



Discriminatory Discipline Based on Sex and Race

BACKGROUND ON DISCRIMINATORY DISCIPLINE

Black girls, other girls of color, and LGBTQI+ children are more likely to be disciplined, pushed out of school, and pushed into the school-to-prison pipeline than their white, cisgender, or heterosexual peers, because of pernicious race- and sex-based stereotypes. For example, Black girls are about four times more likely to be suspended, expelled, or arrested than white girls; Indigenous girls are about twice as likely to be suspended or expelled and three times

more likely to be arrested; and Latina girls are more likely to be suspended or expelled and 1.5 times more likely to be arrested—often for subjective conduct, like “being disrespectful” or “talking back,”¹ that is not criminalized in white girls. In particular, school officials often “adultify” Black girls, perceiving them as “defiant,” “promiscuous,” less innocent, and less in need of care than their white counterparts, which leads them to punish Black girls more often and more harshly for normal, childlike behaviors—even though they are not more likely than other students to misbehave.² This begins at an early age; Black girls make up

only 20% of all preschool girls in the U.S. but comprise 53% of out-of-school suspensions for preschool girls.³

Girls of color, especially Black girls, and LGBTQI+ children are also more likely to be targeted and disciplined for violating dress and grooming codes. These codes frequently reinforce traditional notions of white femininity and the idea that girls' bodies are "shameful" or "vulgar."⁴ They also can promote rape culture by reflecting archaic generalizations about boys' inability to control their sexual impulses and putting the onus on girls to dress a certain way to avoid sexual harassment.⁵ And they can force transgender, nonbinary, and gender-nonconforming students to conform narrowly to traditional gender norms.⁶ In addition, dress and grooming codes are often rooted in Eurocentric standards and treat common Black protective hairstyles—such as braids, locs, hair wraps, Bantu knots,⁷ or bandanas⁸—as unprofessional and disrespectful. These codes also often include hair length requirements that disproportionately harm Indigenous students and other students for whom wearing long hair may be an important part of their identity.⁹ Enforcement of sex discriminatory dress codes against girls and gender-nonconforming students through exclusionary discipline forces them to miss important class time; sends the message that they do not belong; subjects them to significant public humiliation, stress, and anxiety; and damages their confidence, psychological well-being, and sense of belonging in school.¹⁰

Black girls have frequently been targets of body slams, tasing, sexual assault, and other physical and sexual abuse at the hands of school police, who are often called school resource officers (SROs).¹¹ Indeed, law enforcement officers have confronted or arrested Black girls for normal, childlike behavior, like pointing *fingers* in the shape of a gun at age 13,¹² getting a failing grade in a virtual ceramics class at age 15,¹³ taking too much milk in the cafeteria at age 11,¹⁴ and throwing a tantrum at age 6.¹⁵ Despite increased investment in school policing

programs, millions of students—mostly Black and brown students—attend schools that lack resources for mental health and other student supports. Research shows that schools where students of color are more than 50 percent of the population are two to 18 times more likely to use a mix of school police, security guards, metal detectors, locked gates, and random sweeps than schools where students of color are less than 20 percent of the population.¹⁶

In addition, LGBTQI+ youth, particularly those who are Black, Indigenous, and people of color (BIPOC), are disproportionately subjected to school disciplinary action.¹⁷ For example, schools often punish transgender girls for using the girls' bathroom¹⁸ or punish only queer couples for public displays of affection.¹⁹ A 2019 survey found that transgender secondary school students report higher rates of both in- and out-of-school discipline, such as suspensions, than their cisgender LGBTQ+ peers, with transgender girls reporting the highest rates of both (40 percent were disciplined in school and 9 percent were removed from school in a single academic year).²⁰ Another study found that same-sex attraction in girls is associated with a 95 percent increased likelihood of experiencing school discipline.²¹ These discipline disparities for transgender, lesbian, bisexual, and queer girls contribute to a school-to-prison pipeline.²²

Exclusionary discipline, such as suspension and expulsion, deprives students of critical instruction and decreases their chances of future educational success, with disproportionate harm to students of color. In 2018, Black students were five times more likely to lose valuable school time than their white peers due to out-of-school suspensions.²³ Just a single suspension decreases the likelihood that a student graduates from high school²⁴ or enrolls in college,²⁵ and just attending a school with high suspension rates increases the likelihood of having future interactions with the criminal legal system.²⁶ Similarly, after a school-based arrest, students are twice as likely to drop out of school,²⁷ find it harder to

apply to college and obtain federal financial assistance,²⁸ and are more likely to be involved in the juvenile legal system.²⁹ Exclusionary discipline also fractures student-teacher relationships, negatively impacts academic performance, and communicates to students of color that they are unwelcome and unsafe at school.³⁰ For example, girls and Black students who are reminded of their sex or race before an exam—for example, because of discriminatory discipline policies—often perform worse on academic exams because they are afraid of

conforming to negative stereotypes suggesting they won't perform well—a well-documented phenomenon known as “stereotype threat.”³¹ Research repeatedly shows that schools that eliminate “school disturbance” codes do not experience more violent behavior,³² that training school police on implicit bias and de-escalation does not correct racial disparities in arrests,³³ and that more effective methods exist for teaching appropriate behavior that do not deprive students of class time.³⁴

Developments Since 1972

Congress modeled Title IX, passed in 1972, after Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits schools and other entities receiving federal funding from discriminating based on race, color, or national origin. Since then, students' rights to be free from discriminatory and exclusionary school discipline have progressed in many ways. For example, the Supreme Court has long recognized that public schools cannot suspend students without “some kind of” notice and hearing³⁵ and that states cannot prevent undocumented children from attending public schools.³⁶ In 2014, under the Obama administration, the Department of Education issued Title VI guidance on eliminating discriminatory discipline practices³⁷ and a suite of “Rethinking Discipline” documents, appendices, and FAQs.³⁸ The Department under the Obama administration also investigated school districts whose data showed racial disproportionality in discipline, resulting in at least fifty of the largest school districts making changes and half of all states revising their laws to limit discriminatory disciplinary policies.³⁹ In recent years, 15 states have passed the Create a Respectful and Open Workplace for Natural Hair (CROWN) Act, which expressly prohibits racial discrimination based

on natural Black hair texture and Black protective hairstyles, or legislation inspired by the CROWN Act.⁴⁰ And in the aftermath of the 2020 racial justice uprisings, more than 60 school districts across the country have decided to remove police from their schools.⁴¹

Nonetheless, Congress's Gun-Free Schools Act of 1994 and the Violent Crime Control and Law Enforcement Act of 1994 continue to cast a long shadow on discriminatory school discipline, inspiring decades of harsh, “zero-tolerance” state laws and prolific school policing programs.⁴² In 1982, under the Regan administration, the Department rescinded a Title IX regulation that had prohibited schools from enforcing sex-based rules of appearance,⁴³ leading many schools to believe that they could now discriminate based on sex in their dress and grooming codes and resulting in costly litigation.⁴⁴ In 2001, the Supreme Court also held that Title VI does not provide a private right of action for disparate impact claims; that is, people who are disproportionately harmed by a policy that does not explicitly discriminate based on race, color, or national origin, and that cannot

DEVELOPMENTS SINCE 1972 *continued*

be shown to have been motivated by a desire to discriminate, but that disproportionately affects people of color or immigrants, cannot sue to enforce their rights under Title VI.⁴⁵ This means Black and brown students who are disproportionately targeted by “neutral” school discipline policies will frequently not have any redress in the courts. Under the Trump administration, the Department of Education rescinded the Obama 2014 Title VI guidance and the entire “Rethinking Discipline” package, leaving schools without resources from the federal government on identifying and eliminating discriminatory discipline.⁴⁶ The Trump administration also pursued aggressive immigration raid and deportation policies that intensified the school-to-deportation pipeline for migrant students, exacerbating the already tremendous displacement of Latinx students by federal immigration law, which since 1996, has allowed state and local police officers to act as federal immigration agents.⁴⁷ The Biden

administration has discouraged immigration raids in certain protected areas, including schools,⁴⁸ and has expressed a commitment to address discriminatory school discipline, including by requesting information from students, families, educators, school leaders, community and civil rights organizations, and other stakeholders on how schools can best administer discipline in a nondiscriminatory manner.⁴⁹ At the same time, in 2021, under the Biden administration, the Department of Justice spent \$139 million on the Community Oriented Policing Services (COPS) Hiring Program, which may be used for hiring school police officers,⁵⁰ and another \$125 million on the COPS School Violence Prevention Program (SVPP) and Student, Teachers, and Officers Preventing (STOP) School Violence Programs, both of which allow schools to hire police officers and increase measures that surveil and criminalize students.⁵¹

Recommendations

The Department of Education should:

- Restore and strengthen the Obama administration’s 2014 guidance and explore Title VI rulemaking to codify the guidance. In addition, update this guidance to clarify that actions by school-based police may violate Title VI and that the presence of higher concentrations of school-based police in schools with higher populations of students of color may violate Title VI.
- Initiate rulemaking under Title IX and Title VI to prohibit discriminatory dress and grooming policies in schools based on sex (including sexual orientation and gender identity), including by restoring and updating the Title IX dress code regulations that were rescinded in 1982.⁵²

RECOMMENDATIONS *continued*

- Issue guidance with an intersectional lens to clarify when discriminatory and exclusionary discipline violates two or more civil rights laws (Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973, and/or Title II of the Americans with Disabilities Act).
- Encourage schools to: replace exclusionary discipline with restorative and trauma-informed practices; eliminate police from schools and invest in counselors, psychologists, and other non-police school staff who are equipped to address students' emotional and mental health needs; and eliminate dress code requirements and afford students and families the freedom to choose appropriate school attire.
- Clarify that disciplining students for reporting sexual harassment is retaliation in violation of Title IX.
- Expand collection and public reporting of data on school discipline, including the harms of school-based police, with the goal of working with the Department of Justice to eliminate federal funding for practices that criminalize children.
- Provide technical assistance on effective educator training on bias and culturally sustaining practices.

President Biden should issue executive orders to:

- Prohibit the use of federal funds to hire or retain law enforcement in schools.
- End all Section 287(g) agreements, which allow state and local police officers to act as federal immigration agents and conduct immigration raids in many areas, including schools.
- Direct relevant agencies, including the Departments of Education and Justice, to

collect and release data on the prevalence of school-based law enforcement and school-level complaints against school-based police.

Congress should pass:

- The Counseling Not Criminalization in Schools Act (S. 2125/H.R. 4011), which would prohibit the use of federal funds to support police officers in PK-12 schools and establish a \$5 billion grant program for police-free schools to provide adequately trained personnel and trauma-informed services instead.
- The Keeping All Students Safe Act (S. 1858/H.R. 3474), which would prohibit schools receiving federal funding from secluding a child; using a mechanical or chemical restraint; or using a prone, supine, or physical restraint that restricts breathing, stops blood flow to the brain, or is life-threatening.
- The Protecting Our Students in Schools Act (S. 2029/H.R. 3836), which would prohibit schools receiving federal funding from using corporal punishment (which is still legal in 19 states) and would create a federal grant program to assist states and school districts in improving school climate.
- The Ending Punitive, Unfair, School-Based Harm that is Overt and Unresponsive to Trauma (PUSHOUT) Act (H.R. 2248), which would prevent criminalization and pushout of students from school, especially Black and brown girls; establish a grant program for school districts and nonprofits to reduce exclusionary discipline practices; require the Department of Education to collect discipline data annually under the Civil Rights Data Collection; and establish a Federal Interagency Taskforce to End School Pushout.

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