

July 23, 2021

***Submitted electronically via the Federal eRulemaking Portal***

Suzanne B. Goldberg  
Acting Assistant Secretary for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline (“RFI”) [Docket ID ED-2021-OCR-0068-0001]

Dear Acting Assistant Secretary Goldberg:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) submits these comments regarding the administration of school discipline in response to the RFI published in the Federal Register on June 7, 2021, by the U.S. Department of Education (“the Department”).<sup>1</sup> Specifically, the RFI “solicit[s] information on school climate and discipline practices in our nation’s schools serving students in pre-K through grade 12” in order to “inform determinations about what policy guidance, technical assistance, and other resources.” We appreciate the opportunity to respond.

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education, and policy advocacy. Since its inception, Lambda Legal has direct experience representing, assisting, and providing critical resources and toolkits to LGBTQ youth, including students (and their parents or guardians), youth in the child welfare and juvenile justice systems, and youth experiencing homelessness. We have also partnered with and worked alongside school districts and administrators who endeavor to create a safe and inclusive environment where LGBTQ students can thrive and reach their full potential. Our direct experience working with and for LGBTQ youth who are subjected to discriminatory school discipline policies means we can share our informed views with the Department about of the myriad of challenges LGBTQ youth face in their daily lives.

In our response, Lambda Legal provides information and recommendations on the following topic areas identified by the Department in its RFI: exclusionary disciplinary penalties [4(b)], dress and grooming codes [4(c)], referrals and interaction with police and SROs [(4(k)] discipline of victims of harassment [4(m)]. We also address the impact of school discipline on students [7] and comment generally on data collection [9].<sup>2</sup> As described in additional detail below, we provide some illustrative—though not exhaustive—examples from affected LGBTQ youth, parents or guardians, and other members of the community who have sought assistance or legal representation from Lambda Legal concerning discriminatory school discipline policies.

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<sup>1</sup> See 86 FR 30449, available at <https://www.regulations.gov/document/ED-2021-OCR-0068-0001>.

<sup>2</sup> Lambda Legal provides responses and recommendations to the Department on these selected topics based on our particular areas of expertise in order to complement the submissions provided by the broader civil rights community without suggesting that the other areas of school discipline included in the RFI, which others are addressing comprehensively, are not important for LGBTQ people.

Fair and equitable discipline policies are an important component of creating an environment where all students feel safe and welcome. Schools are safer when all students feel comfortable and are engaged in the school community, and when teachers and administrators have the tools and training to prevent and address conflicts and challenges as they arise. Every student, including LGBTQ students, deserve an equal opportunity to learn, grow, and thrive in school.

### **Lambda Legal Response to the RFI**

#### **4(b) Use of exclusionary disciplinary penalties, such as suspensions or expulsions, for minor, non-violent, or subjectively defined types of infractions, such as defiance or disrespect of authority.**

Suspensions and expulsions as disciplinary consequences for minor, non-violent, or subjectively defined infractions deny students the opportunity to meaningfully participate in the education system. Many schools impose an undefined standard of discipline such as “open defiance of authority” that is left to the discretion of a teacher or a school administrator.<sup>3</sup> Importantly, subjective infractions encourage a “discipline system that is reliant on exclusion rather than remediation,”<sup>4</sup> which can lead to catastrophic long-term educational and then economic consequences.

Youth who are removed from class for minor, non-violent, or subjectively defined infractions are set up for failure because missing classroom time, stigma and related alienation means they are more likely to be left behind and pushed out of school.<sup>5</sup> Such discipline policies and practices have led to a devastatingly disproportionate number of exclusions for students of color (many of whom are LGBTQ) who are almost four times more likely to be expelled as white students. This is true even for Black preschoolers who are 3.6 times more likely to be suspended than white preschoolers.<sup>6</sup> LGBTQ and gender nonconforming (“GNC”) students similarly experience push-out at disproportionate levels.<sup>7</sup> GLSEN reported that two in five (39.8%) LGBTQ students reported facing detention, in-school or out-of-school suspension, or expulsion.<sup>8</sup> Discipline resulting from subjectively-defined instances of defiance or disrespect of authority

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<sup>3</sup> *School Discipline Laws & Regulations by Category & State*, National Center on Safe Supportive Learning Environments, available at [https://safesupportivelearning.ed.gov/discipline-compendium/choose-state/results?field\\_sub\\_category\\_value=Grounds+for+possible+suspension+or+expulsion](https://safesupportivelearning.ed.gov/discipline-compendium/choose-state/results?field_sub_category_value=Grounds+for+possible+suspension+or+expulsion).

<sup>4</sup> Hugh Potter, *School Punishments and the Over Reliance on Suspensions*, Michigan State University (2015), available at <https://education.msu.edu/green-and-write/2015/school-punishments-and-the-over-reliance-on-suspensions/>.

<sup>5</sup> Hilary Burdge et al., *Gender Nonconforming Youth: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline*, GSA Network (2014), available at [https://greatlakesequity.org/sites/default/files/201809081082\\_newsletter.pdf](https://greatlakesequity.org/sites/default/files/201809081082_newsletter.pdf); see also Nirvi Shah, *Study Measures Bullying’s Academic Toll*, Education Week (2011), available at <https://www.edweek.org/leadership/study-measures-bullyings-academic-toll/2011/08>.

<sup>6</sup> *2013-2014 Civil Rights Data Collection, A First Look, Key Data Highlights on Equity Opportunity Gaps in Our Nation’s Public Schools*, U.S. Department of Education: Office for Civil Rights (Oct. 28, 2016), available at <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

<sup>7</sup> Hilary Burdge et al., *Gender Nonconforming Youth: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline*, GSA Network (2014), available at [https://greatlakesequity.org/sites/default/files/201809081082\\_newsletter.pdf](https://greatlakesequity.org/sites/default/files/201809081082_newsletter.pdf).

<sup>8</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

assessed against LGBTQ and GNC students lead to lower engagement with and trust in teachers, which can be obstructive to learning.<sup>9</sup>

Actual or perceived sexual orientation and/or gender identity affects the discipline experiences of youth in schools. Some educators and administrators tend to enforce discipline policies unequally or more harshly in the case of LGBTQ and GNC students, particularly where discipline policies are ill-defined or enforcement of student codes-of-conduct reflect staff bias.<sup>10</sup> For example, the threat of punitive punishment for “insubordination,” “inappropriate public displays of affection,” “excessive distraction to other students” and alleged dress code violations<sup>11</sup> are often weaponized against LGBTQ youth.

- In February 2018, an Alabama school principal disciplined a Black lesbian high school student, J.R., for “considered rebelliousness of school personnel” (an “intermediate violation”) after she invited a female classmate to prom following a student performance at a school talent show.<sup>12</sup> The principal disciplined J.R. with in-school suspension, apologized over the school public address system to “anyone who was offended” by the promposal, and threatened to exclude the student from prom based on the disciplinary infraction. After Lambda Legal intervened and threatened legal action, the district expunged the discipline and provided written assurances to the parents of the students that the couple could attend prom together.<sup>13</sup>
- Schools often discipline LGBTQ students for displays of affection more often or more severely than they discipline heterosexual students for similar behavior. According to the Journal of Adolescent Research, LGBTQ youth are disproportionately punished for holding hands, self-expression and “false accusations or rumor.”<sup>14</sup> One female middle school student in Illinois experienced two days of detention for hugging a female friend.<sup>15</sup> Like J.R. above, students encounter resistance to attending school dances with a same-sex date by, for example, school authorities discouraging them, telling them they may not do so, or refusing them a reduced-price couple’s ticket.<sup>16</sup> In many instances, schools invoke subjectively defined code of conduct provisions to justify such discrimination.

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<sup>9</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>10</sup> Shannon D. Snapp et al., *Messy, Butch and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, J. Adolescent Research (2015), available at <https://journals.sagepub.com/doi/abs/10.1177/0743558414557625>.

<sup>11</sup> Discipline issues related to dress and grooming codes discussed *infra*.

<sup>12</sup> Lambda Legal letter to Calhoun County School District (Feb. 8, 2018), available at [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/redacted\\_ccsd\\_ahs\\_promposal\\_letter.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/redacted_ccsd_ahs_promposal_letter.pdf); see also Emanuella Grinberg, *School accused of preventing same-sex couple from attending prom together*, CNN (Feb. 9, 2018), available at <https://www.cnn.com/2018/02/09/us/alabama-lesbian-teens-prom/index.html>.

<sup>13</sup> Lambda Legal Press Release, *Lambda Legal Encouraged by Alabama School District Response* (Feb. 14, 2018), available at [https://www.lambdalegal.org/news/al\\_20180214\\_lesbian-teens-will-attend-prom-together](https://www.lambdalegal.org/news/al_20180214_lesbian-teens-will-attend-prom-together).

<sup>14</sup> Shannon D. Snapp et al., *Messy, Butch and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, J. Adolescent Research (2015), available at <https://journals.sagepub.com/doi/abs/10.1177/0743558414557625>.

<sup>15</sup> Ashley E. Buck et al., *Reactions to Homosexual, Transgender, and Heterosexual Public Displays of Affection*, J. Positive Sexuality, Vol.5, No. 2 (Oct. 2019), p. 35, available at [http://journalofpositivesexuality.org/wp-content/uploads/2019/10/JPS-2019\\_V5I2.pdf](http://journalofpositivesexuality.org/wp-content/uploads/2019/10/JPS-2019_V5I2.pdf).

<sup>16</sup> Human Rights Watch, *“Like Walking Through a Hailstorm”: Discrimination Against LGBT Youth in U.S. Schools*, pp. 73-75 (2016), available at [https://www.hrw.org/sites/default/files/report\\_pdf/uslgbt1216web\\_2.pdf](https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf).

- In December 2019, a Colorado assistant school principal required eighth grade public school student, E.B., to remove her t-shirt that displayed the expressive message “Make America Gay Again.” The assistant principal asserted the shirt was a “distraction” and demanded that she change the shirt in order to attend class. Concerned about being disciplined for a violation under the student code of conduct, she complied with the school official’s order. The district relented after receiving a letter from Lambda Legal regarding its unlawful interference with student speech and expression.

The experiences of LGBTQ students, including youth like J.R. and E.B. who contact the Lambda Legal Help Desk, are not isolated examples. Exclusionary disciplinary penalties have increased significantly “despite research demonstrating the increased likelihood of students subjected to exclusionary discipline to be cited for future behavioral problems, have academic difficulties, and drop out of school.”<sup>17</sup> Safe and welcoming school climates, coupled with a prioritization of restorative justice over removal, are necessary to combat the disproportionate push-out of students of color and LGBTQ youth that result from such counterproductive penalties.

The Department should encourage teachers instead to adopt restorative teaching practices, such as supportive student-teacher relationships and peer mediation, which are “effective in limiting disciplinary sanctions, and in some cases, curbing discipline disparities with other marginalized groups.”<sup>18</sup> When intervention is necessary, teachers must be discouraged from using forms of discipline that are excessive as compared to the student’s infraction. Additionally, educators bear the responsibility of ensuring that students who are disciplined have access to learning opportunities. When removal from the classroom truly is an appropriate measure, it must be followed by steadfast reintegration efforts.

#### **Recommendations:**

- Discipline policies should not include exclusionary, three-strike, or zero-tolerance policies, which mandate harsh disciplinary practices like suspension or expulsion.
- Schools must ensure that same-sex couples are able to date, display affection, and attend dances and other school functions on the same terms as all other students.
- Schools should have practices in place, along with regular training, to guard against inequitable enforcement of discipline policies.
- Discipline policies should implement restorative practices that focus on resolving conflicts, repairing relationships, and building community.

#### **4(c) Discipline issues relating to dress and grooming codes (including restrictions on hairstyles).**

Dress codes are often enforced in ways that disproportionately impact LGBTQ students, students of color, and girls. Sex-differentiated dress and grooming codes often encourage and enforce gender stereotypes that create an educational environment hostile for many students. Grooming codes regulating hair length and style, jewelry, makeup, or ear piercing can have similar discriminatory impacts on LGBTQ students and students of color. Particularly harmful are the many dress codes that are explicitly gendered yet have

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<sup>17</sup> Diana Tate Vermeire et al., *Discipline in California Schools: Legal Requirements and Positive School Environments*, ACLU of Northern California (March 2010), available at [https://www.aclunc.org/sites/default/files/discipline\\_in\\_california.pdf](https://www.aclunc.org/sites/default/files/discipline_in_california.pdf).

<sup>18</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth*, 36 (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

the implicit effect of policing minority cultural groups.<sup>19</sup> Black girls are suspended or expelled more than any other group due in part to dress codes.<sup>20</sup>

Like students of color and girls, LGBTQ students experience higher rates of disciplinary actions based on dress and grooming standards that are applied against them in discriminatory ways.<sup>21</sup> Such policies often lead to exclusionary sanctions if students fail to comply or if they challenge such restrictions. In addition to suspensions, detention and other forms of exclusion, LGBTQ students too often miss school due to concerns about their own personal safety at school, which causes them serious short-term and long-term harm. School discipline policies that punish students for expressing their LGBTQ identity also foster a hostile school climate which causes students to feel unsafe. Suicidality and mental health issues continue to plague LGBTQ youth because of the pervasive harassment and discrimination they experience, which is only exacerbated by the enforcement of dress and conduct codes that require conformity with rigid social and gender expectations.

Examples of how youth are commonly punished for violations of dress codes grounded in impermissible gender stereotypes include:

- In November 2020, a Texas principal disciplined a gay high school student who painted his nails for violating the district's then-dress and grooming code that stated "makeup and nail polish are prohibited" for male students. The student, T.W., who received in-school suspension for refusing to remove the polish, started an online petition that secured over 400,000 signatures<sup>22</sup> and garnered national attention. Lambda Legal and the ACLU of Texas sent a letter on behalf of T.W. to the school board.<sup>23</sup> After months of advocacy, T.W. ultimately convinced the school board to change its sex-based dress and grooming policy in April 2021.<sup>24</sup>
- Lambda Legal had to litigate for four and a half years in order to secure a legal settlement for a Black transgender girl in Indiana barred from the school prom for wearing a pink dress.<sup>25</sup> Discriminatory discipline based on dress and grooming codes is a widespread problem for GNC

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<sup>19</sup> Alyssa Pavlakis et al., *How dress codes criminalize males and sexualize females of color*, Phi Delta Kappan (Sept. 24, 2018), available at <https://kappanonline.org/pavlakis-roegman-dress-codes-gender-race-discrimination/>.

<sup>20</sup> Latham Chloe Sikes, *Racial and Gender Disparities in Dress Code Discipline Point to Need for New Approaches in Schools*, IDRA News Letter (Feb. 2020), available at <https://www.idra.org/resource-center/racial-and-gender-disparities-in-dress-code-discipline-point-to-need-for-new-approaches-in-schools/>.

<sup>21</sup> GLSEN, *The 2019 National School Climate Survey*, 39-45 (2019), available at [https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report\\_0.pdf](https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf); see generally GLSEN, *Educational Exclusion* (2016) ("School policies that disproportionately affect LGBTQ students, such as gendered dress codes and rules about public displays of affection, also expose LGBTQ youth to greater rates of school discipline, and sometimes, as a result, involvement in the justice system"), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>22</sup> Change.Org Petition, *Allow Males to Wear Nail Polish* (2020), available at <https://www.change.org/p/anyone-and-everyone-allow-males-to-wear-nail-polish>.

<sup>23</sup> Lambda Legal and ACLU of Texas letter to Clyde CISD (Dec. 10, 2020), available at [https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/letter\\_to\\_clyde\\_cisd\\_from\\_aclu\\_and\\_lambda\\_legal.pdf](https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/letter_to_clyde_cisd_from_aclu_and_lambda_legal.pdf).

<sup>24</sup> Alisha Ebrahimji, *This teenager's painted nails got him suspended. Now his Texas school district has created a more gender-neutral dress code policy*, CNN (April 23, 2021), available at <https://www.cnn.com/2021/04/23/us/nail-polish-texas-school-gender-neutral-trnd/index.html>.

<sup>25</sup> Press Release, *Lambda Legal Reaches Settlement Agreement with Indiana School District After Transgender Student Was Barred from Prom* (Jan. 28, 2011), available at [https://www.lambdalegal.org/news/in\\_20110128\\_reaches-agreement](https://www.lambdalegal.org/news/in_20110128_reaches-agreement). [https://www.lambdalegal.org/news/in\\_20110128\\_reaches-agreement](https://www.lambdalegal.org/news/in_20110128_reaches-agreement)



students, too. Examples include Mississippi student Constance McMillen (2010) and Alabama student Britney (2018), both of whom encountered resistance to wearing a tuxedo to the prom.<sup>26</sup> Transgender and nonbinary students also commonly face discipline or exclusion from other school activities involving sex-differentiated attire, such as graduation gowns, band or orchestra uniforms, physical education uniforms, and school ceremony attire where such rules have no legitimate educational purposes.<sup>27</sup>

- Students of color and girls also face disproportionate discipline because of dress and grooming codes. In 2020, two Black students in Texas were informed by school officials that they must either cut their natural locs or no longer participate in regular classes and school activities, including one of the student's graduation ceremony. After they filed a lawsuit with the assistance of the NAACP Legal Defense and Educational Fund, a federal court enjoined enforcement of the school's dress and grooming policy.<sup>28</sup> In another legal case, three female students at a North Carolina K-8 public charter school were prohibited from wearing pants or shorts because the school's dress code required girls to wear skirts. A federal court granted summary judgment for the girls, holding the policy violated the Equal Protection Clause.<sup>29</sup>

The consequences of dress and grooming codes range from increased absences to lowered GPAs and a diminished ability to go to college. When students are disciplined because of how they are dressed or how they present, they lose both instructional time and the confidence to carry themselves authentically. Suspending students or removing them from the classroom based on gender, racial, or cultural appearance stereotypes can compromise their ability to stay on track with their learning and can discourage them from coming into school after being disciplined.<sup>30</sup> They receive the message that there is something wrong with their clothing or grooming choices or with their bodies, which only further perpetuates an unwelcome and hostile environment for those whose identities and expression go against established, culturally dominant norms.

### Recommendations:

- Add a new regulation clarifying that Title IX prohibits discrimination on the basis of sex in the application of any rules of appearance.
- Clarify that dress and grooming codes shall not be written or enforced in a manner that disproportionately impacts LGBTQI+ students.
- Clarify that dress and grooming codes shall not be written or enforced based on gender stereotypes.

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<sup>26</sup> *McMillen v. Itawama County School District*, 702 F.Supp.3d 699 (N.D. Miss. 2010); see also SPLC Press Release (May 16, 2018), available at <https://www.splcenter.org/news/2018/05/16/splc-helps-lgbt-student-assert-her-right-wear-prom-tuxedo>.

<sup>27</sup> See, e.g., Mary Whitfill, *ACLU blasts Braintree High over gendered graduation gowns*, The Patriot Ledger (Jan. 16, 2020), available at <https://www.patriotledger.com/news/20200116/aclu-blasts-braintree-high-over-gendered-graduation-gowns>.

<sup>28</sup> See, e.g., *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F.Supp.3d 511 (S.D. Tex. Aug. 17, 2020) (hair length policy).

<sup>29</sup> *Peltier v. Charter Day School, Inc.*, 384 F.Supp.3d 579 (E.D.N.C. 2019), appeal docketed, No. 20-1001 (4th Cir.) (skirts requirement).

<sup>30</sup> *Id.*

- Clarify that schools must allow students to dress and adhere to other rules of appearance consistent with the student’s gender identity and expression.
- Clarify that discipline associated with dress and grooming codes must be applied consistently to all students regardless of gender, sexual orientation, and gender identity and expression
- Partner with the civil rights community and experts to identify best practices to reduce the extent to which schools enforce exclusionary disciplinary policies for dress and grooming code violations, including acquiring data on discipline rates for such violations by race/ethnicity and gender to ensure that appearance codes are not targeted at or unevenly enforced against particular groups of students in a discriminatory manner.

#### **4(f) Referrals to and the resulting interactions with school police, school resource officers, or other law enforcement.**

##### ***The Department Should Issue Guidance Recommending Schools Eliminate School-Based Policing***

Due to the harmful impact on children of increased arrests, juvenile and criminal records, and incarceration resulting from school-based policing, the inconclusive benefits of such practice, and the disparate impacts of these harms on youth of color, youth with disabilities, and LGBTQ and GNC youth, we recommend that the Department issue policy guidance and provide financial incentives to schools to eliminate police presence. Concurrently, the Department should mitigate the ongoing harm of police in schools by providing guidance and financial incentives to increase the use of behavioral specialists, counselors, mediators, and restorative justice practices and facilitate training designed to reduce disparate impact.

To facilitate implementation of this policy guidance, the Department should work with The Department of Justice, Office of Community Oriented Policing Services (“COPS”), to redirect, where possible under federal law, COPS grants away from school police and instead to supportive programming and services that do not contribute to justice system involvement. If police remain in place in some schools, the Department should develop guidance for schools on how to limit the role of police and reduce arrests and referrals to juvenile and criminal justice systems and to provide training and technical assistance to officers designed to reduce disproportionately negative impacts of school policing on youth of color, youth with disabilities, and LGBTQ and GNC youth. In addition, the Department should provide technical assistance to school personnel on how to safely collect sexual orientation- and gender identity-related data regarding referrals to law enforcement and the results of such referrals.

The evidence regarding the disproportionately negative impact of school policing on Black and Brown children, LGBTQ and GNC children, and children with disabilities, and, especially, those children who sit at the intersection of these identities is sufficient to demonstrate that the ongoing violation of the civil rights of children at school can no longer be justified in the name of school safety.

To further support its guidance, the Department should compile existing research regarding harm to children flowing from school policing and research analyzing any purported benefits and publish this compilation. In addition, the Department should gather information from communities that phased out police from their schools in favor of more supportive services for children to document both the process, implementation challenges, and benefits (to children, to the community, and to school district and city budgets). The Department should also catalogue information related to restorative justice programs,<sup>31</sup>

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<sup>31</sup> WestEd Justice and Prevention, *Restorative Justice in U.S. Schools: An Updated Research Review*, *Restorative Justice in U.S. Schools: An Updated Research Review* (March 2019), available at <https://www.wested.org/wp-content/uploads/2019/04/resource-restorative-justice-in-u-s-schools-an-updated-research-review.pdf>; *See also Lambda Legal, Non-Exhaustive Compilation of School-Based Restorative Justice Programs*, (June 30, 2020), available at <https://xchangeforchange.org.files.wordpress.com/2020/07/restorative-justice-models.pdf>.

synthesize data on the effectiveness of such programs, and develop best practice guidance to foster expansion of programs that successfully address conflict and harm and student safety in educational settings with an eye towards how those programs reduce the criminalization of children and promote an affirming and supportive school environment. Also, we recommend the Department conduct a series of nationwide listening sessions for students, teachers, school administrators, and community members about their experiences around school policing and more supportive alternatives to policing and issue a report summarizing these critical conversations and generating recommendations which center the voices of students.

### *School Policing*

The presence of police in schools began as early as the 1950s, with research documenting White Supremacist origins for the practice.<sup>32</sup> The 1990s brought a rise in the use of police in schools flowing from federal grants funding school-based police and concerns over student safety in the wake of school shootings.<sup>33</sup> By 2018, “more than two-thirds of high school students” were attending a school with a police officer present.<sup>34</sup> Using federal data collected by the Department in 2015-16, an “ACLU analysis found that: 1.7 million students are in schools with police but no counselors; 3 million students are in schools with police but no nurses, 6 million students are in schools with police but no school psychologists, and 10 million students are in schools with police but no social workers.”<sup>35</sup>

Practices and models vary from police officers on permanent assignments to schools to school districts with standalone school police departments and nomenclature from school resource officers (“SROs”) to school safety officers (“SSAs”). School-based officers are often authorized to play a variety of roles in addition to policing such as “mentoring, coaching, community liaison services, gang resistance and substance abuse awareness,”<sup>36</sup> without clarity on which role takes priority, whether they have received training in non-law enforcement roles, or have any underlying expertise in non-law enforcement aspects of their jobs, including child development.<sup>37</sup> Despite the intention or emphasis on other, more supportive, roles, COPS is clear that a “[SRO’s] primary responsibility is law enforcement. . . .”<sup>38</sup> Accordingly, the increased presence of police in schools has led to a well-documented rise in arrests and delinquency

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<sup>32</sup> Children’s Rights Litigation Committee of the American Bar Association Section of Litigation, *Police in Schools: Developments, Issues, and Best Practices*, 4 (May 11, 2021), available at [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/policing-in-schools/policing-in-schools-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/policing-in-schools/policing-in-schools-memo.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> Constance A. Lindsay et al., *The Prevalence of Police Officers in US Schools*, Urban Institute (June 21, 2018), available at <https://www.urban.org/urban-wire/prevalence-police-officers-us-schools>.

<sup>35</sup> Evie Blad, *1.7 Million Students Attend Schools With Police But No Counselors, New Data Show*, Education Week (March 4, 2019), available at <https://www.edweek.org/leadership/1-7-million-students-attend-schools-with-police-but-no-counselors-new-data-show/2019/03>.

<sup>36</sup> Children’s Rights Litigation Committee of the American Bar Association Section of Litigation, *Police in Schools: Developments, Issues, and Best Practices*, 5 (May 11, 2021), available at [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/policing-in-schools/policing-in-schools-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/policing-in-schools/policing-in-schools-memo.pdf).

<sup>37</sup> Meryl David Landaus, *What Do Police Know About Teenagers? Not Enough*, New York Times, (July 17, 2021), available at <https://www.nytimes.com/2021/07/17/opinion/police-teenage-psychology.html?referringSource=articleShare>.

<sup>38</sup> *Supporting Safe Schools: What is a School Resource Officer?* U.S. Department of Justice: The Office of Community Oriented Policing Services, available at <https://cops.usdoj.gov/supportingsafeschools>.



adjudications or adult convictions related to behavior at school that should have been handled by administrators as a matter of school discipline.<sup>39</sup>

*Harm to Non-White Students, Students with Disabilities, LGBTQ and Gender Nonconforming Children and Youth and Those at the Intersection of These Identities from School Policing*

According to the Advancement Project, “[t]he presence of police in schools threatens student safety and denies students the opportunity to learn because it leads to criminalization for age-appropriate behaviors. This is especially true for children of color, students with disabilities, and LGBTQIA students who are disproportionately funneled through the school-to-prison pipeline.”<sup>40</sup>

Data, studies, and a barrage of viral videos and related news coverage have shown the stark and profoundly troubling disparate impact of school policing on Black and Brown youth.<sup>41</sup> In addition, “Students with disabilities, who should receive needed services and supports, also represent a quarter of students arrested and referred to law enforcement, even though they are only 12% of the overall student population.”<sup>42</sup> Less well-documented due to the lack of comprehensive collection of sexual orientation- and gender identity-related data, but supported by existing research, is the negative impact of school policing on LGBTQ and GNC youth.

Hidden Injustice, a groundbreaking report about the experiences of LGBTQ youth in juvenile courts, concluded a mix of factors, “including the adoption of ‘zero tolerance’ discipline policies, placement of law enforcement officers on campus, creation of new categories of school-specific offenses, and failure to provide appropriate special education and other services have converted many juvenile courts into de facto school disciplinarians. As a result of anti-LGBT bias, LGBT youth might be particularly impacted by these punitive responses to typical adolescent behavior.”<sup>43</sup>

Where an administration has deferred its disciplinary authority to police officers and combined with a zero-tolerance policy and disproportionate disciplinary action against LGBTQ youth, a school with an SRO is more likely to refer LGBTQ youth to the juvenile justice system.

In a 2016 study, more than two-thirds of LGBTQ youth ages 18 to 24 reported having school security or police at their middle or high schools and stated that this made them feel untrusted and that any misstep would be treated as a crime.<sup>44</sup> LGBTQ youth have “reported feeling targeted and ‘watched’ by increased

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<sup>39</sup> See ABA Children’s Rights Litigation Committee, *Police in Schools: Developments, Issues, and Best Practices*; See also, Dignity in Schools Campaign, *A Resource Guide on Counselors Not Cops: Supplemental Materials for DSC Policy Recommendations on Ending the Regular Presence of Law Enforcement in Schools*, (Sept. 2016), available at [http://www.dignityinschools.org/wp-content/uploads/2017/10/Resource\\_Guide-on-CNC-1.pdf](http://www.dignityinschools.org/wp-content/uploads/2017/10/Resource_Guide-on-CNC-1.pdf).

<sup>40</sup> The Advancement Project, *We Came to Learn: A Call to Action for Police-Free Schools*, 12, available at <https://advancementproject.org/wp-content/uploads/WCTLweb/index.html#page=13>.

<sup>41</sup> ABA Children’s Rights Litigation Committee, *Police in Schools: Developments, Issues, and Best Practices* at 3 (summary of recent publicized incidences of violence against children by police in schools).

<sup>42</sup> U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot (School Discipline)*, Issue Brief No. 1 (March 21, 2014), available at <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf>.

<sup>43</sup> Katayoon Majd et al., *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, Legal Services for Children, National Juvenile Defender Center, and National Center for Lesbian Rights, 77 (2009), available at [https://www.nclrights.org/wp-content/uploads/2014/06/hidden\\_injustice.pdf](https://www.nclrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf).

<sup>44</sup> Center for American Progress and Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*, (August 2016), available at <http://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf>.

surveillance and school policing, as well as being cited for expressions of their gender identity.”<sup>45</sup> “LGBTQ youth of color, and gender nonconforming girls in particular, reported lower levels of “feeling safe” with school security.”<sup>46</sup>

Most alarmingly, in one study, researchers heard stories of LGBTQ and GNC youth “feeling threatened, verbally and/or physically, by the very adults who were supposed to protect them. We heard stories of police, school safety agents, and even educators responding as if the young people were a threat.” The study reported these representative accounts:

- Michele, 17-year-old Black bisexual girl, reported: “A girl in my school is 6’2” and now she came out as a lesbian so the SSA really see her as threatening.”
- Ell, an 18-year-old Latina lesbian, explained that “when she presented herself in more masculine ways she was treated “aggressively” and “with disgust” by teachers and even police. In particular, she [described] a frightening encounter in which she was arrested with classmates right outside of school and sexually harassed by a police officer. [She said] ‘He like tried to figure out if I was gay and like he asked me, ‘did I have a girlfriend?’ It was like really like weird. He was like, ‘Oh, can I be your boyfriend?’ They had me, my hands cuffed on a banister and he was supposed to be watching me. So it was just like him asking me these weird questions in a room with just me and him and it was just really awkward. And I was like, ‘What the heck? Why the hell did they put me in here?’”<sup>47</sup>

As police get involved, students are further pushed out and into the school-to-prison pipeline. LGBTQ youth’s disciplinary infractions at school are the beginnings of a criminal record that can follow them throughout their life.<sup>48</sup> This is especially true for LGBTQ and GNC students of color where school can already be a hostile environment. School policing further funnels them into the youth justice system where they are twice as likely to be arrested and detained for a nonviolent offense.<sup>49</sup>

As addressed in other parts of this comment, school environments that are affirming and supportive for LGBTQ and GNC youth promote well-being and learning and reduce bullying and conflict that contribute to school discipline problems. Where police are present in schools they are, of course, part of the culture and climate of the school. The mere presence of police in schools may contribute to an unsafe environment at school for LGBTQ and GNC youth. Many youth, especially youth of color, have had negative interactions with police outside of schools so their mere presence may be threatening or intimidating.<sup>50</sup> “Drawing from a national population-based sample,” one study “found that LGBTQ youth

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<sup>45</sup> The Advancement Project, *We Came to Learn: A Call to Action for Police-Free Schools* at 40.

<sup>46</sup> J.F. Chmielewski et al., *Intersectional Inquiries With LGBTQ and Gender Nonconforming Youth of Color: Participatory Research on Discipline Disparities at the Race/Gender/Sexuality Nexus*, 9 (2016), available at [https://www.researchgate.net/publication/306356810\\_Intersectional\\_Inquiries\\_with\\_LGBTQ\\_and\\_Gender\\_Nonconforming\\_Youth\\_of\\_Color\\_Participatory\\_Research\\_on\\_Discipline\\_Disparities\\_at\\_the\\_RaceSexualityGender\\_Nexus](https://www.researchgate.net/publication/306356810_Intersectional_Inquiries_with_LGBTQ_and_Gender_Nonconforming_Youth_of_Color_Participatory_Research_on_Discipline_Disparities_at_the_RaceSexualityGender_Nexus).

<sup>47</sup> *Id.* at 13.

<sup>48</sup> #Out4MentalHealth, *LGBTQ Youth & the School-to-Prison Pipeline*, CA LGBTQ Health & Human Service Network, available at <https://bhsd.sccgov.org/sites/g/files/exjcpb711/files/o4mh-schooltoprisonpipeline-factsheet-00-00-00.pdf>.

<sup>49</sup> Development Services Group, Inc., *Literature Review: LGBTQ Youths in Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, 1 (Aug. 2014) available at <https://ojjdp.ojp.gov/mpg/literature-review/lgbtq-youth-in-juvenile-justice-system.pdf>.

<sup>50</sup> Meredith Dank et al., *Locked In: Interactions with the Criminal Justice and Child Welfare Systems for LGBTQ Youth, YMSM, and YWSW Who Engage in Survival Sex*, Urban Institute, 9 (Sept. 2015), available at

are more likely to be stopped by the police and have a 1.25 to 3 times greater probability of experiencing sanctions than their heterosexual counterparts, even when controlling for engagement in transgressive behavior. LGBTQ youth consistently report that police targeting is a serious problem, citing harmful police behaviors such as profiling LGBTQ youth; prosecuting youth for consensual sexual activity; confiscating condoms as evidence of prostitution; and verbally, physically, and sexually assaulting youth.”<sup>51</sup> A New York City study found that, “73% of LGBTQ youth surveyed disagree with the statement: “In general, the police in NYC protect young people like me.”<sup>52</sup>

Organizations specializing in advocacy for LGBTQ and GNC youth in schools like the GSA Network emphasize that, “LGBTQ+ youth need counselors, nurses, psychologists, social workers and caring welcoming adults more than ever,” and call for “Police Free Schools and a reinvestment in the services that will actually support LGBTQ+ youth.”<sup>53</sup>

### *Better Alternatives*

Counseling, mediation, and restorative justice programs not only contribute to a more supportive and safe school environment generally, as described in more detail in other portions of this comment, but also offer an alternative to a police response to school conduct issues. When teachers and administrators have a variety of resources available, they have more options at their disposal when addressing student behavior than calling in an officer. Additional supportive staff, programs and services not only promote well-being and a healthy school environment, but they also directly prevent harm to children and youth resulting from arrest, incarceration, and juvenile or criminal records.<sup>54</sup>

### *Mitigation*

Given the presence of school police officers in so many schools across the country and the continued funding of school resource officers by COPS,<sup>55</sup> it is likely that police will remain a presence in schools for some time in some communities. The Department should make every effort to mitigate the ongoing harm to children of police in schools.

Memorandums of Understanding (“MOUs”) which clearly delineate the roles of police in schools, including eliminating or severely curtailing their involvement in addressing behavioral infractions, have shown positive results in schools where they have been implemented. The 2021 ABA Children’s Rights Litigation Committee report “Police in Schools: Developments, Issues, and Best Practices” notes that MOUs have “been effective tools in reducing the number of arrest and justice system referrals.”<sup>56</sup> The reports highlights Broward County as an example, where in the first quarter after implementing an MOU, “total suspensions dropped sixty-six percent, expulsions declined by fifty-five percent, and school-based

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<https://www.urban.org/sites/default/files/publication/71446/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf>.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> B.G. Stoudt & S. Djokovic, *LGBTQ+ experiences with and attitudes towards police: A summary of four New York City studies*. Public Science Project Fact Sheet, 2 (2016).

<sup>53</sup> GSA Network, *LGBTQ+ Youth of Color Need* (June 25, 2020), available at <https://gsanetwork.org/press-releases/lgbtq-youth-of-color-need-policefreeschools/>.

<sup>54</sup> *Supra* at 1.

<sup>55</sup> *Supporting Safe Schools: What is a School Resource Officer?* U.S. Department of Justice: The Office of Community Oriented Policing Services, available at <https://cops.usdoj.gov/supportingsafeschools>.

<sup>56</sup> ABA Children’s Rights Litigation Committee, *Police in Schools: Developments, Issues, and Best Practices* at 4.

arrests dropped by forty-two percent, where the county had previously led the state in such arrests.”<sup>57</sup> Other promising mitigation practices include providing training to SROs developed and provided by LGBTQ-youth serving organizations such as The Hetrick-Martin Institute in New York City.<sup>58</sup> In addition, “reducing reliance on local and school police departments” by “providing teachers and school staff with trainings for conflict resolution and mediation” has also proven effective.<sup>59</sup>

**Recommendation:**

- The Department should gather examples of MOUs from jurisdictions that have successfully reduced arrest and justice system involvement and develop a “Model MOU” and then provide technical assistance to schools in how to engage police and other community stakeholders in MOU development and implementation.
- The Department should gather examples of quality, effective training for school-based police on child development, implicit bias, and reducing the disparate impact of school policing on youth of color, youth with disabilities, LGBTQ and GNC children and youth, and children and youth at the intersection of those identities.

*Further Research and Data Collection*

Findings from existing research have demonstrated the challenges facing LGBTQ and GNC youth and LGBTQ and GNC youth of color and their often-negative experiences with school police and disproportionately high arrest rates, adjudications on delinquency and criminal charges, and incarceration compared to their non-LGBTQ and GNC peers and White LGBTQ and GNC peers. A lack of school, school district, statewide, and national data regarding contact between LGBTQ and GNC youth and police in schools and resulting system involvement, means that it is challenging to identify systemic issues for these populations, evaluate alternatives, and identify evidence-based practices.

We do not recommend that law enforcement collect SOGIE-related data. School administrators and other school personnel, however, after ensuring that nondiscrimination policy and confidentiality protocols are in place and staff are appropriately trained on how to safely and respectfully collect SOGIE information, can and should collect sexual orientation- and gender identity-demographic information regard referrals to police and the results of those referrals.

Data regarding race and age and referrals to school police has been invaluable in illuminating harmful disparities, however, without SOGIE-related data, the experiences of LGBTQ and GNC youth and LGBTQ and GNC youth of color in regard to school policing will remain largely invisible.

**Recommendations:**

- The Department should survey school districts nationwide to determine if some jurisdictions are already collecting SOGIE data regarding school arrests and subsequent justice system involvement and should report disaggregated results.

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<sup>57</sup> *Id.* at 15.

<sup>58</sup> Queens Neighborhood Youth Justice Council, *Bridging the Gap: Strengthening LGBTQ Youth and Police Relations*, Queens Youth Justice Center (2015), available at [https://www.courtinnovation.org/sites/default/files/documents/QNYJC\\_final\\_report.pdf](https://www.courtinnovation.org/sites/default/files/documents/QNYJC_final_report.pdf).

<sup>59</sup> #Out4MentalHealth, *LGBTQ Youth & the School-to-Prison Pipeline*, CA LGBTQ Health & Human Service Network, 3, available at <https://bhsc.sccgov.org/sites/g/files/exjcpb711/files/o4mh-schooltoprisonpipeline-factsheet-00-00-00.pdf>.

- The Department should look to best practices for collecting SOGIE-related demographic information in the context of child welfare and juvenile justice systems to inform its approach.
- The Department should, in consultation with youth with lived experience, schools with SOGIE-data collection experience, and experts in SOGIE-data collection, develop best practice guidance and technical assistance for schools to collect SOGIE data in regard to school arrests and subsequent justice system involvement.

Also, please refer to recommendations regarding data collection in the context of school discipline more broadly in response to question 9.

**4(m) Discipline of victims of race, color, or national origin harassment, sex harassment, or disability harassment for misconduct that arises as a result of such harassment.**

Bullying, harassment, and threats of physical violence are pervasive problems in our nation's schools. Studies examining school bullying and harassment show that over 50% of students report being bullied at some schools.<sup>60</sup> This phenomenon is not limited to school grounds: in 2019, 37% of middle and high school students reported being bullied online.<sup>61</sup> Likewise, off-campus, in-person harassment is not uncommon. Regardless of where bullying, harassment, or threats occur, victims can suffer from a deterioration in physical and mental health, including increased anxiety, depression, and post-traumatic stress; self-harm and suicidal thinking; and loss of self-esteem and confidence. These impacts are also felt in school, where victims often experience lowered academic achievement and aspirations, feelings of alienation, and increased absenteeism.<sup>62</sup>

Bullying, harassment, and threats disproportionately impact students from historically marginalized groups, including LGBTQ students, students of color, girls and women, and students with disabilities. When students face bullying, harassment, or threats based on one or more of their personal characteristics, they are more likely to report damage to their physical and mental health. In a 2019 national survey of LGBTQ students, 69% reported verbal harassment at school based on sexual orientation and 57% based on gender expression.<sup>63</sup> Over 85% of LGBTQ students reported hearing peers use pejorative terms relating to sexual orientation or gender identity.<sup>64</sup> And a 2015 survey of more than 27,000 transgender adults found that 54% who were out or perceived as transgender in elementary or secondary school had been verbally harassed.<sup>65</sup> As for off-campus harassment, 45% of LGBTQ students said that they experienced harassment or threats within the past year via text message, email, or social media.<sup>66</sup> LGBTQ

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<sup>60</sup> YouthTruth, *Learning from Student Voice: Bullying*, YouthTruthSurvey, available at <https://tinyurl.com/5bnu4ezt>; U.S. Dep't of Health & Hum. Servs., *What Is Bullying*, stopbullying.gov, available at <https://tinyurl.com/9wpsd3f6>.

<sup>61</sup> Justin W. Patchin, *Summary of Our Cyberbullying Research (2007-2019)*, Cyberbullying Rsch. Ctr., available at <https://tinyurl.com/ym7f97yv>.

<sup>62</sup> *Id.*; see also U.S. Dep't of Educ., Off. for C.R., *Dear Colleague Letter Harassment and Bullying* (October 26, 2010), available at <https://tinyurl.com/dh4wfr2y>.

<sup>63</sup> Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey*, at xix (2020), available at <https://tinyurl.com/yhe8waf4>.

<sup>64</sup> *Id.* at xviii-xix.

<sup>65</sup> Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 4, 11 (2016), available at <https://tinyurl.com/u5s9yc94>.

<sup>66</sup> See Kosciw et al., at 30.



middle and high school students consistently report being subjected to bullying online at almost double the rate of non-LGBTQ students.<sup>67</sup>

Bullying and harassment like this have significant, often tragic, consequences. LGBTQ students bullied based on sexual orientation or gender identity are more likely to skip class and have lower grade point averages, lower self-esteem, and higher rates of depression.<sup>68</sup> More than one in six (17.1%) LGBTQ students in one survey changed schools because they felt unsafe or uncomfortable at their prior school.<sup>69</sup> In many cases, the result is dire.

- In Missouri, a classmate told a bisexual fourteen-year-old after he got off the school bus to “do everyone a favor and hang himself.”<sup>70</sup> Two days later, the boy hanged himself.<sup>71</sup>
- In 2019, Channing Smith, a sixteen-year-old Tennessee student, died by suicide after classmates outed him as gay by posting screenshots of text messages between him and another boy on Instagram and Snapchat.<sup>72</sup> In an attempt to hold classmates accountable for cyberbullying, his family sought assistance from both the school and the local district attorney—to no avail. The DA refused to press charges, and he was widely known for public statements that he does not file domestic assault charges if the violence occurred between same-sex spouses, does not recognize “homosexual marriage,” and would not prosecute Tennessee county clerks who deny marriage licenses to same-sex couples.<sup>73</sup>

### *Victimization*

The effects of bullying, harassment, and threats disproportionately fall on students from one or more historically marginalized groups and cause disproportionate impacts on their health, well-being, and access to equal educational opportunities that schools must be able to address. Yet, LGBTQ youth who are the victims of bullying are often labeled as perpetrators and unfairly punished for defending themselves.<sup>74</sup> Such students experience higher rates of victimization by school officials than their peers, and this victimization contributes to higher risk of substance misuse and suicide.

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<sup>67</sup> Sameer Hinduja et al., *Cyberbullying Rsch. Ctr., Bullying, Cyberbullying, and LGBTQ Students 3-4* (2020), available at <https://tinyurl.com/ce4etxj7>.

<sup>68</sup> Kosciw et al. at xx-xxi.

<sup>69</sup> Id. at xviii.

<sup>70</sup> Andra Bryan Stefanoni, *School lawsuit alleging bullying ends with settlement*, Joplin Globe (July 14, 2015), available at <https://tinyurl.com/yxzzd4p4>.

<sup>71</sup> Id.

<sup>72</sup> Kim Wynne, *Family blames cyberbullying for Coffee Co. teen’s suicide*, WKRN (Sept. 28, 2019), available at <https://tinyurl.com/2ebp2mxj>.

<sup>73</sup> Lambda Legal, Tennessee Equality Project, and Domestic Violence and Sexual Assault Center of Rutherford County filed a formal complaint with the Tennessee Board of Professional Responsibility calling for an investigation and disbarment of the local district attorney due to anti-gay public statements. See Letter of Complaint, available at [https://www.lambdalegal.org/in-court/legal-docs/tn\\_northcott\\_20190827\\_letter-of-complaint](https://www.lambdalegal.org/in-court/legal-docs/tn_northcott_20190827_letter-of-complaint).

<sup>74</sup> Preston Mitchum et al., *How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth*, Center for American Progress (Feb. 2014), available at <https://www.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf>.

- Lambda Legal represented then-high school student David Henkle, who endured years of constant violence, bullying and physical attacks, often in the presence of school officials.<sup>75</sup> Classmates tormented the openly gay student, going so far as to lasso him around the neck and suggest dragging him behind a truck. Rather than disciplining the harassers, the district treated Derek as if he was the problem and he was told numerous times to “keep his sexuality to himself.” The district transferred him to an alternative school and, despite pleas to return to the regular classroom, he was informed it was not possible because a traditional high school was not “appropriate.” Instead, the district forced Derek to enroll in adult education classes where a high school diploma was impossible to obtain.

Schools must confront pervasive anti-LGBTQ victimization and ineffective or biased responses from school staff to reduce unnecessary disciplinary involvement. LGBTQ youth who are victimized at school “experience greater school discipline, including disciplinary referrals to school administration, school detention, suspension, and expulsion; and greater involvement in the justice system because of school discipline, including arrest, adjudication, and detention in a juvenile or adult facility.”<sup>76</sup> Therefore, blanket policies that label youth as bullies without taking into account the circumstances under which the bullying occurs fail to address the root causes of the problem: in this case, the harassment of LGBTQ students based on their sexual orientation and gender identity or expression.

#### **Recommendations:**

- When bullying or harassment occurs, all staff should intervene in ways that do not blame the victims of bullying incidents and should consider using restorative practices rather than only or primarily punitive discipline measures.
- Clarify a school district’s responsibility to investigate reports of harassment, including taking prompt and effective steps calculated to end any harassment.
- Clarify a school district’s responsibilities with respect to off-campus bullying and harassment.

## **7. How do school discipline policies impact [students]?**

### **The Impact of Harsh School Discipline Policies on the Lives of Vulnerable Students**

As noted throughout this comment, LGBTQ students frequently experience discrimination and harassment in schools. In addition, LGBTQ students also experience disproportionate and disturbingly high rates of school discipline.<sup>77</sup> This is especially true for transgender students, almost 80% of whom

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<sup>75</sup> *Henkle v. Gregory*, 105 F.Supp.2d 1067 (D. Nevada 2001); see also Lambda Legal Press Release, *Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment*, available at [https://www.lambdalegal.org/news/ca\\_20020828\\_groundbreaking-legal-settlement-first-to-recognize](https://www.lambdalegal.org/news/ca_20020828_groundbreaking-legal-settlement-first-to-recognize).

<sup>76</sup> Neal A. Palmer et al, *LGBTQ Student Victimization and Its Relationship to School Discipline and Justice System Involvement*, *Criminal Justice Rev.* (2017), available at <https://journals.sagepub.com/doi/abs/10.1177/0734016817704698>.

<sup>77</sup> Over one-third of LGBTQ students have been disciplined with detention, and over 15% of LGBQ students have been suspended from school, and 1.3% of LGBTQ students have been expelled from school. See GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

report having been verbally harassed, sexually assaulted, or disciplined harshly for dressing consistently with their gender identity.<sup>78</sup>

There are many school policies that lead to school discipline which disproportionately affect LGBTQ students, including in particular policies that prohibit students from wearing clothing or expressing themselves consistently with their gender identity, policies that prohibit students from using restrooms consistent with their gender identity, and policies that prohibit students from showing public affection for someone of the same gender in ways not similarly policed for non-LGBTQ students.

When schools impose discipline based on such discriminatory policies using sanctions including exclusion from the classroom, there is a corresponding loss of education and often a wide range of short-term and long-term negative consequences for LGBTQ students and other vulnerable students.

#### *Harsh School Discipline Policies Impair LGBTQ Students' Opportunity to Learn*

When students are not in the classroom as a result of punitive school discipline policies, they are cheated out of important educational opportunities and often quickly fall behind their classmates. Another way in which LGBTQ and other students lose the opportunity to learn because of draconian school policies is that they are disciplined because they have responded to harassment or discrimination after school staff responded in an unhelpful manner or simply did not respond at all.<sup>79</sup> The largest national survey of the experiences of transgender people in the United States includes examples, such as the report by a transgender student who was bullied and physically assaulted by other students and witnessed teachers watching the abuse happen but failing to intervene.<sup>80</sup> In another survey, over half of LGBTQ students who had been disciplined missed school because they did not feel safe.<sup>81</sup>

Furthermore, many students identified as recipients of school discipline by teachers or school administrators may be denied time with an instructor or forego asking for such time because they fear further discipline or that they have been “typecast” as students who have violated school policies. In addition, students who are excluded from class often have fewer chances to forge the close working relationships with instructors that provide mentorship and guidance.

#### *Harsh School Discipline Policies are Harmful to LGBTQ Students' Mental Health*

First, it is important to recognize that students who experience mental health conditions such as ADHD, autism, depression, and anxiety are already more likely to receive exclusionary treatment because teachers are often ill-equipped to manage such conditions—causing them to suspend or expel students because such sanctions are the familiar tool at hand. This unjust result is especially common for Black youth with disabilities who are more than twice as likely to be placed in a juvenile detention center than white students.<sup>82</sup> The impact on those students is then exacerbated because, given the psychological

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<sup>78</sup> *Id.*

<sup>79</sup> Neil A. Palmer, *LGBTQ Student Victimization and its Relationship to School Discipline and Justice System Involvement*, *Criminal Justice Review* (May 17, 2017), available at <https://journals.sagepub.com/doi/abs/10.1177/0734016817704698?journalCode=cjra>.

<sup>80</sup> Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, 134 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>81</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>82</sup> Daniel J. Losen et al., *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at the Civil Rights Project (Aug. 2012), available at <https://civilrightsproject.org>.

distress the students already are experiencing, even a short suspension can lead to serious mental health consequences.<sup>83</sup> This disparity in treatment disproportionately impacts the LGBTQ community because LGBTQ youth are more likely than others to experience mental health challenges due to the discrimination and harassment they experience in schools and sometimes in their homes.<sup>84</sup>

Lastly, there are 14 million students in school who have police on the grounds but do not have a counselor, nurse, psychologist, or social worker.<sup>85</sup> Rather than investing in law enforcement or “school resource officers” (SROs), schools should expand the availability of mental health personnel.

#### *Harsh School Discipline Policies Contribute to High Drop Out Rates and Impair Academic Achievement*

As the Department has already recognized, exclusionary policies often lead to serious negative outcomes such as significant drops in academic performance, increases in the rates of students leaving school altogether or “dropping out,” and further sanctions.<sup>86</sup> Punitive school policies that rely upon exclusion sanctions often lead to youth being more likely to drop out because they have fallen so far behind or because they are prevented from learning. LGBTQ students who have experienced school discipline are twice as likely to drop out of school than non-LGBTQ students.<sup>87</sup> Almost 20% of transgender students have left a school because of harsh treatment and some transgender students report having been sexually assaulted by teachers or school staff members.<sup>88</sup>

#### *The Department Should Encourage Empowering Training and Higher Pay to Increase Teacher Retention and Satisfaction*

Teachers are frequently eyewitnesses to challenging student behavior. Teachers should be empowered through training to apply de-escalation techniques and constructive ways to disrupt problematic behavior. Too often, schools force teachers to resort to punitive measures that lead to more, not less conflict, which

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[ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf](https://ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf).

<sup>83</sup> Kiara Moore, *Excluding Children from School May Lead to Long-Term Mental Health Problems*, Hartstein Psychological (citing T. Ford et al., *The relationship between exclusion from school and mental health: a secondary analysis of the British Child and Adolescent Mental Health Surveys 2004 and 2007*, Psychological Medicine (2017)), available at <https://www.hartsteinpsychological.com/excluding-children-school-mental-health-problems>.

<sup>84</sup> See The Trevor Project, *Trevor Project National Survey on LGBTQ Youth Mental Health 2019*, available at <https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf>.

<sup>85</sup> Amir Whitaker et al., *Cops and No Counselors, How the Lack of School Mental Health Staff is Harming Students*, ACLU (2016), available at [https://www.aclu.org/sites/default/files/field\\_document/030419-acluschooldisciplinereport.pdf](https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf).

<sup>86</sup> *School Climate and Discipline*, U.S. Department of Education, available at <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html>.

<sup>87</sup> 1.5% of LGBTQ students compared to .6% of non-LGBTQ students. See GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>88</sup> Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, The National Center for Transgender Equality, 206 (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

in turn leads to teacher dissatisfaction.<sup>89</sup> In addition, school districts should be encouraged to pay teachers a living wage and to take steps to improve the physical environment of school premises in order to improve teacher retention and satisfaction.<sup>90</sup>

*Harsh School Discipline Policies Deny LGBTQ Students and Other Vulnerable Students the Ability to Participate in Honors and Advanced Placement Courses, Arts and Theater and Other Extra-Curricular Programming, and in Meaningful School Ceremonies.*

School discipline policies that disproportionately harm LGBTQ students and other vulnerable youth also strip those students of unique opportunities such as access to advance placement courses, arts and theater and other programming that helps students develop socially and expand their understanding of the world while also allowing accomplishments that help them enter prestigious universities that often lead to lucrative careers. In addition, students who are excluded from school because they were targeted by onerous school discipline policies are denied the unique opportunities to attend graduation and National Honor ceremonies that often instill a sense of accomplishment that infuses those students with self-esteem and confidence.

*Harsh School Discipline Policies Lead to School Discipline Records that Deny Vulnerable Students Access to Scholarships or Enrollment in College*

Harsh school policies also lead to permanent disciplinary records which serve as an impediment for those students seeking to obtain scholarships or to enroll in college. Details of disciplinary sanctions are frequently maintained as part of a student's record and it is not uncommon for colleges as well as graduate schools to ask student applicants whether they have been subjected to serious discipline for violating a school policy. In addition to being denied certain scholarships, some students will forego the opportunity even to apply out of fear or an assumption that they will be considered ineligible.

*Harsh School Discipline Policies Lead to Long-Term Negative Life Outcomes*

The long-term consequences of policies that impose draconian exclusions and disproportionately impact LGBTQ students are devastating. Harsh school discipline policies lead to what is commonly known as the "school-to-prison pipeline." Policies that disproportionately effect students of color, LGBTQ students, and other vulnerable students drive youth out of school, which then forces those students into low-wage jobs and long-term economic insecurity, which in turn leads to health care disparities, homelessness, and often to entanglement within the criminal justice system.

In fact, many youth become involved with the criminal justice system even before they feel forced out of school. The presence of SROs at schools increases the chances that students who receive heightened surveillance and experience disproportionate school discipline will be questioned and searched, and increases the likelihood they will be determined to have violated a school policy and thus transported to a juvenile detention center.

In addition, after being forced out of school or leaving because they do not feel safe, many students turn to "street economies" such as prostitution or drug sales to support themselves—leading to a substantial

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<sup>89</sup> See Joshua Pittman, *The Influence of Student Discipline on Teacher Job Satisfaction when Controlling for Workplace Characteristics, personal Attributes, Human Capital Elements, and Principle Leadership*, Doctor of Education in Educational Leadership for Learning Dissertations (2020) available at [https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1027&context=educleaddoc\\_etd](https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1027&context=educleaddoc_etd).

<sup>90</sup> See Carda M. Moore, *The Role of School Environment in Teacher Dissatisfaction Among U.S. Public School Teachers*, SAGE Open (2012), available at <https://journals.sagepub.com/doi/pdf/10.1177/2158244012438888>.



likelihood they will be arrested, leading to an increased chance of further incarceration and even lower economic outcomes. Almost 70% of the men in federal prison do not have a high school diploma.<sup>91</sup>

#### *Harsh School Discipline Policies Leave Victims of Harassment Vulnerable to Unjustified Punishment*

LGBTQ youths' higher likelihood of victimization, and policies that intentionally or unintentionally target them, may also put them in greater contact with school authorities and increase their risk of discipline. In a recent survey, over 80% of LGBTQ students reported verbal harassment because of their sexual orientation, gender expression or gender identity.<sup>92</sup> Almost 15% of LGBTQ students reported having experienced physical violence because of their sexual orientation, gender identity or gender expression.<sup>93</sup> Recent research of LGBTQ youth in the school-to-prison pipeline has suggested that LGBTQ youth are sometimes punished even when they are the victims in bullying incidents, including as a result of defensive or preemptive violence.<sup>94</sup>

Research additionally shows that schools are especially hostile towards LGBTQ youth of color who experience harassment from students and staff, and at the same time experience higher rates of school discipline than other students.<sup>95</sup> In a survey conducted by GLSEN, 46.7% of LGBTQ Black/African American students, 44.1% of LGBTQ Hispanic/Latino students, and 47.3% of LGBTQ Multiracial students had ever been disciplined at school, compared to 36.3% of LGBTQ White/European students and 35.2% of LGBTQ Asian/South Asian/Pacific Islander students.<sup>96</sup> The GSA Network reported that GNC youth “face persistent and frequent harassment and bias-based bullying from peers and school staff as well as relatively greater incidents of harsh school discipline, and consistent blame for their own victimization.”<sup>97</sup> Many are viewed as a “disruption or challenge to authority” simply based on their gender nonconformity, and are punished for coming to school as their authentic selves.<sup>98</sup>

#### **Recommendations:**

- We urge the Department to enact policies that actively work to protect students who are victims of harassment based on their sexual orientation and gender expression.

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<sup>91</sup> Caroline Wolf Harlow, Ph.D., *Special Report- Education and Correctional Populations*, U.S. Department of Justice- Bureau of Justice Statistics (Jan. 2003), available at <https://bjs.ojp.gov/content/pub/pdf/ecp.pdf>.

<sup>92</sup> Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*, GLSEN, 28 (2020), available at <https://www.glsen.org/research/2019-national-school-climate-survey>.

<sup>93</sup> *Id.*

<sup>94</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>95</sup> See Kathryn E. W. Himmelstein & Hannah Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, *Pediatrics*, available at <https://pediatrics.aappublications.org/content/127/1/49>; GSA Network, *LGBTQ Youth of Color: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline* (2018), available at [https://gsanetwork.org/wp-content/uploads/2018/08/LGBTQ\\_brief\\_FINAL.pdf](https://gsanetwork.org/wp-content/uploads/2018/08/LGBTQ_brief_FINAL.pdf).

<sup>96</sup> GLSEN, *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth* (2016), available at [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>97</sup> Hilary Burdge et al., *Gender Nonconforming Youth: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline*, GSA Network (2014), available at [https://greatlakeequity.org/sites/default/files/201809081082\\_newsletter.pdf](https://greatlakeequity.org/sites/default/files/201809081082_newsletter.pdf).

<sup>98</sup> *Id.*

- We urge the Department to provide training to teachers on how to support LGBTQ students and students of color who act in self-defense when encountering bullying and harassment.
- We urge the Department to take prompt action to protect LGBTQ students, particularly students of color, from punitive discipline.

**9. Describe any data collection, analysis, or record keeping practices that you believe are helpful in identifying and addressing disparities in discipline. Conversely, describe any barriers or limitations in these areas, and any ideas you may have on how to overcome them.**

While research shows that LGBTQ students experience disproportionately high rates of school discipline, the Department does not itself gather such data on behalf of LGBTQ students. The data on race and disability that has been collected by the Department has proven instrumental in understanding the full scope of the disproportionate use of school discipline on students of color and students with disabilities (and students of color with disabilities). We encourage the Department to continue exploring ways in which to balance the privacy interests of LGBTQ students while collecting this data by working with advocacy organizations like the Gay, Lesbian, and Straight Education Network (“GLSEN”) and by reviewing prior research to determine best practices.<sup>99</sup> In addition, we urge the Department to work with other agencies to expand existing federal surveys such as the Youth Risk Behavior Survey and other surveys to include information about LGBTQ students and their experiences with school discipline.

**Conclusion**

We share the Department’s goal of addressing longstanding issues related to the nondiscriminatory administration of school discipline and creation of positive school climates. We appreciate the opportunity to address a few of the many significant issues regarding discipline in schools and appreciate the Department’s renewed commitment to ensuring equal educational opportunities for all students.

If you would like clarification on the information contained in this response to the RFI or any of the recommendations, please contact Paul D. Castillo at [pcastillo@lambdalegal.org](mailto:pcastillo@lambdalegal.org), or any of the attorneys listed below.

Most respectfully,

**Lambda Legal Defense and Education Fund, Inc.**

/s/ Paul D. Castillo

Paul D. Castillo, Counsel and Students’ Rights Strategist  
Lambda Legal South Central Regional Office  
3500 Oak Law Ave., Ste. 500  
Dallas, Texas 75219  
(214) 302-2216  
[pcastillo@lambdalegal.org](mailto:pcastillo@lambdalegal.org)

M. Currey Cook, Senior Counsel and Youth in Out-of-Home Care Project Director  
[ccook@lambdalegal.org](mailto:ccook@lambdalegal.org)

Sruti Swaminathan, Staff Attorney for Youth  
[sswaminathan@lambdalegal.org](mailto:sswaminathan@lambdalegal.org)

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<sup>99</sup> *E.g.*, Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, *Current Measures of Sexual Orientation and Gender Identity in Federal Surveys* (August 2016), available at <https://nces.ed.gov/FCSM/pdf/buda5.pdf>.

Sasha Buchert, Senior Attorney  
[sbuchert@lambdalegal.org](mailto:sbuchert@lambdalegal.org)

Jennifer C. Pizer, Senior Counsel and Director of Law and Policy  
[jpizer@lambdalegal.org](mailto:jpizer@lambdalegal.org)