelearning.ed.gov/sites/default/files/2014%20SSD%20Webinar%20Series%202_DCL%2001%2029%2014%20%283%29.pdf. (Note: The National Center on Safe Supportive Learning Environments is funded by the U.S. Department of Education.)

Unfortunately, the Departments are now considering rescinding this guidance,¹⁸ which was developed as the result of a thoughtful process and has been in use by school districts for over four years. Rescission would remove valuable information now available to school districts, which is used to assist them in following the law, but it does not change the law itself. It is still illegal to discriminate against children in school discipline based on race or ethnicity.

Despite rumors to the contrary, the guidance letter does not instruct school districts to ignore school safety issues, prevent referral to law enforcement, prevent removal of students from school to address dangerous conduct, or set quotas. However, this rescission will be especially harmful to students of color and those with disabilities because they face well-documented and continuing disproportionate levels of school removal (suspension, expulsion and informal removal).

C) Two Year Delay of the “Equity In IDEA” Regulations

The ED’s decision to delay the date by which states must comply with reporting requirements regarding disproportionate rates of identification, placement, and discipline of children with disabilities, and their likely rescission, flies in the face of Congressional intent behind the Individuals with Disabilities Education Act (IDEA) “significant disproportionality” provisions. In fact, these concerns were expressed explicitly when the statute designated disproportionality a priority area for monitoring and enforcement in 20 U.S.C. Sec. 1416. The delay, and likely rescission, of these regulations is representative of the Administration’s attack on civil rights.

According to the 2013-2014 Civil Rights Data Collection issued by ED’s OCR, African American students are more than three times more likely than White students to be suspended or expelled from school.¹⁹ Studies, as well as numerous OCR investigations of school districts,²⁰

¹⁸ Rebecca Klein, *Betsy DeVos Mulls The Fate Of Guidance Designed To Reduce Racial Bias In Schools*, April 4, 2018, accessed at https://www.huffingtonpost.com/entry/devos-discipline-guidance_us_5ac4f523e4b093a1eb2150df.

¹⁹ U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE, accessed at <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

²⁰ See, for example, U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, RESOLUTION AGREEMENT, FALL RIVER PUBLIC SCHOOLS COMPLAINT NO. 01-12-1255 (September, 2018) (Describes evidence of different treatment).

have found that differential treatment based on race and implicit biases²¹ are significant factors in racially disproportionate rates of suspensions and expulsions.²²

Across all racial groups, ED data also reveals that *students with disabilities* are more than twice as likely as students without disabilities to be *suspended* in K-12 settings, and are suspended for longer periods of time. Although students with disabilities are just 12% of the overall student population in the U.S., they represent two-thirds of students who are *secluded* from their classmates or *restrained* to prevent them from moving, and are 25% of students subjected to a “school-related” *arrest or referral* to law enforcement.²³

Suspensions are associated with negative student outcomes like lower academic performance and engagement and higher school dropout rates. While, suspensions are linked to students’ failure to graduate on time, future disciplinary exclusion, and entering the juvenile justice system,²⁴ the harm ripples out beyond childhood. Research has found causal links between suspensions in school and long-term negative outcomes, including involvement in the adult criminal law system.²⁵

²¹ See, Staats, C, *Implicit Racial Bias and School Discipline Disparities: Exploring the Connection* (May 2014). Retrieved from Ohio State University, Kirwan Institute website: <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/05/ki-ib-argument-piece03.pdf>. See also, Okonofua, J. A. & Eberhardt, J. L. *Two Strikes: Race and the Disciplining of Young Students*. PSYCHOLOGICAL SCIENCE, 26(5), 617-624 (2015). Retrieved from <https://doi.org/10.1177/0956797615570365> (when African American students misbehaved more than once, teachers were more likely to stereotype the students as troublemakers and recommend harsher discipline), Gilliam, W. S., Maupin, A. N., Reyes, C. R., Accavitti, M., and Shic, F. *Do Early Educators’ Implicit Biases Regarding Sex and Race Relate to Behavior and Recommendations of Preschool Expulsions and Suspensions?* YALE CHILD STUDY CENTER, (2016). Retrieved from Yale University, Edward Zigler Center in Child Development & Social Policy website, https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf.

²² Jayanti Owens & Sara McLanahan, 2018. "Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion," *Working Papers* wp18-04-ff, Princeton University, Woodrow Wilson School of Public and International Affairs, Center for Research on Child Wellbeing. Accessed at <https://ideas.repec.org/p/pri/crcwel/wp18-04-ff.html>.

²³ U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE, accessed at <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> at 16-17. Data shows that between 2%-12% of non-disabled children are suspended when looking individually at all 50 states and the District of Columbia. However, between 5%-25% of students with disabilities are subjected to an out-of-school suspension.

²⁴ Costenbader & Markson, 1998; Skiba & Peterson, 1999.

²⁵ Rosenbaum, Janet, *Educational and Criminal Justice Outcomes 12 years After School Suspension*, Youth & Society (January 17, 2018), accessed at <http://journals.sagepub.com/doi/abs/10.1177/0044118X17752208>.

Additionally, students of color are *identified* as students with disabilities under the IDEA at substantially higher rates than peers²⁶ African American students between ages six and 21 are 40% more likely to be identified as having disabilities than their peers, and Native American children are 70% more likely.²⁷

Unfortunately, *students of color with disabilities* also experience the highest rates of school exclusion, arrest, and restraint. More than one out of four African American, Native Hawaiian, and Native American boys with disabilities — and nearly one in five girls of color with disabilities — receive an out-of-school suspension.²⁸ African American children make up 19% of students with disabilities but they are 36% of those students with disabilities subjected to mechanical restraints.²⁹ Nationally, African American students are just 16% of overall student enrollment, but are 27% of the students referred to law enforcement and 31% of students arrested in a “school-related” arrest.³⁰

The disparity between students of color, students with disabilities, and their White non-disabled peers has devastating consequences.

During the 2004 reauthorization of the federal Individuals with Disabilities Education Act (IDEA), Congress attempted to address issues of racial and disability-related disproportionality in schools. The reauthorized law required local education agencies to use 15 percent of their IDEA, Part B funds³¹ for early intervening services if a district were found to have “significant disproportionality” based on race and ethnicity with respect to: “(1) the identification of children with disabilities; (2) the identification of children in particular disability categories; (3)

²⁶ See, Robert Balfanz, Vaughn Byrnes, and Joanna Fox, *Sent Home and Put Off Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the 9th Grade* (2012), accessed at <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/sent-home-and-put-off-track-the-antecedents-disproportionalities-and-consequences-of-being-suspended-in-the-ninth-grade/balfanz-sent-home-ccrr-conf-2013.pdf>. Also, Losen, Daniel J., Hodson, Cheri L., Keith II, Michael A Morrison, Katrina Belway, Shakti, *Are We Closing the School Discipline Gap*, (2015) accessed at <https://escholarship.org/uc/item/2t36g571>.

²⁷ U.S. DEPARTMENT OF EDUCATION, 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT (2016), available at <https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf>.

²⁸ *Id.* at p.4.

²⁹ *Id.* at p.10.

³⁰ *Id.* at p.6.

³¹ “Part B” of the IDEA is the section that covers children between the ages of 3 and 21.

the placement of children with disabilities in particular educational settings; and (4) the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.”³² The change was meant to both draw attention to disproportionate treatment and also to require spending in at least one area that could have an impact - increased academic support for early intervention services. However, Congress did not define “significant disproportionality,” and ED did not issue regulations clarifying the standard.

Perhaps unsurprisingly, without federal guidance, states established their own metrics to define what counts as “disproportionate.” In 2013, the Government Accountability Office (GAO) issued a report raising alarms regarding these metrics. The GAO found that some states defined disproportionality in a way that all but guaranteed localities would not be required to provide additional services. For example, Nebraska did not find disproportionality in any districts in the school year reviewed for the GAO report, whereas Louisiana identified 73 districts as having significant disproportionality. The GAO found that, had Nebraska school districts used Louisiana’s definition, a number of Nebraska’s districts would likely have been required to provide additional services.³³

In response to these discrepancies and the GAO’s report, ED engaged in rulemaking and released final regulations in December 2016. These regulations both (1) established a standard methodology states would use to make significant disproportionality calculations; and (2) clarified that ED’s “long standing interpretation” that IDEA-required remedies would need to be put into place when there is “significant disproportionality in identification, placement, or any type of disciplinary removal.”³⁴ States had 18 months to ensure their methodologies were in

³² 20 U.S.C. 1418(d). Previously, the law simply allowed a local education agency to use up to 15% of its funds, and the funds were for children without disabilities or for those who were suspected of having disabilities. The 2004 reauthorization required the expenditure of funds and allowed the money to be used on children without disabilities.

³³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-137, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STANDARDS NEEDED TO IMPROVE IDENTIFICATION OF RACIAL AND ETHNIC OVERREPRESENTATION IN SPECIAL EDUCATION, (February 2013), available at <https://www.gao.gov/products/GAO-13-137>.

³⁴ REVISIONS TO REGULATIONS REGARDING THE CALCULATION OF SIGNIFICANT DISPROPORTIONALITY UNDER THE EDUCATION OF CHILDREN WITH DISABILITIES, 81 Fed. Reg. 92376(Dec. 19, 2016) (amending regulations found at 34 C.F.R. §300.646- 647).

line with federal guidelines and to make necessary changes for compliance.³⁵ These regulations were developed through two public comment periods with extensive stakeholder input.

On June 28, 2018, despite powerful proof that permitting a wide range of calculation methodologies ultimately thwarted the intent behind the significant disproportionality reporting requirements, ED delayed implementation of the regulations by two years.³⁶

One of several justifications cited by ED was that recent research, based on a national sample of students, had called into question whether the issue of over-identification was a legitimate problem. The research studies cited were among a string of studies by the same researchers, Morgan and Farkas.³⁷

The studies in question have been deeply criticized for the following flaws. First, Morgan and Farkas use national sample-based studies that did not look at the problem of over-identification as it is found at the district level, directly contrary to the purpose of the regulation to review individual districts. Second, Morgan and Farkas did not appropriately account for racial bias, implicit and explicit, in several areas, including teachers' behavioral ratings of students,³⁸ or how structural racism contributes to differences in the opportunity to learn. Differences range from the access to experienced teachers, higher suspension rates, and the exposure to unhealthy school environments (e.g. lead in water from drinking fountains). Such differences can contribute to racial differences in test scores or other academic outcomes.

³⁵ When published, states were given until July 1, 2018 to comply for children ages 5-21, and were given until July 1, 2020 to comply with new calculation requirements for children ages 3-5. *Id.*

³⁶ There were also changes to the Part C regulations on significant disproportionality. These impact children with disabilities ages Birth Through Age 2.

³⁷ See for example, Morgan, P. L., Farkas, G., Hillemeier, M. M., Mattison, R., Maczuga, S., Li, H., & Cook, M.

(2015). Minorities Are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions. *Educational Researcher*, 44(5), 278–292. <https://doi.org/10.3102/0013189X15591157>

³⁸ Gilliam, W. S., Maupin, A. N., Reyes, C. R., Accavitti, M., and Shic, F. *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior and Recommendations of Preschool Expulsions and Suspensions?* YALE CHILD STUDY CENTER, (2016). Retrieved from Yale University, Edward Zigler Center in Child Development & Social Policy website, accessed

https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf; Okonofua, J. A. & Eberhardt, J. L. *Two Strikes: Race and the Disciplining of Young Students*. *PSYCHOLOGICAL SCIENCE*, 26(5), 617-624 (2015). Retrieved from

<https://doi.org/10.1177/0956797615570365> (when African American students misbehaved more than once, teachers were more likely to stereotype the students as troublemakers and recommend harsher discipline).

Instead, Morgan and Farkas treated these areas as if the differences in results reflect no racial differences in educational opportunities. Their methods lead to the erroneous and alarming conclusion that far higher percentages of African American children should be labeled as eligible for special education, even though they are already over-identified, especially in categories like emotional disturbance.

Third, researchers have criticized the numerous technical flaws of Morgan and Farkas's studies in peer-reviewed academic journals.³⁹ One example is that the researchers use a sampling of data to estimate baseline identification rates for racial groups where actual data is available to use. The starting rates that Morgan and Farkas use invariably show lower levels of disparity in several disability categories than have been found in the actual national data. This is akin to a pollster asserting that his estimated results describe the election outcome more accurately than the actual vote tally. The researchers sampled data generally containing with smaller racial disparities than found in reports to Congress containing the official racially disaggregated counts of students eligible for IDEA. For example, in Morgan and Farkas' recent study using the students in the 2013 NAEP 4th grade reading sample, approximately 11% of both African American and White students had IEPs. The ratio of African Americans to Whites for special education eligibility in that sample was merely 1.01, which does not reflect the disparities we know exist.

When the Trump Administration opted to delay the regulation, pushing the compliance date back for two years until July 2020, it also indicated that during that two-year period it intended to repeal or significantly amend the regulations.⁴⁰ A primary rationale for delaying the regulation is that school districts may be incentivized to deny students special education services on the basis of their color in order to avoid a significant disproportionality determination and/or that the measures will result in *de facto* quotas, preventing students of

39 Skiba R. J., Arltles A. J., Kozleski E. B., Losen D. J., Harry E. G. , *Risks and consequences of oversimplifying educational inequities: A response to Morgan et al.* Educational Researcher, 45, 221–225 (2015). Accessed at <https://journals.sagepub.com/doi/10.3102/0013189X16644606>.

⁴⁰ ED has noticed its intent to submit the delayed rule for notice and comment in February 2018. It is assumed that they will propose to rescind or truncate the regulation.

color from receiving services. However, the prior administration considered and rejected those specific concerns, and there has been no change in circumstances that would justify a different result.

Council of Parent Attorney and Advocates (COPAA) recently filed a lawsuit arguing that the Department cannot delay the compliance date of the rule because the prior administration considered and rejected those concerns, and there has been no change in circumstances that would justify a different result. Further, there is no evidence that any district has ever been encouraged to adopt racial quotas by either the current law or the proposed regulations, and the legal prohibitions against such are well established.

D) Rescission of Guidance Documents Re: J.J.D.P.A. Implementation

The Juvenile Justice and Delinquency Prevention Act (J.J.D.P.A) contains four core requirements that are intended to ensure program equity and quality from states that receive Title II formula grant funds from the Office of Juvenile Justice and Delinquency Prevention (OJJDP).⁴¹ Recently, Caren Harp, Administrator of OJJDP, made an announcement that OJJDP would be “simplifying” the implementation and compliance of the core protections of the JJDPA.⁴²

“Disproportionate Minority Contact” (DMC) is one of the four core requirements of the JJDPA. It is intended to reduce racial disproportionality in the juvenile justice system. The Department of Justice recently rescinded seven guidance documents related to juvenile justice, one of which was the “Disproportionate Minority Contact Technical Assistance Manual”⁴³ This manual, which provides specific instructions to states, was not replaced with new guidance, so states are left without the information they need to comply with the law. Since DOJ cannot

⁴¹ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JJDPA CORE REQUIREMENTS, Accessed at https://www.ojjdp.gov/ojstatbb/structure_process/qa04301.asp?qaDate=2013.

⁴² Rachel Marshall, Joshua Rovner and Sarah Bryer, *OJJDP Administrator’s Words on Racial Disparities Shock Us*, Juvenile Justice Information Exchange.(July 6, 2018) Accessed at <https://jjie.org/2018/07/06/ojjdp-administrators-words-on-racial-disparities-shock-statewide-advisory-group-community>.

⁴³ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JJDPA , DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL, Fourth Edition, (July 2009), https://drive.google.com/file/d/1TihjCotv9Bq7WP_2VaPK95sRL6PiNG5O/view?ts=5b3e3c14

eliminate the statutory requirement on its own, as with other methods reviewed in this paper, this is an effective method to functionally amend it at the agency level. In addition, OJJDP has also made recent changes to the amount and type of data and information that states are required to provide them in their Title II grant applications on DMC, which may also have the effect of weakening state work on reducing disparities.

E) Privatization

In addition to the direct methods of change discussed above, the Trump Administration has tried repeatedly to use the power of the federal government to further privatize education. Some of these efforts have been unsuccessful, but others have started to succeed -- and all have demonstrated the Administration's intent to shift funding from public education to private schools.

Those efforts are problematic for children of color with disabilities for multiple reasons. First, when children leave the public school system to attend private schools, he or she loses many civil rights, as most civil rights laws apply only in public schools.⁴⁴ Second, there are open federal constitutional questions that rest in the play in the joints between the Supreme Court's decisions in *Zelman v. Simmons-Harris*⁴⁵ (permitting public funding of private school vouchers if the money passes through the parent and the parent independently chooses the school) and *Trinity Lutheran Church of Columbia, Inc. v. Comer* (evaluating denial of generally available state grants to religious institutions using strict scrutiny).⁴⁶ Advocates of privatization are likely to take the opportunity of any direct federal funding of private schools to push to extend the decision in *Trinity Lutheran* to apply to the circumstances not contemplated in the *Zelman* case.

⁴⁴ For instance: *Under the IDEA, public schools are required to provide for evaluation, free appropriate public education, individualized education plans (IEPs), least restrictive environment, parent participation, and procedural safeguards (known as "due process") to challenge school decisions. Assuming the student is admitted to a private school, the school does not have to accept the student's IEP or provide special educational and related services (such as speech therapy, assistive technology, and transportation), unless the state has enacted legislation with these requirements, which few have.*

⁴⁵ 536 U.S. 639 (2002).

⁴⁶ 137 S. Ct. 2012 (2017).

This will have the result of depleting further the funds available for public education and limiting the choices of families who cannot or do not wish to access private school.

In terms of the administration's existing privatization efforts, their unsuccessful methods have been their most public methods, such as asking Congress to approve hundreds of millions of dollars in new funds for education privatization, including for private school vouchers.⁴⁷ So far, Congress has not approved these programs, nor included any significant privatization measures in approved federal budgets. Similarly, advocates defeated the Education Savings Accounts for Military Families Act of 2017 (H.R. 5199, S. 2517), an effort to turn the longstanding "Impact Aid" program (which makes up local education funding on/around non-taxable properties like military bases) into private school vouchers; the administration ultimately turned against the Congressional proposal after it became clear it would not pass.⁴⁸

However, they have succeeded in some less public ways in pushing education privatization. For instance, the Department of Education issued a *Dear Colleague Letter* (DCL) at the end of 2017, stating that they would allow charter schools even more flexibility than before.⁴⁹ Among other things, the DCL permits exemptions from the kinds of lottery-based admissions processes that protect against discriminatory admissions practices. As another example, in the *Tax Cuts and Jobs Act of 2017*, Senator Ted Cruz added an amendment, 1725,⁵⁰ to expand "529" accounts. "529" accounts were previously only available for qualified higher education expenses, but this amendment expanded them so they can now be used for K12 education expenses. Although "529" expansion is different from direct federal funding of private schools, it pushes federal law and policy closer to permitting such funding.

F) Use of Race in College and K-12 Admissions

⁴⁷ U.S. DEPARTMENT OF EDUCATION, FACT SHEET: President Trump's FY 2018 Budget, accessed at <https://www2.ed.gov/about/overview/budget/budget18/budget-factsheet.pdf>

⁴⁸ Alyson Klein , *Trump Administration: Don't Rob Impact Aid Dollars for Military Choice*, *Ed Week*, (May 17, 2018) , accessed at http://blogs.edweek.org/edweek/campaign-k-12/2018/05/choice_trump_devos_impact_aid.html

⁴⁹ UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF INNOVATION AND IMPROVEMENT, DEAR COLLEAGUE LETTER (November 15, 2017), accessed at <https://innovation.ed.gov/files/2017/12/CSP-DCL.pdf>.

⁵⁰ Tax Cuts And Jobs Act Of 2017, Pub.L. 115–97,AMENDMENT 1725 (Cruz) (December 2, 2017), Accessed at <https://www.cruz.senate.gov/files/documents/Bills/1852.pdf>.

On July 2, 2018, the Trump Administration rescinded seven guidance documents that the Departments of Education and Justice spent over a decade developing, guidance documents that contained resources for colleges and universities to help prepare for an increasingly diverse society and global workforce. Together, the documents contained information on how elementary, secondary, and post-secondary schools could voluntarily use race as a factor in achieving diversity and avoiding racial isolation.¹⁷ While the 2003 Supreme Court ruling *Grutter v. Bollinger*⁸ upheld the right of colleges and universities to use race as an admission criterion to promote diversity in their student body, the Trump Administration has made its own policy preference abundantly clear by taking away tools that can be used to promote such diversity and address segregation.

The withdrawal of the diversity guidance leaves fewer tools in the diversity toolbox, namely percentage plans and economic diversity programs.

More recently, the Department of Justice's support of a lawsuit challenging Harvard University's admissions policies demonstrates its willingness to scale back advances for minority students by limiting the consideration of race in admissions. Harvard's admission policies and many others were adopted to help counter decades of well-documented, systemic racial and ethnic discrimination. While the most selective private colleges (those that admit less than 40% of applicants) are most likely to use race-conscious admissions, public and private colleges across the selectivity spectrum have similar measures, according to a study by the American Council on Education.⁵¹ The Administration's decision to try to limit the use of race in admissions and in achieving diversity in both the K-12 and postsecondary setting indicates their unwillingness to address these systemic disparities, to integrate increasingly segregated public schools, or to benefit society as a whole through increased diversity in our nation's schools and colleges.

⁵¹ Carolyn Phenicie, *Affirmative Action Thrives at Most Selective Colleges*, Roll Call (March 23, 2015). Accessed at https://www.rollcall.com/news/affirmative_action_thrives_at_most_selective_colleges-240861-1.html.

Further, missing from the Administration position is any acknowledgment that race-conscious admissions policies, such as those used by Harvard, were also created for benefit of the entire student body that will enter the workforce in increasingly diverse society.

Conclusion

The changes outlined above are not the result of an accident or sloppiness. The Trump Administration acts intentionally. These changes part of a systematic attempt to weaken protections for less powerful groups in gender, changes based on race, national origin, sex, and disability, which will ultimately weaken the foundation of our nation's public education system as a whole. These benefits accrue to actors who have previously been found to be biased, which preserves the power structure.

If this trend is permitted to continue, decades of civil rights protections and useful, practical reforms will be lost, injuring a generation of children. Even once they can be reversed, it will take time to do so. In addition to the children they protect, there are school districts, juvenile justice facilities, government agencies, and private providers who have depended on this guidance, and now must change their polices to conform with rapid fire and poorly wrought policy alterations.

It is not too late to change course, but all stakeholders, including advocates and policy-makers must work rapidly and cooperatively **now** to reverse these changes and prevent further damage.

RECOMMENDATIONS

We make the following recommendations:

FEDERAL

- The Secretary of Education should appoint a commission, containing all stakeholders, to provide feedback on future proposed policy changes at the regulatory and sub-regulatory level.

- The Secretary of Education should state clearly that Every Student Succeeds Act (ESSA) funds may not be used to purchase weapons and make the choice not to rescind the “Equity in Education” regulations and Title VI guidance.
- The GAO or other appropriate government entity should study the informal removal⁵² of students of color, and those with disabilities from school, and make recommendations about legislative and policy changes that would result in fewer such removals, which work as end runs around existing legal protections.

STATE ATTORNEYS GENERAL

- State Attorneys General should create a state level complaint process to review facially neutral education policies or methods of administration, including but not limited to school discipline policy, that may be having an unlawful disparate impact pursuant to federal Title VI; Section 504; and Title IX disparate impact regulations, as well under extant state laws and regulations that have a disparate impact component.
- State Attorneys General should provide oversight of their state department of education’s annual review of the data on school district discipline policies and practices for possibly excessive use of disciplinary removal, including those pertaining to school policing, or where large disparities along the lines of race, disability status, gender, English Learner status, suggest the possibility of civil rights violations.
- State Attorneys General should recommend that their state policymakers codify in state legislation, regulations, or guidance all of the federal civil rights regulations and guidance that have been rescinded, or are about to be rescinded, by the current administration.

⁵² “Informal removal” refers to the practice of school administrators of removing students from school and/or from instruction as a form of discipline, without naming it a suspension or expulsion and providing the requisite due process, such as sending children home “for a break” or shortening the child’s school for an extended period of time.

- State Attorneys General should review and where possible, prohibit district expenditures of federal funds to purchase weapons to arm teachers wherever such action might possibly violate state education law or policy.

STATE POLICYMAKERS/STATE DEPARTMENTS OF EDUCATION

- State policy makers and departments should collaborate with state attorneys general to review school and district level data on disciplinary removal.
- State policy makers and departments should require that, annually, schools and districts publicly report and analyze the actual number of days of missed instruction due to suspensions, disaggregated by race/ethnicity, gender, and disability, and further broken down by reasons for removal.
- State policy makers and departments should support the implementation of the standard methodology outlined in the stalled Equity in Education regulations, as many states are already doing.⁵³
- State policy makers and departments should support efforts to change state and local codes of conduct to eliminate suspensions for minor behaviors, including, but not limited to, suspensions for disruption or willful defiance.
- State departments should provide technical assistance to high-suspending districts for the implementation of restorative discipline policy and other non-punitive forms of intervention focused on prevention of school removal.
- State policy makers and departments should require that schools conduct student, parent, and staff climate surveys, and report the outcomes publicly, to ensure that interventions are supporting a safe and healthy environment.
- State departments should set goals for accountability plans to reduce disciplinary exclusion's impact on instruction as part of state and local standards.
- State departments should measure progress with methods that make it clear whether lost instruction due to discipline is increasing or decreasing, with special attention to

⁵³ Caitlin Emma, *Some States Spurn Possible Delay Of Obama Special Education Rule*, Politico (05/16/2018). Accessed at <https://www.politico.com/newsletters/morning-education/2018/05/16/some-states-spurn-possible-delay-of-obama-special-education-rule-220181>.

whether the subgroups that have historically lost the most instruction time are benefitting from interventions.

EDUCATORS

- Educators should review the number of days of lost instruction due to discipline and corresponding rates of discipline by race, gender, and disability status and use the data within the school system to evaluate progress alongside other academic and school climate indicators.
- Educators should implement alternative systems of school discipline that emphasize non-punitive approaches, including restorative and rehabilitative responses to behavior problems.
- Educators should prioritize training and support for teachers to improve their engagement with students and parents. Also, include training and supports for administrative leaders.
- Where rates are high and disparities are wide, educators should reject the status quo and accept a share of responsibility for remedying disparities by race/ethnicity, gender, and disability status.

ADVOCATES

- Advocates should request discipline data annually and request that schools and districts provide data that includes the number of days of lost instruction, as well as discipline data by race, gender, and disability status.
- Advocates should express support for positive policies and practices, in addition to raising concerns about excessive and disparately applied discipline policies.
- Advocates should encourage the use of resources for staff training and for professional development in initiating and implementing more effective methods.
- Advocates should bring concerns about excessive and disparate discipline to the attention of administrators and of state and local education boards.

- Advocates should utilize the media to bring public attention to harmful policies and practices.

MEDIA

- The media should keep the focus on accurate, fact and data based analysis of systemic inequality in education in all of its forms.
- The media should find and feature districts that have successfully improved their learning environment and reduced the use of severe discipline policies.
- The media should highlight noncompliance with public reporting requirements and encourage school authorities to make timely corrections.
- The media should describe discipline data as an indicator of school performance or achievement.
- The media should raise questions about the impact of excessive suspensions, such as leaving large numbers of children unsupervised in the community, and the long-term safety implications of frequent suspensions that lead to higher dropout and delinquency rates. Expanding the data available will be essential to informing the efforts outlined above. Where possible, districts should consider piloting the collection of discipline and safety data on LGBTQ youth as well. Likewise, increased reporting on the length of suspension will provide an accurate depiction of which students are missing extended periods of instruction in school.

ALL

- Educators, lawmakers, and community members should also continue to question whether suspensions are an educationally justifiable response to minor or more serious student behavior.
- Have hard and honest conversations about the root causes of systemic inequality and work cooperatively correct them.

Signed:

American Civil Liberties Union

The Judge David L. Bazelon Center for Mental Health Law

Center for Civil Rights Remedies at the Civil Rights Project at UCLA

Center for Public Representation

Council of Parent Attorneys and Advocates

Disability Rights and Education Fund

Education Law Center – PA

Juvenile Law Center

Lauren Onkeles-Klein, Director, Juvenile and Special Education Law Clinic, UDC – David A. Clarke School of Law.”

Lawyers’ Committee for Civil Rights Under Law

National Center for Youth Law

National Disability Rights Network

Native American Disability Law Center

Public Interest Law Center