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The New York State Office of the Attorney General (“OAG”), New York State Education Department (“SED”), and the New York State Board of Regents write this letter to clarify the obligations of every school district in New York in administering their school discipline policies. On December 21, 2018, the U.S. Department of Justice (“USDOJ”) and U.S. Department of Education (“USDOE”) rescinded a federal guidance letter that detailed protections for students against discriminatory discipline policies and practices.<sup>1</sup> In light of this rescission, our offices write to remind school districts in New York that—even in the absence of this federal guidance—districts remain required by law to ensure every student has access to a safe and supportive learning environment, free from harassment, bias, or discrimination.

Across the nation and in New York, black, Hispanic, and mixed race students are disproportionately likely to experience exclusionary school discipline, such as referrals, suspensions, and expulsions.<sup>2</sup> Similarly, students with disabilities, lesbian, gay, bisexual, transgender, and questioning students, and Native American students experience high levels of school discipline.<sup>3</sup> Disproportionate discipline of these groups is especially troubling, as exclusion leads to lower academic achievement and higher dropout rates, as well as higher rates of entry into the juvenile justice system.<sup>4</sup> Moreover, even students who are not suspended are harmed, rather

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<sup>1</sup> U.S. Dep’t of Just. and U.S. Dep’t of Educ., Dear Colleague Letter 1 (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> (The December 2018 Dear Colleague Letter formally withdrew: the January 2014 Dear Colleague Letter on Nondiscriminatory Administration of School Discipline; Overview of the Supportive School Discipline Initiative; Guiding Principles: A Resource Guide for Improving School Climate and Discipline; Appendix 1: U.S. Department of Education Directory of Federal School Climate and Discipline Resources; Appendix 2: Compendium of School Discipline Laws and Regulations for the 50 States, Washington D.C., and Puerto Rico; and School Discipline Guidance Package FAQs).

<sup>2</sup> The New York Equity Coalition, *Stolen Time: New York’s Suspension Crisis* (2018), <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2018/12/09090556/Stolen-Time.pdf>.

<sup>3</sup> *Id.* See also GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), <https://www.glsen.org/article/drop-out-push-out-school-prison-pipeline>.

<sup>4</sup> M. Karega Rausch, et al., *New and Developing Research on Disparities in Discipline*, Discipline Disparities Series at Indiana University (2014); Tony Fabelo, et al., *BREAKING SCHOOLS’ RULES: A*

than helped, by a high rate of suspensions in their schools. Research confirms that over-utilizing exclusionary discipline adversely impacts the overall school climate,<sup>5</sup> and that exclusionary discipline fails to make schools safer.<sup>6</sup>

Our offices are committed to ensuring equality of opportunity in schools across New York.<sup>7</sup> As part of that commitment, our offices will continue to enforce applicable state and federal laws to ensure that disciplinary practices are administered equitably and appropriately. These legal protections, discussed in detail below, include federal protections from discrimination, such as Title VI of the Civil Rights Act of 1964 (“Title VI”), Section 504 of the Rehabilitation Act,<sup>8</sup> the Americans with Disabilities Act (“ADA”),<sup>9</sup> and the Individuals with Disabilities Education Act (“IDEA”), federal and state mandates to reduce the use of exclusionary discipline, including the Every Student Succeeds Act (“ESSA”), and federal and state procedural safeguards for students in the disciplinary process, including New York Education Law Section 3214.

***Existing law prohibits school districts from discriminating against students in the disciplinary context***

Existing federal and state laws protect students from discrimination in the school discipline context. Title VI expressly prohibits school districts and other programs receiving federal financial assistance from discriminating against students on the basis of race or national origin,<sup>10</sup> and bars districts from applying school discipline policies in a discriminatory manner.<sup>11</sup> Moreover, evidence that a disciplinary policy disproportionately burdens a particular minority group may constitute evidence of discriminatory intent.<sup>12</sup> As a result, evidence of gross disparities in discipline rates between black and Hispanic students and their white peers can place a district at risk of violating Title VI, especially where there is additional evidence that the district has treated similarly situated students differently on the basis of race or national origin.

In addition, the IDEA separately requires New York State to proactively identify school districts that disproportionately discipline students of color with disabilities.<sup>13</sup> Where New York

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STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT, Council of State Governments Center (2011).

<sup>5</sup> John Shindler, et al., *The School Climate - Student Achievement Connection: If we Want Achievement Gains, we Need to Begin by Improving the Climate*, 1 JOURNAL OF SCHOOL ADMINISTRATION RESEARCH & DEVELOPMENT 9, 9–16 (2016).

<sup>6</sup> American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AMERICAN PSYCHOLOGIST 852, 852–62 (2008).

<sup>7</sup> See New York State Board of Regents, Resolution (January 14, 2019), [http://www.regents.nysed.gov/common/regents/files/Resolution\\_0.pdf](http://www.regents.nysed.gov/common/regents/files/Resolution_0.pdf).

<sup>8</sup> 29 U.S.C. § 794(a).

<sup>9</sup> 42 U.S.C. § 12132.

<sup>10</sup> 42 U.S.C. § 2000d.

<sup>11</sup> See *Zeno v. Pine Plains Cent. School Dist.*, 702 F.3d 655, 665 (2d Cir. 2012); *Biswas v. City of New York*, 973 F.Supp. 2d 504, 531-532 (S.D.N.Y. 2013).

<sup>12</sup> *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 339 n. 20 (1977).

<sup>13</sup> 20 U.S.C. § 1418; 34 C.F.R. § 300.646.

State identifies a significant disproportionality, it will review the district’s policies, practices and procedures, and require the district to adopt any necessary remedial steps. In exercising its oversight obligations, SED expects all districts to report and address significant disparities in suspension rates for students with disabilities.

Finally, State law provides similar protections from discrimination as federal law, but expands those protections to additional categories of students. Specifically, New York Executive Law § 296(4) prohibits schools from denying access to any student on the basis of race, color, religion, disability status, national origin, sexual orientation, military status, sex, age or marital status. As with Title VI of the Civil Rights Act, Section 504 of the Rehabilitation Act, and the ADA, this provision prohibits schools from employing discriminatory disciplinary practices.

The federal government’s recent rescission of its school discipline guidance in no way impacts the ongoing obligation of districts in New York to identify and address racial and ethnic disparities in school discipline. Nor does the federal government’s withdrawal of school discipline guidance change the requirement that school districts refrain from imposing school discipline in a discriminatory manner.<sup>14</sup> As a result, our offices remain committed to investigating, reviewing, and enforcing compliance with these requirements.

***Districts continue to be required to reduce reliance on exclusionary discipline.***

Under the New York State Education Law, every board of education must adopt a code of conduct with disciplinary measures that “incorporate a progressive model of student discipline” and include “measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline.”<sup>15</sup> Each board of education must annually consider “the effectiveness of code provisions and the fairness and consistency of its administration.”<sup>16</sup> These requirements are designed to ensure that districts evaluate and assess their disciplinary policies, and avoid codes of conduct that are unnecessarily draconian.

Likewise, the federal Every Student Succeeds Act mandates the creation of State<sup>17</sup> and district-level<sup>18</sup> plans to avoid “the overuse of discipline practices that remove students from the classroom.”<sup>19</sup> Under the New York State plan approved by USDOE in early 2018, New York recognized several goals for school districts, including “ensur[ing] that student discipline practices are equitable and proportionate to the incident” and “reduc[ing] the overuse of punitive and exclusionary responses to student misbehavior.”<sup>20</sup> The State is supporting districts in achieving

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<sup>14</sup> Nothing in the December 21, 2018 letter by the USDOJ and USDOE indicates otherwise. To the extent that this letter questions the disparate impact theory of liability under Title VI, *see* Federal Commission on School Safety, Final Report, at 70, it is well-established that in appropriate circumstances, racial disparities may be evidence of intentional discrimination.

<sup>15</sup> 8 NYCRR § 100.2(1)(2)(ii).

<sup>16</sup> *Id.* § 100.2(1)(2)(iii).

<sup>17</sup> Every Student Succeeds Act § 1111(g)(1)(C)(i)-(iii).

<sup>18</sup> *Id.* § 1112(b)(11).

<sup>19</sup> *Id.*

<sup>20</sup> New York State Department of Education, *ESSA Plan* (Jan. 12, 2018), <http://www.nysed.gov/common/nysed/files/programs/essa/nys-essa-plan.pdf>.

those goals by “develop[ing] guidance and technical assistance for schools to assist them in implementing policies to transition away from exclusionary discipline practices.”<sup>21</sup>

The federal government’s recent guidance rescission has no bearing on the requirement that districts curtail reliance on exclusionary disciplinary policies and work to adopt behavior plans that are proportionate, progressive, and measured. Our offices strongly encourage all school districts to take these obligations seriously. We urge all districts to fully evaluate whether they over-rely on exclusion as a form of discipline, and to adjust their codes and policies to remedy these issues.

***Districts must comply with procedural safeguards in the disciplinary process.***

Federal and state law continue to require that districts provide adequate due process protections for students in the disciplinary process. Under the New York State Education Law, school districts must ensure that students facing suspension receive adequate notice and an opportunity to be heard, the specific form of which is determined by the length of discipline contemplated.<sup>22</sup> Moreover, districts must offer adequate alternative instruction to suspended students.<sup>23</sup>

The federal IDEA provides students with disabilities with additional procedural safeguards. Specifically, suspensions that constitute a change in placement for a child with a disability trigger a formal review of the decision to discipline that child.<sup>24</sup> Where the behavior is a manifestation of the disability, the child must be immediately returned to his or her original placement.<sup>25</sup> The IDEA also requires districts to assess the behavioral needs of frequently suspended students with disabilities and create behavioral plans to address their needs.<sup>26</sup>

These procedural safeguards are important for ensuring fair administration of disciplinary policies in school districts, and for protecting students from discrimination. Our offices will continue to enforce these requirements across the state and encourage districts to continue to be mindful of the due process obligations triggered by school disciplinary actions.

***Conclusion***

Over-reliance on exclusionary discipline and disparities in its use leave school districts in New York vulnerable to liability under a host of federal and state laws that protect students from discrimination and over-utilization of exclusionary disciplinary actions, and guaranteed due process protections. Notwithstanding the rescission of the federal school discipline guidance, our offices continue to enforce these legal requirements in furtherance of our shared commitment to provide equal access to safe and supportive learning environments. To that end, SED will continue to provide resources and technical assistance on these issues to school districts, and to develop

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<sup>21</sup> *Id.*

<sup>22</sup> N.Y. Education Law § 3214(3)(b)-(c); 8 NYCRR §100.2[1].

<sup>23</sup> N.Y. Education Law § 3214(3)(e); *Turner v. Kowalski*, 49 A.D.2d 943, 944 (N.Y. App. Div. 1975).

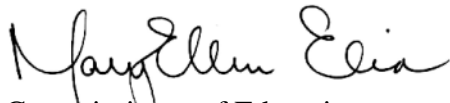
<sup>24</sup> 20 U.S.C. §1415(k)(1)(C).

<sup>25</sup> *Id.*

<sup>26</sup> 20 U.S.C. §1415(k)(1)(D)(ii).

additional programs and guidance that provide further clarification and support. The OAG will also continue to bring enforcement actions pursuant to federal and state laws where necessary. It is imperative that school districts continue adopting and implementing policies designed to address the overuse of punitive discipline and disproportionalities that negatively impact vulnerable students. Thank you for the work you do on behalf of all students in the State of New York.

Sincerely,

Handwritten signature of MaryEllen Elia in black ink.

Commissioner of Education  
President of the University of the State of New York

Handwritten signature of Letitia A. James in blue ink.

Letitia A. James  
Attorney General