State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL

February 4, 2019

RE: Oversight and Enforcement of Laws Related to Discrimination in School Discipline in California

Dear Colleagues:

Responding to the discriminatory use of suspensions and expulsions in school and its impact on educational outcomes, the United States Departments of Education and Justice jointly released the School Discipline Guidance Package ("2014 Guidance") in January 2014.[1] These important documents assist elementary and secondary schools with meeting their obligations under the Civil Rights Act of 1964 and other federal laws to administer student discipline without discriminating on the basis of race, color, sex, disability, or national origin.[2] In a troubling step backward, on December 21, 2018, these federal agencies rescinded critical portions of the 2014 Guidance. As a result, I am writing to clarify the legal obligations of schools in California that receive state funding.

The 2014 Guidance provides valuable tools and information to California school administrators on how to achieve an equitable and safe classroom environment, without visiting unfair and unnecessary harm on students through exclusionary discipline. The alternative methods for creating safe schools that the 2014 Guidance sets forth have proven to be effective and the 2014 Guidance's goal of keeping students in class and learning is in the best interests of students, schools, public safety, and the State of California.[3]

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[1] U.S. Dept. of Educ. & U.S. Dept. of Justice, ED-DOJ School Discipline Guidance Package (Jan. 8, 2014), available at http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance.

[2] E.g., Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, et. seq.; Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794(a) & (b)(2)(B).

[3] See Rumberger & Losen, *The Hidden Costs of California's Harsh School Discipline: And the Localized Economic Benefits From Suspending Fewer High School Students* (Mar. 8, 2017), available at http://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/the-hidden-cost-of-californias-harsh-discipline; Losen et al., *Are We Closing the School Discipline Gap* (Feb. 23, 2015), available at http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap (discussing that to close the achievement gap, we must close the discipline gap); Tex. Juvenile Justice Dept., *Effectiveness of Positive Behavioral Interventions and Supports* (Dec. 2012), available at http://www.tjjd.texas.gov/publications/reports/pbislegislativereport2012-12.pdf; Ross et al., *Teacher Well-Being and the Implementation of School-Wide Positive Behavior* (July 12, 2011) 14(2) J. POSITIVE

The California Department of Justice remains committed to pursuing the civil rights principles reflected in state and federal law, and in documents like the 2014 Guidance. President Lyndon Baines Johnson described the Civil Rights Act of 1964 as "a challenge to all of us to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved country."[4] California will not turn its back on the legacy of Dr. Martin Luther King, Jr., and other civil rights leaders who fought for the Civil Rights Act of 1964. The California Department of Justice and our partners accept the challenge to protect students from discriminatory exclusionary discipline, which impairs impacted children's educations and denies them their futures.[5]

Accordingly, I call upon all those who work with and on behalf of our students to dedicate themselves anew to ensuring that our schools are free from policies and practices that have a discriminatory impact. Like Dr. King, our office will pursue the cause of justice until racial discrimination is eliminated from California schools, and our schools are "transformed into bright tomorrows of quality, integrated education."[6]

BEH. INTERVENTIONS 118; Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools* (Apr. 20, 2009) 12(3) J. POSITIVE BEH. INTERVENTIONS 133; Luiselli et al., *Longitudinal Evaluation of Behavior Support Intervention in a Public Middle School* (July 1, 2002) 4(3) J. POSITIVE BEH. INTERVENTIONS 184. See also *Piper v. Big Pine Sch. Dist.* (1924) 193 Cal. 664, 668, 673 (explaining that the rights and privileges in the California constitution for public school for all establishes "the advantages and necessities of a universally educated people as a guarantee and means for the preservation of the rights and liberties of the people.")

[4] Johnson, *Remarks upon Signing the Civil Rights Act of 1964* (July 2, 1964).

[5] See Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension* (Jan. 17, 2018) YOUTH & SOC'Y (finding that suspended youth were less likely to have graduated from college or high school, and were more likely to have been arrested and on probation); Morris & Brea, *The Punishment Gap: School Suspension and Racial Disparities in Achievement* (Feb. 1, 2016) 63(1) J. SOC. PROBS. 1 (in longitudinal study, finding that school suspensions account for approximately one-fifth of black-white differences in school performance, and stating that findings suggest that exclusionary school punishment hinders academic growth and contributes to racial disparities in achievement); Perry & Morris, *Collateral Consequences of Exclusionary Punishment in Public Schools* (Nov. 5, 2014) 79 AM. SOC. REV. 1067 (finding that high levels of exclusionary discipline within schools threaten the academic success of all students, including those who have never been suspended); The Council on State Gov't & Pub. Policy Research Inst. at Tex. A&M Univ., *Breaking Schools' Rules: A Statewide Study on How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (July 2011), available at http://csgjusticecenter.org/youth/breaking-schools-rules-report/ (comprehensive longitudinal study in Texas showing that even one out of school suspension made it five times as likely for a student to drop out and three times as likely for the student to enter the juvenile justice system within one year, when compared to similar students); Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large Multicultural School District* (May 1, 2006) 38 EDUC. & URB. SOC'Y 359 (identifying a correlation between suspension and school avoidance, diminished educational engagement and decreased academic achievement).

[6] King, *Where Do We Go From Here?* (Aug. 16, 1967).

I am well aware that advice alone is not an adequate safeguard against discrimination, and that sometimes it is necessary to investigate and act to protect the rights of Californians. Dr. King advocated for the use of government enforcement actions to protect students against immoral and unlawful discrimination because "[w]e cannot combat pneumonia by prescribing an occasional tablet of aspirin and a goblet of goodwill."[7] California law unequivocally provides that discrimination on any protected basis is unlawful and policies with a discriminatory adverse impact on a group of students because of race, color, national origin, disability, gender, or sexual orientation are prohibited. (Cal. Const., art. I, § 7(a) & (b); Ed. Code, §§ 220, 262.3, & 262.4; Gov. Code, § 11135; Cal. Code Regs., tit. 5, § 4911 & Cal. Code Regs., tit. 2, § 11154).[8]

Though California is committed to providing an equal education to all children, unfortunately there is still a great deal of work to do. In California, African-American students are suspended at three times the rate of White students,[9] and lose nearly four times the number of days of instruction to suspensions and expulsions as White students.[10] Many of these suspensions are based on determinations by school administrators that students have engaged in disruptive conduct. These determinations, however, are highly subjective and a persistent source of disproportionate discipline.[11] Compounding this problem, today's students are at risk of being judged by the color of their skin because of the biases that school employees and officials may carry into the schoolhouse. Research has demonstrated that these biases can result in discriminatory disciplinary decisions,[12] and may exacerbate the achievement gap by

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[7] King et al., *A Statement to the President of the United States* (June 23, 1958).

[8] See also *Harris v. Civil Serv. Comm'n* (1998) 65 Cal.App.4th 1356, 1365 (hereafter "Harris") (Proof may be offered, "usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are 'in operation . . . functionally equivalent to intentional discrimination.'"); *Butt v. State of California* (1992) 4 Cal.4th 668, 685–86 ("[F]ederal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest."); *Jackson v. Pasadena City Sch. Dist.* (1963) 59 Cal.2d 876, 881 (holding that even without intentional discriminatory conduct by district, students alleging that substantial racial imbalance exists are entitled to relief).

[9] Cal. Dept. of Educ., *State Superintendent Torlakson Announces 2018 Rates for High School Graduation, Suspension and Chronic Absenteeism* (Nov. 19, 2018), available at https://www.cde.ca.gov/nr/ne/yr18/yr18rel76.asp.

[10] Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California* (Sept. 18, 2018) at p. 5, available at http://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/the-unequal-impact-of-suspension-on-the-opportunity-to-learn-in-ca/.

[11] *Id.* at p. 19.

[12] See, e.g., Gilliam et al., *Do early educators' implicit biases regarding sex and race relate to behavior expectations and recommendations of preschool expulsions and suspensions?* (Sept. 28, 2016) YALE CHILD STUDY CENTER (finding in laboratory experiments that teachers had racially discriminatory perceptions of the severity of preschoolers' misbehavior), available at http://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf; Dee, *A teacher like me: Does race, ethnicity, or gender matter?* (May 2005) 95(2) AM. ECON. REV. 158 (finding that White teachers were more likely than African-American teachers to perceive African-American students as disruptive).

decreasing expectations and opportunities for children of color.[13] This is not a situation unique to schools, as "[m]ost people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes."[14] Nevertheless, bias though perhaps implicit, is no less harmful.[15]

State law authorizes strong and immediate action to ensure that discrimination and bias—explicit and implicit—are rooted out of educational programs or activities benefiting from state financial assistance. As applied in the school discipline context in California, this means that schools may not discriminate against children of color by disproportionately or disparately excluding them from school.[16] It means that the requirements of non-discrimination apply with equal force to the conduct undertaken by individuals or entities, such as security agencies, school resource officers, and school police departments, that carry out some or all of the schools' discipline and safety functions through contracts, memoranda of understanding, or other arrangements.[17] Such protections apply throughout the disciplinary process, from behavior management in the classroom, and behavior referrals outside of the classroom, to resolution of the conduct. If a school's practices result in discrimination at any of these stages, this triggers California's anti-discrimination prohibitions.[18] While not all referrals result in a sanction, students nevertheless lose critical classroom and academic instructional time.[19] In addition, sanctions that become part of a student's record can follow a student during their educational

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[13] Gershenson et al., *Who believes in me? The effect of student–teacher demographic match on teacher expectations* (June 2016) 52 ECON. EDUC. REV. 209 (finding that White math teachers had lower educational expectations for African-American students than African-American teachers).

[14] *Woods v. City of Greensboro* (4th Cir. 2017) 855 F.3d 639, 641 (hereafter "Woods") (citing Mahzarin & Greenwald, *Blindspot: Hidden Biases of Good People* (Feb. 12, 2013); Banks, et al., *Discrimination and Implicit Bias in a Racially Unequal Society* (2006) 94 CAL. L.REV. 1169; Eberthardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital–Sentencing Outcomes* (May 10, 2006) 17 PSYCHOL. SCI. 383; Greenwald & Kriegar, *Implicit Bias: Scientific Foundations* (July 31, 2006) 94 CAL. L.REV. 945). See also Dasgupta, *Implicit In group Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations* (2004) 17 SOC. JUST. RES. 2, 146, 155 (discussing "[a]lmost a hundred studies" verifying the existence and importance of implicit bias in understanding racial stereotyping that results in different treatment on the basis of race or other protected categories).

[15] E.g. *Woods, supra*, 855 F.3d at 651–652 ("Indeed, it is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional.").

[16] See *ante*, at p. 3, ¶ 1.

[17] See, e.g., Ed. Code, §§ 200, 201(g) and 220 (providing that California anti-discrimination prohibitions are to be interpreted consistently with Title VI of the Civil Rights Action of 1964); Cal. Code Regs., tit. 2, § 11154, subd. (i) (incorporating language from 34 C.F.R. § 100.3(b)(1) & (2)); see also 2014 Guidance, *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014) ("DCL on School Discipline"), at p. 6.

[18] See *ante*, at p. 3, ¶ 1.

[19] See, e.g., Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* (2010) 39(1) EDUC. RESEARCHER 59, 60 (discussing consequences of lost instructional time due to school removals, where research shows strong positive relationship between time engaged in academic learning and student achievement).

career, sometimes also resulting in enhanced sanctions for later offenses.[20] Accordingly, it is critical for schools to take effective steps to eliminate discrimination in all stages of the process.

California law is intended to be as or more extensive than the federal Civil Rights Act of 1964.[21] Federal regulations promulgated in 1964 to implement the objectives of the Civil Rights Act of 1964 include a protection for students from discipline policies or practices that have a disparate adverse discriminatory effect or impact.[22] However, the United States Department of Education indicated in December 2018 that it will no longer enforce this federal regulation.[23] Yet, this regulation remains in effect and has the force of law. The United States Supreme Court has also affirmed that disparate impact is a "crucial" civil rights tool to combat "systemic discrimination."[24] The California Department of Justice continues to view this federal regulation as legally enforceable, and our office remains committed to enforcing California civil rights laws providing the same protection.[25] Similarly, our office will continue to consider the 2014 Guidance when enforcing California law to ensure the nondiscriminatory administration of school discipline.

The administration of student discipline can result in unlawful discrimination in several ways, including if a student is subjected to different treatment based on the student's race, and if a policy or practice administered in an evenhanded manner has a disparate and unjustified effect on students of a particular protected group. Where the latter is shown, the school must demonstrate that the discipline policy or practice is necessary to meet an important educational goal, and that there are no comparably effective alternative policies or practices that would meet the goal with less of an adverse impact. Under these inquiries, data and information, including

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[20] See 2014 Guidance, DCL on School Discipline, at p. 2.

[21] Ed. Code, § 201, subd. (g).

[22] 34 C.F.R. § 100.3(b)(2) ("A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangement, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating of substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."); 29 Fed. Reg. 16299 (Dec. 4, 1964).

[23] See U.S. Dept. of Educ. & U.S. Dept. of Justice, *Dear Colleague Letter* (Dec. 21, 2018); U.S. Dept. of Educ., Office for Civil Rights, *Questions & Answers on Racial Discrimination and School Discipline* (Dec. 21, 2018) (stating only that OCR will address discriminatory different treatment in discipline but not that it will address discriminatory disparate impact in discipline).

[24] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* (2015) 135 S.Ct. 2507, 2525 (hereafter "Inclusive Cmtys.") (upholding the right to bring disparate impact civil rights claim under the federal Fair Housing Act) (internal quotations and citations omitted).

[25] Ed. Code, §§ 200, 201, subd. (g) and 220 (providing that California anti-discrimination prohibitions are to be interpreted consistently with Title VI of the Civil Rights Action of 1964); Cal. Code Regs., tit. 2, § 11154, subd. (i) (incorporating language from 34 C.F.R. § 100.3(b)(1) & (2)).

statistical data, showing the impact of discipline policies or practices on particular groups of students are important indicators of potential discrimination.[26]

We note that evidence of racial discrimination can come from a variety of sources, such as remarks, testimony, or admission by school officials revealing discriminatory motives, proof of selective enforcement of a particular disciplinary rule against one group of students but not another, information showing that a discipline policy or practice weighs more heavily on students of a particular racial group, or that the policy has been inconsistently applied to students of different racial backgrounds.[27] To ensure non-discrimination in discipline, schools must keep accurate and complete data regarding all disciplinary actions taken.

In California, the law also provides that suspension generally may be used only as a discipline tool of last resort and that alternative means of correction, such as restorative justice and a continuum of positive behavior supports, must be exhausted prior to most exclusions.[28] These and other effective, research-based, and proven alternatives to discipline help ensure that appropriate behavior is positively reinforced, encourage students to accept responsibility for misbehavior and follow school rules, assist students in developing social and emotional competencies (*e.g.*, responsible decision-making and self-management), and involve students and parents in maintaining safe, inclusive, and positive educational environments. California has tools available to support the implementation of such alternatives. I encourage schools to access the additional resources and training being made available soon through Assembly Bill 1808 to help reduce discriminatory discipline and close the achievement gap.[29]

My office is looking closely at school discipline policies and practices to assess where discrimination still exists in our state. We will continue to seek stronger, more comprehensive legislation and to use the authority vested in the Office of the Attorney General to pursue

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[26] See, generally, *Inclusive Cmtys., supra*, 135 S.Ct. at 2525 (upholding the right to bring disparate impact civil rights claim under the federal Fair Housing Act); *Harris, supra*, 65 Cal.App.4th at 1365 (Proof may be offered, "usually through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are 'in operation . . . functionally equivalent to intentional discrimination.'"); 2014 Guidance, DCL on School Discipline, at pp. 11–12.

[27] *Arlington Heights v. Metro. Hous. Dev. Corp.* (1977) 429 U.S. 252, 266–67 (discriminatory intent can be established by the "totality of the circumstances" and "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "departures from the normal procedural sequence"); *Washington v. Davis* (1976) 426 U.S. 229, 242 (evidence of discrimination includes whether the official action "bears more heavily on one race than another" and whether there is a history of discrimination).

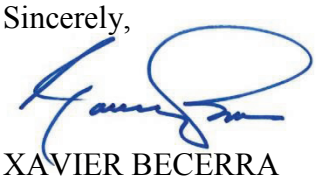
[28] Ed. Code, § 48900.5, subds. (a) & (b); see also Ed. Code, § 48900, subd. (k)(2) (prohibiting suspensions in grades K-3 and expulsions in all grades for the subjective category of "willful defiance" and disruption).

[29] AB 1808 (2017–2018) § 143 ($15 million dollar allocation to develop improved discipline techniques that combine Positive Behavior Interventions and Supports—a framework for implementing proven supports along a continuum—and restorative justice); Washburn, *Improving California school environment focus of pilot program* (July 25, 2018) EDSOURCE, available at http://edsource.org/2018/improving-california-school-environments-focus-of-pilot-program/600663.

investigations to protect the rights of all students to be free from discrimination, in all its forms.[30] I encourage those with information regarding suspected practices in violation of state or federal law to report them to the Bureau of Children's Justice in the Civil Rights Enforcement Section of my office, through the online complaint form located at https://oag.ca.gov/bcj/complaint, or via email at bcj@doj.ca.gov.

It is up to all of us to accept the challenge to protect California's children and communities from injustice. My office looks forward to working with our partners to bring our schools to a brighter tomorrow and protect our students from discrimination.

Sincerely,



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[30] See, e.g., Cal. Const., art. V, § 13 ("Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction."); *Pierce v. Superior Court* (1934) 1 Cal.2d 759 (Attorney General has power, in absence of legislative restriction, to file any civil action or proceeding directly involving state's rights and interests or deemed necessary by him to enforce state laws, preserve order, and protect public rights and interests.)