



# Advocates for Children of New York

Protecting every child's right to learn

July 23, 2021

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**Re: Docket No. ED-2021-OCR-0068-0001; The Nondiscriminatory Administration of School Discipline**

Dear Acting Assistant Secretary Goldberg,

Advocates for Children of New York, Inc. (“AFC”) appreciates the opportunity to provide written comments in response to the U.S. Department of Education’s (“U.S. DOE”) Request for Information (“RFI”) Regarding the Nondiscriminatory Administration of School Discipline, Docket ID ED-2021-OCR-0068. Our comments focus on exclusionary, punitive school discipline and police policies and practices faced by New York City public school students; the disproportionate impact these policies and practices have on Black and Brown students and students with disabilities; the impact these practices have on students’ academic performance and social-emotional well-being; and promising alternative practices.<sup>1</sup>

For nearly 50 years, AFC has worked to ensure a high-quality education for New York students who face barriers to academic success, focusing on students of color and students from low-income backgrounds. We speak out for students who are most likely to struggle or experience discrimination in school because of poverty, race, disability, homelessness, immigration status, involvement in the child welfare or juvenile or criminal legal systems, or language barriers. AFC provides a range of direct services, including free individual case advocacy for families of students who are excluded, or at risk of being excluded, from school through suspension, arrest, summons, or inappropriate referral to the emergency room due to unaddressed or unsupported behavioral and mental health needs. AFC works to help these students get the behavioral, mental health, and academic support they need to succeed in school. AFC also works on institutional reform of education policies and practices through

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<sup>1</sup> Abbe Petuchowski, a student at Columbia Law School, class of 2023, provided invaluable research support on these comments.



advocacy and impact litigation and advocates for positive, restorative, and trauma-informed alternatives to exclusionary, punitive discipline.

### **School Discipline and Policing Practices With Discriminatory Effects Should Be Prohibited**

An ongoing and persistent school discipline practice that impacts the communities we serve is the reliance on law enforcement to respond to students in emotional crisis. In New York City, New York City Police Department (“NYPD”) school safety agents<sup>2</sup> outnumber school social workers, 5,400 to 1,500. Black students and students with disabilities continue to be disproportionately harmed by exclusionary, punitive discipline and policing practices—responses that are traumatic for children, do nothing to address the root cause of student behavior, reduce time spent in class learning, push students out of school, and increase the likelihood of entering the juvenile or criminal legal system. Being removed from class by police, potentially even handcuffed, and sent to the hospital emergency room is traumatic for a student, fails to address the root cause of their emotional distress, and decreases their time in class learning.<sup>3</sup>

Last month, AFC released a report, “Police Response to Students in Emotional Crisis: A Call for Comprehensive Mental Health and Social Emotional Supports in Police-Free Schools,” analyzing NYPD data over the last four school years, finding that NYPD officers, including precinct officers and school safety agents, responded to a total 12,050 incidents in which a student in emotional distress was removed from class and transported to the hospital for psychological evaluation—what the NYPD terms a “child in crisis” intervention.<sup>4</sup> Almost half of these interventions (5,831, or

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<sup>2</sup> In New York City, school safety agents provide security within school buildings and are law enforcement personnel. While school safety agents are designated as peace officers under the law and do not carry guns, they are employed by the NYPD and have similar duties, roles, training, and appearances to police officers, as they make arrests, issue summonses, carry and use handcuffs made of metal or Velcro, wear law enforcement uniforms and badges, and get trained at the New York City Police Academy. N.Y. Crim. Proc. Law § 2.10.

<sup>3</sup> See, e.g., Elizabeth A. Shaver & Janet R. Decker, *Handcuffing A Third Grader? Interactions Between School Resource Officers and Students with Disabilities*, 2017 Utah L. Rev. 229 (2017); Elsa Haag, *Who Protects Whom: Federal Law As A Floor, Not A Ceiling, to Protect Students from Inappropriate Use of Force by School Resource Officers*, 16 Duke J. Const. L. & Pub. Pol'y Sidebar 187 (2021); see also Melanie Asmar, *Handcuffed in Denver in Fifth Grade: ‘Whenever I Shut My Eyes I Saw The Cuffs,’* Chalkbeat Colorado (May 30, 2019), <https://co.chalkbeat.org/2019/5/30/21108333/handcuffed-in-denver-in-the-fifth-gradewhenever-i-shut-my-eyes-i-saw-the-cuffs>.

<sup>4</sup> Advocates for Children of New York, *Police Response to Students in Emotional Crisis: A Call for Comprehensive Mental Health and Social Emotional Supports in Police-Free Schools* (June 2021),



48.4%) involved children between the ages of 4 and 12. In nearly one out of every ten interventions, the NYPD’s response to an apparent school-based mental health crisis involved putting handcuffs (i.e., metal or Velcro restraints) on the child. Many New York City schools continue to lack the resources and appropriately trained staff to support their students’ emotional, behavioral, and mental health needs; instead, they rely heavily on law enforcement to respond to students in emotional crisis. Mirroring broader trends in policing, a disproportionate number of child in crisis interventions involve Black students, students with disabilities in New York City Department of Education (“NYC DOE”) District 75 special education schools—a specialized school district in New York City for students with significant needs—and students attending schools located in low-income communities of color. Black students and students in District 75 are not only dramatically over-represented in these incidents; they are also more likely than their peers to be handcuffed when removed from school. For example:

- More than one out of every three (36.7%) students in emotional crisis handcuffed between July 2018 and March 2020 was a Black boy, even though Black boys comprised just 13% of enrollment. Black girls were handcuffed at twice the rate of White girls.
- Of the children between the ages of 4 and 12 who experienced a child in crisis intervention during the 2018-19 and 2019-20 school years, more than half (51.8%) were Black.
- At least 9.1% of all child in crisis interventions during the 2018-19 and 2019-20 school years occurred in District 75 special education schools, even though District 75 enrolled only 2.3% of City students. More than one out of every five (21.3%) students handcuffed while in crisis was a student with a disability in District 75.

In addition to the overreliance on police to address student behavior, since the pandemic started in March 2020 and during the 2020-2021 school year, new discipline practices emerged in the remote learning setting. During the Spring 2020 remote learning period, young people reported incidents of educators putting them on mute for speaking “out of turn,” a punitive response made possible through remote learning that fosters an unwelcoming classroom environment and is equivalent to a classroom removal. When schools moved to blended learning (partially in-person and partially remote) in the 2020-2021 school year, schools began moving students to remote learning from blended learning as a form of

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[https://www.advocatesforchildren.org/sites/default/files/library/police\\_response\\_students\\_in\\_crisis.pdf](https://www.advocatesforchildren.org/sites/default/files/library/police_response_students_in_crisis.pdf) [hereinafter *Police Response to Students in Emotional Crisis*].



exclusionary discipline without providing parents with the necessary notice and due process required by the U.S. Constitution; the New York State Constitution, law and regulations; and New York City laws and regulations.<sup>5</sup> Many of these students are students with disabilities and thus were also denied the protections guaranteed to them under the Individuals with Disability Education Act (“IDEA”), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (“ADA”).<sup>6</sup>

Since the pandemic, some school districts have been using the excuse of health safety to remove students from their in-person classes without any due process protections. The NYC DOE and at least one charter school in New York City have asserted that it need not offer due process or conduct manifestation determination reviews (“MDRs”) for students with disabilities when they are removed from their in-person class to remote learning based upon behaviors that are named as “COVID unsafe” behaviors. These behaviors, however, are manifestations of the students’ disabilities, and include such behaviors as tantrums, elopement, not following directions, and laying on the floor. The mere labeling of behaviors as “unsafe” cannot sidestep a student’s due process protections and protections set forth in the IDEA. *See Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 233 (E.D.N.Y. 2018). The NYC DOE’s approach, which would permit schools to label most, if not all, disruptive behaviors under the blanket designation, “COVID unsafe,” would effectively leave discretion solely to the school to decide when a student can be removed from their in-person class to a remote placement. This, in turn, would completely deprive the child of their due process rights and protections under the IDEA and Section 504.

We have seen a few illegal suspensions where Black students with disabilities allegedly failed to comply with health and safety guidelines and their schools failed to offer accommodations that would enable these students to remain learning in person. Contrary to guidance released by the U.S. DOE and NYC DOE requiring accommodations prior to removing a student from in-person learning, their schools failed to take into full consideration the student’s age, the unique impact of any early childhood trauma, the student’s developmental stage, and the student’s disability.<sup>7</sup>

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<sup>5</sup> *Goss v. Lopez*, 419 U.S. 565, 565-566 (1975); N.Y. Const. art. 11 § 1; N.Y. Educ. Law § 3214; *School Discipline Procedures*, N.Y.C. Dep’t of Educ. Chancellor’s Regulations § A-443 (Mar. 5, 2004), <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-443-3-5-04-english>.

<sup>6</sup> Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400; Nondiscrimination under Federal Grants and Programs, 29 U.S.C. § 794; Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 to 12213.

<sup>7</sup> N.Y.C. Off. of Sch. Health, *Guidance Regarding Use of Face Coverings for Students Participating in Blended Learning* (2020); U.S. Dep’t of Educ., Off. of Civ. Rts., *Questions and Answers for K-12*



For example, in one case, a kindergarten student with significant Attention Deficit Hyperactivity Disorder (“ADHD”) and Autism was placed on remote learning indefinitely due to his alleged failure to maintain the required distance of 6 feet from his peers and wear a mask. The parent was provided with no written notice, no hearing, and no real avenue to appeal the decision to move the student to remote learning indefinitely. Moreover, the school insisted it was not a disciplinary action and that the student was not entitled to these protections.

We have also heard about a few instances of improper removals to remote learning for violations of the school discipline code. For example, just this month, on the first day of summer school in July, a student with an Individualized Education Program (“IEP”) in foster care was told not to return to school until September after allegedly threatening another student. The school did not provide his foster mother written notice of the suspension or the opportunity to attend a suspension hearing or an MDR to determine whether the student’s alleged behavior was a manifestation of his disability or a result of the school’s failure to implement his IEP. The school also failed to provide the student any alternate instruction during the suspension. Subsequently, after the student had missed several days of school and we escalated the matter to the central NYC DOE office, school staff told the student’s foster care agency he was not suspended, offering remote instruction pending location of another summer school site. However, the student’s foster care coach and foster parent previously communicated to the school that the student—with the disability classification Emotional Disturbance and a one-to-one paraprofessional on his IEP—does not learn remotely and needs close supervision.

### **Students in Pre-K Through Third Grade Should Not Face School Discipline**

Students in pre-K through third grade should never be subjected to suspension, whether in-school or out-of-school. In New York City, the discipline code does not apply at all to students in 3-K or pre-K. Students in 3-K and pre-K may not be expelled or suspended. In addition, 3-K and pre-K students may not be sent home early as a form of punishment or as a way to manage disruptive behavior in the classroom. The NYC DOE’s “Statement on Positive Behavior Guidance” for 3-K and pre-K students referenced in the discipline code provides helpful guidance on positive support and interventions to be used in lieu of suspension.<sup>8</sup>

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*Public Schools In the Current COVID-19 Environment* (Sept. 28, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf>.

<sup>8</sup> N.Y.C. Dep’t of Educ., *Citywide Behavioral Expectations to Support Student Learning Grades K-5* (Sept. 2019), <https://www.schools.nyc.gov/docs/default-source/default-document-library/discipline-code-kindergarten-grade-5-english> [hereinafter *K-5 NYC Discipline Code*].



In 2019, as a result of extensive advocacy by AFC in coalition with other advocates, students, parents, and educators, New York City revised its discipline code to significantly limit classroom removals and suspensions for students in kindergarten to third grade. For example, students in kindergarten through second grade cannot be removed from class for more than one school day and cannot be suspended for up to five days, except in very limited cases where the student’s behavior is repeatedly violent or could cause serious harm. For students in kindergarten through third grade, students cannot be suspended for up to five days unless the principal gets permission from the main NYC DOE office that oversees suspensions. The main NYC DOE office looks at whether the school has used supports and interventions and other types of discipline that keep students in class before allowing the suspension. Furthermore, sixteen states and the District of Columbia have policies that explicitly limit or prohibit the use of suspensions and expulsions by grade level, particularly for the younger grades.<sup>9</sup>

### **Exclusionary Discipline for Minor, Non-Violent, or Subjectively Defined Types of Infractions Should Be Prohibited**

For several years, many advocates, parents, students and educators in New York City<sup>10</sup> have been advocating for the elimination of exclusionary disciplinary penalties for minor, non-violent, or subjectively defined types of infractions in the NYC DOE Citywide Behavioral Expectations to Support Student Learning (“Discipline Code”). The New York City Discipline Code divides behavior into five different “Levels,” with Level 1-3 involving minor and non-violent behavior. Recent revisions to the NYC Discipline Code reduced the number of infractions where exclusionary disciplinary penalties are imposed; however, there are still many Level 1-3 infractions where students can be subjected to exclusionary discipline: a teacher’s removal from a class; principal’s suspension for 1-5 days; or superintendent’s suspension for 6-20 days. Many of these infractions also involve subjectively defined behavior including, “defying authority,” engaging in a “minor altercation” or “physically confrontational behavior,” behaving in a manner that “disrupts the educational process,” and engaging in “disrespectful behavior.”<sup>11</sup>

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<sup>9</sup> Alyssa Rafa, *The Status of School Discipline in State Policy*, Education Commission of the States (Jan. 2019), <https://www.ecs.org/wp-content/uploads/The-Status-of-School-Discipline-in-State-Policy.pdf>.

<sup>10</sup> AFC is part of a city-wide coalition Dignity in Schools, New York. DSC-NY is made up of 23 New York City organizations led by students, parents, educators, and advocates working to end school pushout, stop the overuse of suspensions, and remove all school police and school policing practices from NYC schools. <https://dignityinschools.org/dsc-ny> (last visited July 22, 2021).

<sup>11</sup> N.Y.C. Dep’t of Educ., *Citywide Behavioral Expectations to Support Student Learning Grades 6-12* (Sept. 2019), <https://www.schools.nyc.gov/docs/default-source/default-document-library/discipline-code-grade-6-12-english> [hereinafter *6-12 NYC Discipline Code*].



Exclusionary discipline practices place students at risk for experiencing a myriad of short- and long-term educational, economic, and social-emotional problems, including school avoidance, increased likelihood of dropping out of school, and involvement with the juvenile and/or criminal legal system.<sup>12</sup> The American Academy of Pediatrics and the American Psychological Association note the significant negative health and mental health impacts of out-of-school suspensions on students, including negative impacts on self-esteem and increased student alienation from school staff.<sup>13</sup> Furthermore, students of color and students with disabilities are often disciplined more harshly and more frequently than their peers, causing serious, negative consequences for their academic success.<sup>14</sup>

This school-to-prison pipeline has been conclusively established in New York City. The Center for Court Innovation initially established this connection in a study of middle and high school students who faced school discipline in 2012 and 2013. The results were alarming. Suspensions were connected to arrests, failing a grade, and further suspensions in future school years: 50% of students had a future disciplinary incident and 20% of students had a future juvenile or criminal arrest. Black and Hispanic students, students with disabilities, and low-income students were more likely to be suspended than other students, even when past behavior was accounted for and only similar types of incidents were examined.<sup>15</sup> In 2018, an analysis of NYC DOE suspension records by the Independent Budget Office in New York City found that Black students, including Black students with disabilities, were more likely to receive longer suspensions on average for 8 of the 10 most common

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<sup>12</sup> See, e.g., Advancement Project, Padres and Jovenes Unidos, Southwest Youth Collaborative, and Children & Family Justice Center of Northwestern University School of Law, *Education on Lockdown: The Schoolhouse to Jailhouse Track* (Mar. 2005), [https://www.njcn.org/uploads/digital-library/Education-on-Lockdown\\_Advancement-Project\\_2005.pdf](https://www.njcn.org/uploads/digital-library/Education-on-Lockdown_Advancement-Project_2005.pdf); Johanna Wald and Daniel Losen, *Defining and Redirecting a School-to-Prison Pipeline*, *New Directions for Youth Dev.*, Fall 2003, at 9, [https://pdfs.semanticscholar.org/6954/11a14bda3a82dd941c504272c57a8ccc4d44.pdf?\\_ga=2.95874396.118423638.1541436106-983094117.1541436106](https://pdfs.semanticscholar.org/6954/11a14bda3a82dd941c504272c57a8ccc4d44.pdf?_ga=2.95874396.118423638.1541436106-983094117.1541436106).

<sup>13</sup> See Am. Acad. of Pediatrics, Pol’y Statement by Comm. on Sch. Health, *Out of School Suspension and Expulsion*, 112 *Pediatrics* 1206 (2013), <https://pediatrics.aappublications.org/content/pediatrics/112/5/1206.full.pdf>; Am. Psych. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* (Aug. 9, 2006), <https://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>.

<sup>14</sup> See U.S. Comm’n on Civ. Rts., *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, *Briefing Report* (July 2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

<sup>15</sup> Lama Hassoun Ayoub et al., *School Discipline, Safety, and Climate: A Comprehensive Study in New York City*, Ctr. for Ct. Innovation (Sept. 2019), <https://www.courtinnovation.org/school-discipline> [hereinafter *School Discipline, Safety, and Climate*].





behavioral infractions.<sup>16</sup> Given the significant impact exclusionary discipline has on students, including racial disparities, exclusionary discipline must be eliminated as an option for all minor, non-violent, and subjectively-defined infractions.

Moreover, currently, students are immediately and automatically removed from school once a superintendent's suspension (a suspension for more than 5 school days requiring superintendent approval) is issued and they are assigned to an Alternate Learning Center ("ALC") while waiting for a hearing. Since hearings are scheduled five school days after the effective date of suspension, a student is removed from their school at least five school days before the opportunity to be heard at a hearing and a determination whether a suspension is even warranted. This automatic removal – without regard for the specific situation or incident – has a detrimental impact on a student's social-emotional well-being and academic performance. In our work, we repeatedly see the negative impact that these immediate removals have on a student's relationship with their school and their sense of belonging in a school community. This occurs even for infractions where there is no violent or harmful behavior. We have urged the NYC DOE to stop the immediate removal of students prior to a suspension hearing when there is no immediate or ongoing threat of danger to the school community. Immediate removal should never occur for Level 1-3 infractions and for Level 4 and 5 infractions the decision should be made on a case-by-case basis and reserved for truly dangerous and violent incidents.

### **Restraints on Students in Emotional Crisis Should Be Prohibited**

While there is no federal law prohibiting the use of handcuffs or other restraints on students in school, New York State law explicitly prohibits schools' use of restraints for the purpose of preventing or discouraging specific behavior,<sup>17</sup> restricting their use to emergency situations.<sup>18</sup> Emergency situations, however, is broadly defined, including instances where there is no physical threat of harm to people, but rather potential harm to school property or when a student's behavior is interfering with the "orderly exercise" of the school.<sup>19</sup> These exceptions to the ban on restraints also apply in New York City. Moreover, as members of law enforcement, rather than

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<sup>16</sup> Liza Pappas, *When Students of Different Ethnicities Are Suspended For the Same Infraction Is the Average Length of Their Suspensions the Same?*, N.Y.C. Indep. Budget Off. (Oct. 2018), <https://ibo.nyc.ny.us/iboreports/print-nycbtn-suspensions-october-2018.pdf>.

<sup>17</sup> Prohibition of Corporal Punishment and Aversive Interventions, 8 NYCRR § 19.5.

<sup>18</sup> *Id.*; Program Standards for Behavioral Interventions, Emergency/interventions, 8 NYCRR § 200.22(d).

<sup>19</sup> Prohibition of Corporal Punishment and Aversive Interventions.





school staff, school safety agents and other members of the NYPD are not subject to these restrictions and have even wider discretion in the use of handcuffs.<sup>20</sup>

Regardless of its legality, however, this over-reliance on police to address students in emotional crisis in schools has far-reaching consequences for students, particularly students with disabilities and students of color who, according to national and local data, are often disproportionately policed in school.<sup>21</sup> The use of restraints on these children not only has a traumatic impact on the child, but also can exacerbate the behavior that led to the crisis, increasing the likelihood of repeated incidents, or even causing new problematic behaviors from the trauma of being restrained.<sup>22</sup> Psychological injury from restraints may range from short-term, such as fear, to long-term, such as Post-Traumatic Stress Disorder.<sup>23</sup> Physical injuries may range from bruising to bone fractures, and even death.<sup>24</sup> Handcuffing students can also have a traumatizing effect on classmates who observe the incident and cause a significant negative impact on school climate.<sup>25</sup>

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<sup>20</sup> *Pupil Discipline and Behavior - Corporal Punishment*, N.Y.C. Dep't of Educ. Chancellor's Regulations § A-420 (Nov. 28, 2014), <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-420-english>.

<sup>21</sup> N.Y. Police Dep't, *NYPD Patrol Guide Procedure No. 221-13: Mentally Ill or Emotionally Disturbed Persons* (June 1, 2016), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations\\_pdf/pg221-13-mentally-ill-emotionally-disturbed-persons.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-13-mentally-ill-emotionally-disturbed-persons.pdf).

<sup>22</sup> Jason Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 Wash. L. Rev. 919 (2016); Roberta Meyers Douglas, *Helping Justice Involved Individuals with Substance Use & Mental Health Disorders: Understanding How Laws, Regulations & Policies Affect Their Opportunities*, Legal Action Ctr. (Sept. 2018), <https://www.lac.org/resource/helping-justice-involved-individuals-with-substance-use-and-or-mental-health-disorders-understanding-how-laws-regulations-and-policies-affect-their-opportunities>.

<sup>23</sup> Nat'l Disability Rts. Network, *School Is Not Supposed to Hurt* (Mar. 2012), [http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School\\_is\\_Not\\_Supposed\\_to\\_Hurt\\_3\\_v7.pdf](http://www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf) [hereinafter Nat'l Disability Rts. Network]; U. S. Gov't Accountability Off., *GAO-09-719T, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (May 19, 2009), <http://www.gao.gov/products/GAO-09-719T> [hereinafter *GAO, Seclusions and Restraints*]; *CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings*, 34 Behavioral Disorders 223 (Aug. 2009) [hereinafter *CCBD's Position Summary*].

<sup>24</sup> Nat'l Disability Rts. Network, *supra* note 22; *GAO, Seclusions and Restraints, supra* note 22; *CCBD's Position Summary, supra* note 22.

<sup>25</sup> *Id.* See also Sec'y of Educ., U.S. Dep't of Educ., *Dear Colleague Letter on School Resource Officers ('SROs') in Schools* (Sept. 8, 2016), <https://www2.ed.gov/policy/gen/guid/school-discipline/files/ed-letter-on-sros-in-schools-sept-8-2016.pdf>; Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., *Dear Colleague Letter on School Resource Officers ('SROs')* (Sept. 8, 2016), <https://www2.ed.gov/documents/press-releases/cops-sro-letter.pdf>.



While the existing legal framework does not prohibit the use of restraints in emergency situations, depending on the circumstances, handcuffing a student in emotional distress may violate the student’s civil rights. For example, it could violate the student’s constitutional right to be free from unreasonable seizure and excessive force; the right to a free appropriate public education, including positive behavioral supports and interventions that keep students with disabilities in the classroom learning pursuant to the IDEA; and the right to be free from disability-based discrimination and to receive accommodations pursuant to the ADA and Section 504 of the Rehabilitation Act.<sup>26</sup>

Despite the impact of using restraints on students in schools, the NYPD continues to use restraints on NYC students. There are significant disparities by race and gender on the use of restraints on students in emotional crisis. During the 2018-19 and 2019-20 school years, more than one out of every three (36.7%) students handcuffed while in emotional crisis was a Black boy, while more than one in five (22.4%) was a Black girl. Hispanic/Latinx boys were also slightly over-represented, making up 20.8% of enrollment but 22.4% of those handcuffed in these incidents. (Hispanic/Latinx girls were under-represented, relative to overall enrollment). Together, Black and Latinx youth—who are roughly two-thirds of the student population—accounted for 92% of the students in emotional crisis on whom the NYPD used handcuffs.<sup>27</sup>

Between July 2018 and March 2020, Black boys in emotional crisis were handcuffed 12.5% of the time, while White boys subject to the same type of intervention were handcuffed 8.9% of the time and Asian boys 5.6% of the time; Black girls were handcuffed at nearly twice the rate of White girls (10.1% versus 5.1%) and 4.8 times as often as Asian girls. While egregious, these numbers nevertheless represent some improvement since 2016-17, when 15.9% of Black boys and 14.2% of Black girls were handcuffed. Still, all 33 children between the ages of 5 and 7 who were

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<sup>26</sup> U.S. Const. amend. IV; U.S. Const. amend XIV; Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400; Prohibition Against Discrimination and Other Generally Applicable Provisions, Discrimination, 42 U.S.C. § 12132; Nondiscrimination under Federal Grants and Programs, 29 U.S.C. § 794; When a student with a disability exhibits behavior that impedes the student’s learning or that of others, the IDEA requires the IEP Team “to consider the use of positive behavioral interventions and supports, and other strategies, to address the student’s behavior.” Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements, 20 U.S. Code § 1414; 34 C.F.R. § 300(D); *See also* Assistant Sec’y of Educ., U.S. Dep’t of Educ., Off. for Civ. Rts., *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> [hereinafter *Dear Colleague: Restraint and Seclusion*]; Nancy Lee Jones and Jody Feder, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, Cong. Rsch. Serv. (Apr. 14, 2009), <https://fas.org/sgp/crs/misc/R40522.pdf>.

<sup>27</sup> *Dear Colleague: Restraint and Seclusion*, supra note 25.



handcuffed during the past four years were students of color; 17 were Black boys, 8 were Black girls, and 8 were Hispanic/Latinx boys.<sup>28</sup>

In 2020, AFC worked with New York City Councilmember Diana Ayala to draft and propose Int. No. 2188-2020, which regulates the NYPD’s response to children in emotional crisis within public schools and imposes significant limitations on the NYPD’s ability to handcuff children in emotional crisis.<sup>29</sup> The bill is currently still pending in the New York City Council.

### **Referrals to Alternative Schools May Result in Violating the Rights of Students with Disabilities**

New York City has historically struggled to educate students with significant behavioral challenges and has failed to provide crucial behavioral support for students who demonstrate challenging behaviors so they can remain in school. The consequence of this is that students with significant behavioral challenges are often referred for special education supports, classified with an Emotional Disturbance, and then removed from mainstream settings and placed in highly segregated settings such as District 75 schools, NYC’s citywide special education school district. This is especially concerning given that the majority of students whose IEPs recommend a District 75 placement have a classification of autism, emotional disturbance,<sup>30</sup> or intellectual disability—and Black students and students from low-income families are disproportionately likely to be assigned the latter two classifications.<sup>31</sup> One result is that the 26,000 students served by District 75 are in no way representative of the larger student population, but are instead disproportionately Black, male, and economically disadvantaged. In 2019-20, for example, 34.9% of students in District 75 were Black, compared to 24.9% of all City students and 27.0% of all NYC DOE

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<sup>28</sup> *Id.*

<sup>29</sup> The bill’s lead sponsor and champion, Councilmember Diana Ayala, introduced the bill on December 17, 2020, and provided a statement on the bill at the hearing on February 28, 2021. N.Y.C. Council, Int. No. 2188-2020, Police Department’s Response to students in emotional crisis in public schools (Feb. 28, 2021), <https://bit.ly/2188-2020>.

<sup>30</sup> We find the name of the disability classification “emotional disturbance” inaccurate, offensive, stigmatizing, and a barrier to inclusion. It is written into the IDEA and New York State special education law. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(c)(4); 8 NYCRR § 200.1(zz)(4). We appreciate that the New York State Education Department is discussing replacing the name in New York, as other states have done. See The State Educ. Dep’t, The Univ. of the State of N.Y., Letter to P-12 Educ. Comm., Special Education Disability Classification “Emotional Disturbance” (Jan. 2, 2020), <https://www.regents.nysed.gov/common/regents/files/120p12d1.pdf>. We urge Congress to amend the IDEA to change the name of the disability classification, too.

<sup>31</sup> Cheri Fancsali, *Special Education in New York City: Understanding the Landscape*, Rsch. All. for N.Y.C. Schs. (2019), <https://steinhardt.nyu.edu/research-alliance/research/publications/special-education-new-york-city>.



students with IEPs; 86.7% of students in District 75 were eligible for free/reduced-priced lunch or Human Resources Administration benefits, compared to 72.6% of all City students and 82.0% of all NYC DOE students with IEPs; and 73.5% of students in District 75 were boys, compared to 51.4% of all City students and 66.1% of all NYC DOE students with IEPs. In other words, the data suggest that low-income Black students with emotional and behavioral disabilities are disproportionately referred to some District 75 schools, where they are segregated from their peers, heavily policed, and may not be receiving the therapeutic supports and services they need to learn, in violation of their rights under federal law.

### **Threat Assessments are Harmful, Should Be Discouraged, and Should Not Be Funded By the Federal Government**

School shootings are rare but devastating events, each one prompting policymakers and schools to search for strategies to try to prevent such tragedies. As a consequence, there has been a rapidly growing movement towards the use of threat or risk assessments by school districts to determine if a child is a “threat” to school safety. A threat assessment team is a group of officials that meet to identify, evaluate, and address threats or potential threats by students to school security. Members of a threat assessment team can include school principals, counselors, school resource officers, police officers, and outside medical and mental health professionals.<sup>32</sup> While proponents of threat assessments argue that the assessments will prevent violence and help students get behavioral interventions and services, we are concerned about their impact on the students we serve. In particular, research shows that *threat assessments harm students and disproportionately harm students with disabilities*. For example, they can:

- Over-identify students with disabilities as potential threats.
- Stigmatize or label students with disabilities.
- Ignore substantive and procedural requirements under special education law.
- Be used to get supports for children (with a higher risk of harm based on law enforcement involvement), rather than using another more appropriate process to offer supports, including as may be required under special education law (with therapists, social workers, school counselors, and behavioral specialists).
- Result in inappropriate school discipline.
- Violate student privacy protections under the Family Educational Rights and Privacy Act (“FERPA”) and the Health Insurance Portability and

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<sup>32</sup> U.S. Dep’t of Educ., *What is a Threat Assessment Team?*, <https://studentprivacy.ed.gov/faq/what-threat-assessment-team> (last visited July 22, 2021).



Accountability Act (“HIPAA”) if existing personal information and educational records are inappropriately shared with law enforcement.

- Result in the creation of new school and/or law-enforcement records and remain on school or public records.
- Result in inappropriate arrest and/or law enforcement referral and court involvement.<sup>33</sup>

We have also seen this in our work. A pre-teen student with emotional disabilities attending a therapeutic state-approved non-public special education school in New York had a history of making threats with no intent or means to carry them out. Despite this, at one point, police got involved and wanted to conduct a threat assessment and the school wanted to exclude the student from school pending the result. Because we were involved, we were able to convince the school to allow the student's therapist to evaluate him. The therapist recommended that he return to school immediately.

Threat assessments may result in further discriminatory disparities against students with disabilities. For example, in the 2018-2019 school year, Albuquerque public schools conducted 834 threat assessments on students: 56% of all threat assessments were conducted on students with disabilities, while students with disabilities comprised only about 18% of Albuquerque’s public-school population.<sup>34</sup>

Instead, schools must comply with the IDEA and Section 504 of the Rehabilitation Act by providing positive support and interventions for students with disabilities.<sup>35</sup> Schools must conduct effective Functional Behavior Assessments (“FBAs”) and create appropriate Behavior Intervention Plans (“BIPs”) for students with disabilities whose behavior impedes their learning or the learning of others.<sup>36</sup> The U.S. DOE should remind schools of their obligations under the IDEA and Section 504 to conduct FBAs and BIPs when students exhibit behavior that impedes their learning or the learning of others instead of threat assessments. Moreover, the federal

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<sup>33</sup> Miriam A. Rollin, *Here’s How Threat Assessments May Be Targeting Young Vulnerable Students*, Educ. Post (Dec. 12, 2019), <https://educationpost.org/heres-how-threat-assessments-may-be-targeting-vulnerable-students>; Ike Swetlitz, *Who’s the Threat? Hundreds of Special Ed Students ID’d as Potential Threats*, Searchlight N.M. (Oct. 15, 2019), <https://www.searchlightnm.org/whos-the-threat> [hereinafter Ike Swetlitz]; Bethany Barnes, *Targeted: A Family and the Quest to Stop the Next School Shooter*, The Oregonian/Oregon Live (updated Aug. 29, 2019; posted June 26, 2018), [https://www.oregonlive.com/news/erry-2018/06/75f0f464cb3367/targeted\\_a\\_family\\_and\\_the\\_ques.html](https://www.oregonlive.com/news/erry-2018/06/75f0f464cb3367/targeted_a_family_and_the_ques.html).

<sup>34</sup> Ike Swetlitz, *supra* note 32.

<sup>35</sup> 20 U.S.C. § 1400; 29 U.S.C. § 794.

<sup>36</sup> 20 U.S.C. § 1414(d)(3)(B)(i); 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.324(a)(2)(i).



government should not fund or promote the use of threat assessments for any students.

### **Students Should Not Be Automatically Suspended for Bringing Items Categorized as Weapons or Using Them at School**

OCR should issue guidance strongly discouraging the use of zero tolerance for any behavior, including bringing weapons to school or using them at school, and requiring consideration of intent, mitigating circumstances, and defenses. For example, some students carry a weapon, such as pepper spray, as protection traveling to and from school in a neighborhood where they do not feel safe. Additionally, some students carry an item that would be considered a weapon (e.g., a knife) to and from school because they need it for work. Based on this information, an inquiry on the broader range of disciplinary responses should be available when a student possesses a stun gun, knife, or other weapon or uses it in self-defense. OCR guidance and toolkits should also include a safe harbor for a student who brings an injurious object to school that may be lawfully possessed off school grounds and who presents the object to school staff so that the object would be returned to the student at the conclusion of the school day.<sup>37</sup> In these and other instances where discipline is imposed, OCR guidance should encourage school districts to use discipline that is restorative, trauma-informed, age-appropriate, progressive, and based on the totality of the circumstances, including whether the student has a disability.

In New York City, the current discipline code, last revised in 2019, allows for mitigating circumstances where a student possesses, displays, or sells certain limited types of weapons defined as Category II weapons. The discipline code provides that: “Before requesting or imposing a suspension for possession of or displaying an article listed in Category II for which a purpose other than infliction of physical harm exists, e.g., a nail file, the principal must consider whether there are mitigating factors present. In addition, the principal must consider whether an imitation gun is realistic looking by considering factors such as its color, size, shape, appearance, and weight.”<sup>38</sup>

### **Students Should Not Face Discipline for Attendance and Time Management**

No student should be disciplined for attendance or time management issues. It would be counterintuitive to exclude a student from class or school for not attending class or school. Discipline would reinforce the same behavior sought to be changed. If a student is having difficulty staying in class or in school, appropriate supports and

<sup>37</sup> School districts would still need to comply with the federal Gun-Free Schools Act when imposing discipline if a student brought a firearm, bomb, or other explosive to school. 20 U.S.C. § 7961.

<sup>38</sup> *K-5 NYC Discipline Code*, *supra* note 7, at 27; *6-12 NYC Discipline Code*, *supra* note 10, at 29.





interventions should and can be considered and provided to help the student remain in school supported and learning. Schools should focus on preventing school absence and understanding the reasons why individual students face difficulties remaining in class or attending school and effectively addressing those reasons.

Other jurisdictions should follow New York’s policy prohibiting suspension for attendance-related behavior. The NYC discipline code does not permit any exclusionary discipline for not attending school, lateness, lack of identification, or dress code violations.<sup>39</sup> New York law also prohibits suspensions or other school exclusions from instruction as a punishment for all of these behaviors. *See Matter of Ackert*, 30 Ed. Dept. Rep. 31, 33 (Aug. 6, 1990) (“a student may not be suspended, expelled or dropped from school attendance for truancy”); *Matter of Hynds*, Decision No. 13,407 (May 4, 1995) (invalidating school policy of suspending student from class for lateness or nonattendance); *Matter of Strada*, Decision No. 13,434 (June 19, 1995) (invalidating school’s absence policy by which student with four absences could be removed from class and assigned to study hall on basis that it results in suspension of student from class due to truancy); *Matter of Vitello*, Decision No. 12,813 (Sept. 25, 1992) (invalidating school policy of suspending student from class for cutting that class).

### **Students Harassed Because They Are a Member of a Protected Class Should Not Face Exclusionary, Punitive Discipline**

Students who are harassed due to race, color, national origin, sex, or disability for behavior arising from the harassment should not face exclusionary, punitive discipline. Instead, school districts should emphasize the use of restorative practices and social-emotional learning to prevent and address harassment, discrimination, bullying, and intimidation. Through the use of restorative practices and social-emotional learning, students learn how to build relationships with each other and staff, communicate effectively, empathize, problem solve, and resolve conflicts to prevent problems before they start, and prevent others from escalating.

These approaches, as well as curricular strategies such as culturally responsive-sustaining education and comprehensive sexual health education, bolster students’ sense of inclusion and safety and create a positive school climate. Culturally responsive education uses educational strategies that leverage aspects of students’ identities to celebrate students, promote cross-cultural connection, and help all

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<sup>39</sup> *K-5 NYC Discipline Code*, *supra* note 7, at 30; *6-12 NYC Discipline Code*, *supra* note 10, at 32.





students feel valued and develop empathy.<sup>40</sup> Comprehensive sexual education provides students with developmentally appropriate and medically accurate information on a broad range of topics related to sexuality.<sup>41</sup> Teaching comprehensive sexual education is an effective, evidence-based way to empower students with the information and communication and decision-making skills they need to make healthy choices and to create a culture of consent.<sup>42</sup> We recommend that OCR emphasize and connect these approaches, supports, and strategies to preventing bullying, intimidation, harassment, and sexual harassment.

### **Zero Tolerance Discipline Policies Should Be Prohibited**

Ample research indicates that zero tolerance discipline policies do not make schools safe and welcoming, but do result in a disproportionate number of students of color suspended, expelled, and referred to law enforcement for the same behavior as their white peers.<sup>43</sup> Given the harm discussed above from suspension and police involvement, it is critical that OCR urge states and school districts to prohibit zero

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<sup>40</sup> See N.Y.C. Coal. for Educ. Just., *Chronically Absent: The Exclusion of People of Color from the NYC Elementary School Curricula* (2019), <http://www.nyccej.org/wp-content/uploads/2019/02/reportCEJ-Chronically-Absent-FINAL.pdf> (describing how culturally responsive education contributes to a healthy school climate for all students); Girls for Gender Equity, *The School Girls Deserve*, 8 (2017), [https://www.ggenyc.org/wp-content/uploads/2017/11/GGE\\_school\\_girls\\_deserveDRAFT6FINALWEB.pdf](https://www.ggenyc.org/wp-content/uploads/2017/11/GGE_school_girls_deserveDRAFT6FINALWEB.pdf) (recommending investment in culturally responsive education) [hereinafter *The School Girls Deserve*].

<sup>41</sup> See, e.g., Am. Pub. Health Ass'n, *Sexuality Education as a Part of Comprehensive Health Education Program in K to 12 Schools, Policy Number 20143* (Nov. 18, 2014), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/23/09/37/sexuality-education-as-part-of-a-comprehensive-health-education-program-in-k-to-12-schools> (supporting comprehensive sex education programming as an evidence-based way to help students become healthy adults); Am. Coll. of Obstetricians and Gynecologists, *Comprehensive Sexuality Education Committee Opinion, Number 678* (Nov. 2016), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Adolescent-Health-Care/Comprehensive-Sexuality-Education?IsMobileSet=false> (affirming that evidences shows that comprehensive sex education promotes healthy outcomes); Am. Acad. of Pediatrics, *Sexuality Education for Children and Adults*, 138 *Pediatrics* (2016), <https://pediatrics.aappublications.org/content/pediatrics/138/2/e20161348.full.pdf> (recommending the use of comprehensive sex education in school).

<sup>42</sup> See *The School Girls Deserve*, *supra* note 40.

<sup>43</sup> See Am. Acad. of Pediatrics, *Policy Statement: Out-of-School Suspension and Expulsion*, 131 *Pediatrics*, e1005 (Mar. 2013), <https://pediatrics.aappublications.org/content/131/3/e1000> (denouncing the use of zero-tolerance policies due to its ineffectiveness and harmful effects; see also *School Discipline Explained: Why It Harms Students of Color and How We Can Fix It*, *Educ. Post* (Mar. 15, 2021), <https://educationpost.org/school-discipline-explained-why-it-harms-students-of-color-and-how-we-can-fix-it> (citing research that illustrates the impact of zero-tolerance policies on students of color).



tolerance policies and implement progressive models of student discipline with age-appropriate responses.

New York’s Dignity in Schools Act (“DASA”) to address bullying in schools is illustrative. The implementing regulations emphasize DASA’s more progressive model of student discipline with age-appropriate responses. The education regulations were amended by adding 8 NYCRR § 100.2(l)(2)(ii)(h), which provides as follows:

*provisions for responding to acts of harassment, bullying, and/or discrimination against students by employees or students pursuant to clause (b) of this subparagraph which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment. This progressive model of student discipline shall be consistent with the other provisions of the code of conduct; (emphasis added).*

The New York State Department of Education issued guidance to school districts incorporating DASA to codes of conduct, noting “This policy is meant to promote progressive discipline and intervention, as opposed to a ‘zero tolerance’ approach. The response to a student’s violations of the policy shall be age-appropriate and include both consequences and appropriate remedial responses.”<sup>44</sup>

### **School Districts Should Employ Restorative Practices to Reintegrate Students After Long-Term Out-of-School Suspensions**

Currently in New York City, the New York City Discipline Code mandates “Welcome Back Circles,” a restorative practice, for students who are returning to

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<sup>44</sup> N.Y. State Dep’t of Educ., *Dignity for All Students Act: Student Discrimination, Harassment and Bullying Prevention and Intervention, Guidance for Local Implementation* (updated July 13), <http://www.p12.nysed.gov/dignityact/documents/DASAGuidanceLocalImplementation.pdf>.



school after a long-term suspension.<sup>45</sup> Though, unfortunately, schools do not receive the degree of support or guidance needed to implement this mandate effectively. Despite calls from the community to invest \$118.5 million to expand whole-school restorative practices to 500 New York City public middle and high schools, New York City's FY22 Budget contains only \$12 million to fund restorative practices.<sup>46</sup>

Restorative practices are a type of healing-centered practice that builds and heals relationships, teaches positive behaviors, and holds students accountable for their actions; adoption of restorative practices is correlated with improved academic outcomes, school climate, and staff-student relationships.<sup>47</sup> We know that these practices work. For example, researchers studying 804 public middle and high schools in New York City in the 2012 and 2013 school years found that restorative practices and other positive approaches can greatly improve overall school climate, student-staff relationships, and student outcomes.<sup>48</sup> In California, the Oakland Unified School District uses restorative circles to provide 1:1 support and successful re-entry of youth after a suspension, truancy, expulsion or incarceration with the goal to welcome a youth back to the school community and provide wraparound support for that student.<sup>49</sup>

### **School Districts Must Use Alternatives to Discipline When Returning to In-Person Instruction Next School Year**

Given the trends we saw in our work during the 2020-2021 school year, we are deeply concerned that schools will go back to the pre-pandemic status quo—suspending students instead of supporting them—and continue to use remote learning as a form of discipline. When students return to school, they may act out because of pandemic-related stress, anxiety, depression and grief. Instead of punishing and excluding students from their school communities, we and our allies have urged the NYC DOE to provide alternatives to discipline that are equitable,

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<sup>45</sup> *K-5 NYC Discipline Code*, *supra* note 7, at 24-28; *6-12 NYC Discipline Code*, *supra* note 10, at 26-30.

<sup>46</sup> The City of N.Y., *Mayor de Blasio, First Lady McCray, Chancellor Carranza Announce Major Expansion of Social-Emotional Learning and Restorative Justice Across All City Schools* (June 20, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/314-19/mayor-de-blasio-first-lady-mccray-chancellor-carranza-major-expansion-of#/0>.

<sup>47</sup> *School Discipline, Safety, and Climate*, *supra* note 14.

<sup>48</sup> *Id.*

<sup>49</sup> *See generally, Restorative Justice*, Oakland Unified Sch. Dist., <https://www.ousd.org/restorativejustice> (last visited July 22, 2021); Oakland Unified Sch. Dist., *Restorative Welcome and Reentry Circle*, YouTube (Apr. 26, 2013), <https://www.youtube.com/watch?v=HiLtFVHR8Q0>.



trauma-informed, restorative, culturally-responsive, and safe and supportive for all returning students,<sup>50</sup> including:

- Increasing social-emotional supports and services for students, particularly those experiencing challenges, by providing all students with access to guidance counselors and social workers and direct mental health supports and services, and by providing students with significant mental health challenges targeted and intensive mental health supports and services.<sup>51</sup> Such supports and services should be provided prior to, and in most instances in lieu of, any exclusionary discipline;
- Reminding school staff of the myriad supports, interventions, and alternatives to classroom removal and suspension listed in the discipline code and how they can access assistance to implement them;
- Providing training and monitoring of school staff on the special protections that students with disabilities have related to school discipline, including students whom the NYC DOE is deemed to know have a disability, and ensuring that students with disabilities receive positive behavioral supports and interventions when necessary and are not suspended or otherwise disciplined for behavior exhibited as a result of their disability;
- Reminding school staff that they must carefully examine circumstances of a student's behavior and take into account the student's individual

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<sup>50</sup> Kara Arundel, *Avoid Punitive Approach to School Discipline During the Pandemic*, Special Ed Connection (July 21, 2020),

<https://www.specialedconnection.com/LrpSecStoryTool/index.jsp?contentId=22730785>.

<sup>51</sup> In the FY 22 Budget, New York City included \$5 million to fund a Mental Health Continuum in high needs schools. N.Y.C. Council, *Speaker Corey Johnson, Finance Committee Chair Daniel Dromm, Capital Budget Subcommittee Chair Helen Rosenthal, and Mayor Bill de Blasio Announce Agreement on FY 2022 Budget* (June 30, 2021), <https://council.nyc.gov/press/2021/06/30/2096>. The New York City Comptroller issued a report on school reopening recommending that the NYC DOE implement a Mental Health Continuum to “enable a team of clinicians to work with students and staff to coordinate with schools and enhance their capacity to respond to students in crisis and provide direct mental health support to students and families as needed.” N.Y.C. Comptroller Scott M. Stringer, *Strong Schools for All: A Plan Forward for New York City* (July 2020), [https://comptroller.nyc.gov/wp-content/uploads/documents/School\\_Reopening\\_Report\\_07\\_07\\_20.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/School_Reopening_Report_07_07_20.pdf) (referencing The Mayor's Leadership Team on School Climate and Discipline, *Maintaining the Momentum: A Plan for Safety and Fairness In Schools, Phase Two Recommendations* (July 2016), [http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT\\_Report\\_7-21-16.pdf](http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT_Report_7-21-16.pdf), which first developed and proposed the Mental Health Continuum model in 2016). See also Letter from 41 Organizations to Mayor Bill de Blasio Re: Funding for Students with Significant Mental Health Needs (Apr. 17, 2020), [https://www.advocatesforchildren.org/sites/default/files/on\\_page/mental\\_health\\_continuum\\_letter\\_41\\_720.pdf](https://www.advocatesforchildren.org/sites/default/files/on_page/mental_health_continuum_letter_41_720.pdf).



circumstances before determining any consequences for student behavior;  
and

- Providing support and training for school staff to understand that student behavior communicates needs and to address those student needs.

### **School Districts Should Promote Digital Citizenship and Use Restorative Practices to Address Student Behavior Online**

During remote learning and in virtual school settings, educators are often unable to respond to conflict during class time or manage a remote learning environment and lack access to restorative supports to address conflict and harassment. Instead of relying on punitive discipline to address incidents in the virtual environment, it is vital that school districts proactively provide students with the tools to lead safe and healthy digital lives and proactively provide teachers with clear guidance regarding online learning best practices that foster student connectedness and inclusivity.

To do this, we recommend that OCR actively promotes digital citizenship to develop and foster critical thinking and social-emotional skills in online interactions and respond to incidents that occur through online learning in a restorative way.<sup>52</sup> Digital citizenship helps young people learn how to safely and effectively participate in the digital world, including helping them understand their rights and responsibilities, recognize the benefits and risks, and realize the personal and ethical implications of their actions.<sup>53</sup> There are developmentally appropriate digital citizenship curricula available to the public, and schools must use these curricula.<sup>54</sup> Additionally, there should be safety protocols for online learning that are available to the public. OCR should encourage school districts to offer professional development on facilitating a safe online classroom and digital citizenship, make lesson plans and modules easily accessible to all teachers, and provide interactive digital modules for students. Given this shift to a new learning environment, schools must adapt specific

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<sup>52</sup>See Carrie James et al, *Teaching Digital Citizens in Today's World: Research and Insights Behind the Common Sense K-12 Digital Citizenship Curriculum*, 28-33 (2019), [https://d1e2bohyu2u2w9.cloudfront.net/education/sites/default/files/tlr\\_component/common\\_sense\\_education\\_digital\\_citizenship\\_research\\_background.pdf](https://d1e2bohyu2u2w9.cloudfront.net/education/sites/default/files/tlr_component/common_sense_education_digital_citizenship_research_background.pdf) (describing how digital citizenship teaches students skills to improve their well-being in digital interactions).

<sup>53</sup> Making Caring Common Project, Harvard Graduate Sch. of Educ., *For Educators: Digital Citizenship Resource List*, <https://mcc.gse.harvard.edu/resources-for-educators/digital-citizenship-resource-list> (last reviewed Oct. 2018) (citing TechInCtrl, *Teaching Digital Citizenship* (2019) [www.ciconline.org/DigitalCitizenship](http://www.ciconline.org/DigitalCitizenship)).

<sup>54</sup> See, e.g., Common Sense Education, *Digital Citizen Curriculum* (2020), <https://www.common sense.org/education/digital-citizenship/curriculum>.



policies and disseminate best practices that address student well-being and behavior in the virtual environment.

We also recommend encouraging the use of restorative practices to address discrimination, harassment, intimidation, bullying, and sexual harassment, when all students involved consent. Restorative practices can prevent and address these behaviors by fostering understanding and relationships between community members with different identities, backgrounds, and points of view. Indeed, punitive school responses may cause problem behaviors to increase rather than diminish.<sup>55</sup>

The New York State Education Department and the New York State Attorney General published joint guidance and model training materials to help schools comply with the state's Dignity for All Students Act ("DASA"), which aims to provide students with a safe and supportive environment free from discrimination, intimidation, taunting, harassment, and bullying at school.<sup>56</sup> Recognizing that restorative practices help students improve their behavior, the model materials include training tools for schools to implement DASA that list restorative practices as appropriate supports to end bullying, harassment, and discrimination.<sup>57</sup> Additionally, other districts use restorative practices to address these behaviors.<sup>58</sup> For example, Berkeley Unified School District adopted a policy that "encourages the use of restorative justice and alternative resolutions in lieu of expulsion hearings, even in the most serious cases including cases of sexual assault and sexual battery."<sup>59</sup> The school board recognized that: "Restorative justice is, in many cases, more likely to repair harm to complainant(s) and likely to be less traumatic to complainant(s) than an adversarial expulsion hearing."<sup>60</sup> A national leader in restorative justice has explained that restorative justice provides an option for complainants "to receive

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<sup>55</sup> See Trevor Fronius et al., *Restorative Justice in U.S. Schools: An Updated Research Review*, WestEd Just. & Prevention Rsch. Ctr., 1-3, 17 (Mar. 2019), <https://www.wested.org/wp-content/uploads/2019/04/resource-restorative-justice-in-u-s-schools-an-updated-research-review.pdf>.

<sup>56</sup> See Press Release: A.G. Schneiderman And State Education Commissioner Elia Release Guidance And Model Materials To Help School Districts Comply With The Dignity For All Students Act (Aug. 31, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-and-state-education-commissioner-elia-release-guidance-and-model>.

<sup>57</sup> See N.Y. State Educ. Dep't & N.Y. State Ctr. for Sch. Safety, *Dignity for All Students Act, Requirements for Schools (Tool for training school employees)*, 21 (2016), [https://ag.ny.gov/sites/default/files/dasa\\_training\\_materials\\_final\\_-\\_8.30.16.pdf](https://ag.ny.gov/sites/default/files/dasa_training_materials_final_-_8.30.16.pdf).

<sup>58</sup> See *Violence Prevention: Bully Prevention*, Oakland Unified Sch. Dist., <https://www.ousd.org/Page/1158> (last visited July 22, 2021).

<sup>59</sup> Berkeley Sch. Dist. Bd. of Educ., Board Policy ("BP") 5144.3, Administrative Regulation ("AR") 5144.3, Expulsion, <https://www.berkeleyschools.net/schoolboard/policies>.

<sup>60</sup> *Id.*





healing and vindication in the face [of] the harms suffered.”<sup>61</sup> Research also indicates the effective use of restorative practices in schools to address bullying.<sup>62</sup>

### **Recommended OCR Guidance and Technical Assistance**

In order to support school districts to create positive, inclusive, safe and supportive school climates, they must have resources that help them move towards eliminating reliance on law enforcement to address student behavior. OCR must release guidance and technical assistance that directly addresses the impact school discipline and policing has on students and provides schools with resources on how to create safe and supportive environments without law enforcement and exclusionary, punitive discipline. OCR should maximize federal funding, publications, training, and technical assistance to promote effective behavioral support and approaches in schools.

In addition, as students return to school this fall and begin to process the collective trauma and loss of the past year and a half, school districts must have guidance on how to develop healing-centered school communities. It is imperative that students and families see school as a place of physical, psychological, and emotional safety—somewhere they are supported and valued, not somewhere they experience trauma. Healing-centered schools can provide that environment through changes to policies and practices to help create schools where students collectively heal from trauma and obtain the support that they need.<sup>63</sup> Healing-centered educational practices have

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<sup>61</sup> See Letter from Sujatha Baliga (sbaliga@impactjustice.org), Dir., Restorative Just. Project, Vice President, Impact Rsch., to Berkeley Unified Sch. Dist., undated (on file with Advocates for Children). There are striking results: “In a study of participating crime victims in Alameda County, including sexual harm victims, over 98% of victims said that they would participate in a RJ [Restorative Justice] practice again.” *Id.*

<sup>62</sup> See, e.g., Ctr. for Safe Schs., Clemson Inst. on Fam. and Neighborhood Life & Highmark Found., *Integrating Bullying Prevention and Restorative Practices in Schools: Considerations for Practitioners and Policymakers* (Oct. 2014), <http://www.safeschools.info/content/BPRPWhitePaper2014.pdf> (suggesting ways restorative practices and bullying prevention can be used in tandem); Brenda Morrison, *Bullying and victimization in schools: A restorative justice approach*, Trends and Issues in Crime and Crim. Just. (Australian Inst. of Criminology), Apr. 2, 2002, <https://aic.gov.au/publications/tandi/tandi219> (concluding that restorative justice approaches can be effective in addressing bullying in schools by incorporating a range of processes for maintaining healthy relationships, including community building, conflict resolution, and shame management).

<sup>63</sup> See Shawn Ginwright, *The Future of Healing: Shifting From Trauma Informed Care to Healing Centered Engagement*, Medium (May 31, 2018), <https://ginwright.medium.com/the-future-of-healing-shifting-from-trauma-informed-care-to-healing-centered-engagement-634f557ce69c>. In their Community Roadmap to Bringing Healing-Centered Schools to the Bronx, the Bronx Healing-Centered Schools Working Group—a coalition of Bronx parents, students, mental health providers,





been proven to produce positive outcomes for students, staff, and parents.<sup>64</sup> OCR should disseminate materials such as toolkits, training tools, specific policy recommendations, training, and other guidance on how to bring healing-centered educational practices to schools to emphasize students' social-emotional well-being and remove punitive responses to behavior.

OCR and the U.S. Department of Justice (“DOJ”) should redirect funding from school police to trained clinical social workers, behavior specialists, school counselors, restorative justice coordinators, school climate managers, trauma-informed crisis de-escalation specialists, and other school staff with the expertise necessary to appropriately address student behavioral and mental health needs. It is imperative to increase grant funding to facilitate the ability of school districts to build and expand school infrastructure to better meet the mental and behavioral health needs of students, and shift to restorative, trauma-informed, and healing-centered approaches. No federal funding from any federal agency should be used to support police or police infrastructure in schools.

Additionally, OCR and DOJ should reissue, revise, and strengthen the 2014 guidance documents on the nondiscriminatory administration of school discipline to encourage school districts to “proactively redesign discipline policies and practices to more effectively foster supportive and safe school climates” and urge them to move away from zero tolerance policies, which disproportionately impact students of color and with disabilities.<sup>65</sup> OCR and DOJ should timely enforce violation of civil rights of Black students and students with disabilities who face disproportionate exclusionary discipline and treatment.

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and advocates—outlines specific steps individual schools can take to become healing-centered. Bronx Healing-Centered Schs. Working Grp., *Community Roadmap to Bring Healing-Centered Schools to the Bronx* (2020), <https://www.legalservicesnyc.org/storage/PDFs/community%20roadmap%20to%20bring%20healing-centered%20schools%20to%20the%20bronx.pdf>.

<sup>64</sup> For example, the Schenectady City Schools District uses a suspension diversion program to identify the root cause of student behavior and provide interventions and trauma-informed treatment to address the mental health needs of students. More than half (78) of the 141 students who participated in diversion in the 2016-17 school year completed their intervention program. 95 percent of the students who completed the diversion program did not have another serious behavior incident. *See* Schenectady City Schs., *Developing Trauma-Sensitive Schools* (2018), [http://www.schenectady.k12.ny.us/News/what\\_s\\_new/our\\_work\\_to\\_develop\\_trauma\\_sensitive\\_schools](http://www.schenectady.k12.ny.us/News/what_s_new/our_work_to_develop_trauma_sensitive_schools).

<sup>65</sup> U.S. Dep’t of Educ., Off. for Civ. Rights. & U.S. Dep’t of Just., *Dear Colleague Letter on Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014) (rescinded), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; *see also*, U.S. Dep’t of Educ. & U.S. Dep’t of Just., School Discipline Guidance package website (archived), <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html>.



To increase transparency, when districts certify their Civil Rights Data Collection (“CRDC”) submission via an action plan because they are unable to provide complete data, OCR should post the approved action plan publicly. Without being able to see the plans, communities are completely in the dark as to why data are missing and how the Local Educational Agency plans to rectify the problem. Additionally, the various data tables and analysis tools on the CRDC website need to clearly indicate when and where data are missing or incomplete, as they provide important context for understanding what the tables and tools show. For example, it is necessary to dig quite a bit to figure out that NYC certified via an action plan its submission where some values of “zero” are based on just a handful of schools and thus not particularly meaningful. Moreover, OCR should use enforcement and monitoring as tools to hold Local and State Educational Agencies when and where data are missing or incomplete.

OCR should issue guidance to states and school districts as to what data they should be looking at or publicly reporting on their own and require data to be cross-tabulated by race, gender, and disability status. While OCR provides cross-tabs, that data does not get updated every year and is slow to get posted online, which makes it less useful. For example, the NYC DOE only publicly reports on one variable at a time (e.g., we know the number of suspensions issued to boys, the number issued to students with IEPs, and the number issued to Black students—but not the number that went to Black boys with IEPs, specifically), which can conceal important differences within student subgroups. It would be useful for OCR to require Local Education Agencies to release cross-tabulated data as the default so advocates and community members can understand those intersections.

OCR must raise concerns about harms to children—particularly children of color and children with disabilities—from “threat assessments” and work with the U.S. Department of Justice and U.S. Secret Service National Threat Assessment Center to end further dissemination of federal funding and informational resources that further advance this harmful approach. Additionally, OCR should ensure that the CRDC begins to collect data on “threat assessments,” including the numbers and demographics of the children referred, the numbers and demographics of any resulting discipline and/or law enforcement responses, the numbers and demographics of children who are referred for any therapeutic or otherwise helpful services, and the extent to which the services are actually provided to children who are referred for services. Furthermore, OCR must ensure that investigations are conducted to determine whether disparities for children of color and children with disabilities result from “threat assessments” to determine any violations of anti-discrimination laws and then promptly address any such violations.



Thank you for the opportunity to share these recommendations. We look forward to working with OCR to remove harm and make schools healing-centered.

For more information or should you have any questions, please contact Dawn Yuster at [dyuster@advocatesforchildren.org](mailto:dyuster@advocatesforchildren.org).

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