

May 14, 2019

The Honorable Robert C. Scott
Chairman
U.S. House Committee on
Education and Labor
2176 Rayburn H.O.B.
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
U.S. House Committee on
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2176 Rayburn H.O.B.
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:



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On behalf of the American Civil Liberties Union (“ACLU”) and our more than three million members, activists, and supporters, we submit this letter for the record of the House Committee on Education and Labor’s April 30 hearing on “Brown v. Board of Education at 65: A Promise Unfulfilled.” The 65th anniversary of the landmark decision in *Brown v. Board of Education of Topeka*¹ is an opportune time to discuss and reflect on the state of civil rights and racial justice in our schools, and we appreciate the committee’s attention to these critical issues.

The *Brown* decision, delivered on May 17, 1954, marked a defining moment in the history of the United States. On that day, Chief Justice Earl Warren, on behalf of the U.S. Supreme Court, declared, “In the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” Although the decision outlawed many of the racist practices of states that engaged in mandatory or permissive segregation in public education, *Brown’s* promise has not yet been fulfilled. As a 2016 Government Accountability Office (GAO) report revealed, increasing racial and economic segregation continue to drive inequities in education.² Similarly, a 2018 GAO report showed that students of color suffer harsher discipline for lesser offenses than their white peers.³

¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

² U.S. Gov’t Accountability Office, *K-12 EDUCATION: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, GAO-16-345, Apr. 21, 2016, <https://www.gao.gov/products/GAO-16-345>.

³ U.S. Gov’t Accountability Office, *K-12 EDUCATION: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, GAO-18-258, Mar. 22, 2018, <https://www.gao.gov/products/GAO-18-258>.

The reality is that every day millions of students enter schools where they will face racially discriminatory policies and practices that police and punish them more severely than their peers, that fuel the school-to-prison and school-to-deportation pipeline, and that rob them of their dignity. These inequities are made more acute by the Department of Education's abdication of its responsibility to pursue educational equity for all students. Ensuring equal access to education for students of color, LGBTQ students, young women and girls, students with disabilities, immigrant children, including undocumented students, and children of immigrants requires robust enforcement of the nation's civil rights laws — and a basic recognition that these students have been historically underserved and marginalized in systemic ways. Instead, the Department of Education continues to undermine protections and advancements while undercutting support for public education and schools that are required to uphold students' civil rights and to serve every child.

The Department of Education and Congress have critical roles in ensuring educational equity and a broad array of civil rights, whose current status we examine in this letter. *Brown* goes to the heart of these civil rights. It is critical that the federal government stand vigilantly against the erosion of progress made in the 65 years since the case was decided, and vigorously pursue the fulfillment of its promise.

Racial Justice in Education

The ACLU has long had a role in school desegregation efforts, as a friend-of-the-court participant in the landmark *Brown* case,⁴ and with an ACLU lawyer serving as lead counsel when the case was re-opened to desegregate Topeka's public schools in the 1980s and '90s.⁵ The ACLU's Racial Justice Program is still involved in litigation to advance integration in Hartford-area public schools, in accordance with the Connecticut Supreme Court's 1996 decision in *Sheff v. O'Neill*.⁶ In 2019, the Racial Justice Program filed a motion to intervene in a lawsuit challenging efforts to address racial segregation in schools.⁷

Although the decision in *Brown* outlawed many of the racist practices of states that engaged in mandatory or permissive segregation in public education, the promise of *Brown* has remained elusive and, in fact, segregation has increased in recent years

⁴ American Civil Liberties Union, *ACLU Amicus Brief in Brown V. Board of Education*, Oct. 1952, <https://www.aclu.org/legal-document/aclu-amicus-brief-brown-v-board-education>.

⁵ American Civil Liberties Union, *Interview with Chris Hansen*, accessed May 13, 2019, <https://www.aclu.org/other/interview-chris-hansen>.

⁶ American Civil Liberties Union, *Sheff V. O'Neill*, accessed May 13, 2019, <https://www.aclu.org/cases/sheff-v-oneill>.

⁷ Matthew Kauffman, *Sheff Supporters Look To Intervene In Suit Challenging Connecticut Schools' Racial Quotas*, Hartford Courant, May 8, 2018, <http://www.courant.com/news/connecticut/hc-news-sheff-intervene-20180508-story.html>.

along race and class lines.⁸⁹ While the United States school population has grown more racially diverse, it has also grown more racially segregated over the last three decades. According to new research, since 1988, the percentage of schools that enroll at least 90 percent non-white students has tripled to more than 18 percent, and overall, students tend to attend schools with students in the same racial category. White students attend schools in which almost 70 percent of their classmates are white; Black students attend schools in which almost half of students are Black and three quarters are students of color; and Latino students attend schools in which 55 percent of students are Latino and three quarters are students of color.¹⁰ Additionally, large shares of students of color attend intensely segregated schools. At least 40 percent of Black and Latino students attend schools where at least 90 percent of students are nonwhite.¹¹

Racial segregation is often accompanied by poverty. Prior research showed that half of students in intensely segregated Black and Latino schools are in schools with more than 90 percent low-income students.¹²

Court-mandated desegregation orders, once a powerful tool for advancing integration, have been lifted over the last four decades¹³ or left unenforced because of a lack of oversight by the federal government. A GAO report from 2016 found that the Department of Justice does not track key cases and many cases remain dormant for long periods of time.¹⁴ Additionally, a 2014 investigation by ProPublica found that many school districts do not know the status of their desegregation orders, or wrongly believe they have ended, while federal courts have lifted orders in places where segregation still exists.¹⁵

⁸ Alvin Chang, *The data proves that school segregation is getting worse*, Vox, Mar. 5, 2018, <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data>.

⁹ U.S. Gov't Accountability Office, *K-12 EDUCATION: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, GAO-16-345, Apr. 21, 2016, <https://www.gao.gov/products/GAO-16-345>.

¹⁰ Erica Frankenberg et al., *Harming our Common Future: America's Segregated Schools 65 Years after Brown*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA and Center for Education and Civil Rights at Penn State 23, May 10, 2019, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-america-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

¹¹ Penn State College of Education, *Brown at 65: New research details increasing segregation in a transformed school population*, May 10, 2019, <https://ed.psu.edu/news/2019-04-06-news/brown-at-65-new-research-details-increasing-segregation-in-a-transformed-school-population>.

¹² Frankenberg et al., 15.

¹³ Yue Qui and Nikole Hannah-Jones, *A National Survey of School Desegregation Orders*, ProPublica, Dec. 23, 2014, <http://projects.propublica.org/graphics/desegregation-orders>.

¹⁴ U.S. Gov't Accountability Office, *K-12 EDUCATION: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, GAO-16-345, Apr. 21, 2016, <https://www.gao.gov/products/GAO-16-345>.

¹⁵ Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, ProPublica, May 1, 2014, <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration>.

Beyond failing to move the promise of *Brown* forward, we increasingly have been losing ground. One cause of school resegregation is school district secession. With borders that resemble the most egregiously gerrymandered political districts, school district boundaries in every part of the nation separate white children from non-white children, and wealthier children from poorer ones. As the educational non-profit EdBuild observed, permitting this practice has “created and maintained a system of schools segregated by class and bolstered by arbitrary borders that, in effect, serve as the new status quo for separate but unequal.”¹⁶

When these systems fail, and segregation is permitted to flourish through mechanisms like school district secession¹⁷ and voucher schemes, public schools are drained of resources for the benefit of a small number of students and at the expense of the rest. For example, school-voucher schemes divert funding to private and religious schools that discriminate against students based on disability, religion, LGBTQ status, and pregnancy, among other criteria. And students who use school vouchers often come from families that can already afford tuition. Over time, as public money flows to private and religious schools, those students who remain in the public school system are left with even less. Secretary Betsy DeVos and allies in Congress champion these policies in public statements and policy proposals, including the Education Freedom Scholarships proposal announced earlier this year as part of the White House’s budget request.¹⁸ This proposal would create a new \$5 billion tax credit scheme, through which taxpayers would subsidize education at private and religious schools, which are not obligated to serve all students or ensure that students’ rights are protected. It is nothing more than a federal private-school voucher program by another name, and would take desperately needed resources away from public schools, which serve 90 percent of our nation’s children.

Congress should reject this proposal during the FY 2020 appropriations process, as well as discontinue funding and authorization of the District of Columbia’s Opportunity Scholarship Program, which provides public funds for private schools that do not abide by all federal civil rights laws and do not serve all students.¹⁹

¹⁶ EdBuild, *Fault Lines: America’s Most Segregated School District Borders* (2016),

<https://s3.amazonaws.com/edbuild-public-data/data/fault+lines/EdBuild-Fault-Lines-2016.pdf>.

¹⁷ Valerie Strauss, *Back to the future: A new school district secession movement is gaining steam*, The Washington Post, May 2, 2018, <https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/02/back-to-the-future-a-new-school-district-secession-movement-is-gaining-steam/?noredirect=on>; EdBuild, *Fractured: The Accelerating Breakdown of America’s School Districts* (2019), <https://edbuild.org/content/fractured>.

¹⁸ U.S. Dep’t of Educ., *U.S. Department of Education Fiscal Year 2020 Budget Summary 4*, available at <https://www2.ed.gov/about/overview/budget/budget20/summary/20summary.pdf#page=4>.

¹⁹ See Letter from National Coalition for Public Education to Senate Committee on Homeland Security, Feb. 25, 2019, available at <https://static1.squarespace.com/static/582f7c15f7e0ab3a3c7fb141/t/5c745bbf7817f77ef6bf1375/1551129536939/2019-02-19+NCPPE+DC+Voucher+Letter+HSGAC+Hearing+FINAL.pdf>. Moreover, the

Instead, Congress and the Department of Education should work to preserve and fulfill the promise of *Brown* by ensuring that schools have the necessary resources to provide all students with equal educational opportunities.

Discrimination in Discipline

Students of color are robbed of educational opportunity through discriminatory and disproportionate application of discipline. Each year, significant numbers of students of color and students with disabilities are disproportionately suspended and expelled for minor infractions of school rules. These practices lead to time not spent in the classroom and play a significant role in lowering achievement²⁰ and increasing the likelihood of dropping out and engaging with the criminal justice system, which can have lifelong effects, and for non-citizen students can even lead to deportation.²¹

When the Department of Education in December rescinded a 2014 school discipline guidance issued to combat bias in the nation's public schools,²² it took a step backward in remedying such disparities.

The recommended rescission of this guidance was included in the final report by the Federal Commission on School Safety. The Commission was formed following the mass shooting in Parkland, Florida with the purpose of formulating recommendations for preventing further tragedies. But the commission pushed the false narrative that schools can be protected from mass shootings by rolling back civil rights protections for Black and brown students and students with disabilities,

Department of Education's most recent study of the DC voucher program concluded that participation in the voucher program led to a statistically significant negative impact on math achievement for students overall, and this negative impact was greater after two years than after one year. K-5 students, who made up a majority of the students in the program, suffered statistically significant negative impacts in both reading and math. Nor was there any statistically significant improvement on student or parent satisfaction or on parental involvement. See Dynarski, M., Rui, N., Webber, A., and Gutmann, B. Evaluation of the DC Opportunity Scholarship Program: Impacts Two Years After Students Applied (NCEE 2018-4010). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at <https://ies.ed.gov/ncee/pubs/20184010/pdf/20184010.pdf>.

²⁰ Alan Ginsburg, Hedy Chang, Phyllis Jordan, *Absences Add Up: How School Attendance Influences Student Success*, Attendance Works, Aug. 2014, <http://www.attendanceworks.org/absences-add-up/>.

²¹ Daniel J. Losen and Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA, Aug. 7, 2012, <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crr-research>.

²² Francisco Vara-Orta, *It's official: DeVos has axed Obama discipline guidelines meant to reduce suspensions of students of color*, Chalkbeat, Dec. 21, 2018, <https://chalkbeat.org/posts/us/2018/12/21/its-official-devos-scrap-Obama-discipline-rules-meant-to-reduce-suspensions-of-students-of-color/>.

and claimed that this guidance “endangers school safety,”²³ despite the lack of any evidence linking civil rights protections for students of color to school shootings.

In reality, withdrawing this guidance weakens federal civil rights protections at a time when the GAO reports that Black K-12 students receive punishments that are overly severe and frequent in schools across the country. This report found that Black students account for 15.5% of all public-school students, but about 39% of students suspended from school.²⁴

These race and disability-based disparities prompted the Obama-era Department of Education to issue the 2014 school discipline guidance, which was based on a substantial body of research as well as the department’s own investigations, which included findings of “cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students.”²⁵ The Department’s final analysis: “Racial discrimination in school discipline is a real problem.”

Withdrawing the guidance will not increase school safety, and continue the criminalization of children of color. We urge the Department of Education to re-invest in efforts to implement best practices in school discipline, including those that that rely on positive support and intervention techniques, rather than escalating punishments, to improve outcomes for students, teachers, and schools.

Additionally, we urge Congress to reject authorization or funding for programs that would further harden schools—for instance, by increasing the presence of law enforcement, including school resource officers, in educational settings, adopting student surveillance and policing technologies, and allowing funds to be used to put guns in schools. The desire to keep students safe in their schools is universal, but Congress must not hurt our students in its rush to protect them. Not only have these “hardening” measures not been demonstrated to improve student safety in any meaningful way, they threaten to hurt students by undermining their right to free speech, association, and privacy, undercutting their academic and intellectual freedom, and placing students—especially students of color and with disabilities—at risk of unwarranted punishments and further social isolation and robbing them of educational opportunities.

²³ U.S. Dep’t of Educ., U.S. Dep’t of Homeland Sec., U.S. Dep’t of Health and Human Serv., and U.S. Dep’t of Justice, *Final Report of the Federal Commission on School Safety* 68, Dec. 18, 2018, available at <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

²⁴ U.S. Gov’t Accountability Office, *K-12 EDUCATION: Discipline Disparities for Black Students, Boys, and Students with Disabilities*, GAO-18-258, Mar. 22, 2018, <https://www.gao.gov/products/GAO-18-258>.

²⁵ U.S. Dep’t of Educ., Office for Civil Rights and U.S. Dep’t of Justice, Civil Rights Division, *Nondiscriminatory Administration of School Discipline* (Dear Colleague letter), Jan. 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

Protecting the Rights of Transgender Students

One of the first actions taken following the arrival of Secretary DeVos was the rescission of a guidance document outlining how Title IX protects transgender students from discrimination. The decision to rescind the guidance was contrary to numerous federal court rulings holding that discrimination based on gender identity is a form of sex discrimination. This legal foundation—grounded in case law—served as the basis for the joint guidance document issued by the Departments of Education and Justice in 2016. The decision to rescind the guidance was driven by anti-transgender animus emanating from the highest levels of this administration.

Since rescinding the guidance, the Department of Education has drawn back from investigating complaints of discrimination against transgender students,²⁶ and confirmed what was already clear: the federal government, under President Trump and Secretary DeVos, does not view discrimination against transgender students as a violation of Title IX.²⁷

Through its inaction, the Department of Education is attempting to write transgender students out of the protections of Title IX. However, federal courts have repeatedly concluded that federal civil rights laws protect transgender students from discrimination, including in the context of restroom and locker room use.

Congress can protect transgender students by passing the Equality Act (H.R. 5/S. 788), landmark civil rights legislation that would provide LGBTQ people with consistent, explicit, and nationwide nondiscrimination protections across all of the key areas of daily life, including in education. It would do this by explicitly prohibiting discrimination based on sexual orientation and gender identity in our nation's federal civil rights laws, giving LGBTQ people the same protections that have long existed for other characteristics under federal law, such as race, religion, and national origin.

Enacting the Equality Act would provide students like Gavin Grimm, a 19-year-old young man who is transgender and was a student at Gloucester High School in Gloucester County, Virginia, with explicit protection under federal law. When he was 15, Gavin came out to his family as a boy and transitioned to living in accordance with his male identity.

By the time Gavin began his sophomore year at Gloucester High School, he had legally changed his name and had begun using male pronouns. He wore his clothing

²⁶ Caitlin Emma, *Scoop: The scope of transgender student complaints under DeVos*, Politico Morning Education, Feb. 28, 2018, <https://www.politico.com/newsletters/morning-education/2018/02/28/scoop-the-scope-of-transgender-student-complaints-under-devos-118460>.

²⁷ Moriah Balingit, *Education Department no longer investigating transgender bathroom complaints*, The Washington Post, Feb. 12, 2018, https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?noredirect=on&utm_term=.fbb38b156399.

and hairstyles in a manner typical of other boys and used men's restrooms in public venues, including restaurants, libraries, and shopping centers, without encountering any problems.

With the support of the school principal and superintendent, Gavin used the boys' restrooms at his high school for approximately seven weeks without incident. But in response to complaints from some adults in the community—including those without school-age children—the Gloucester County School Board overruled its own administrators and enacted a policy prohibiting students “with gender identity” issues from using the same restrooms as other students. The new, discriminatory policy directed transgender students to an “alternative appropriate private facility.” This policy effectively banished Gavin from the boys' restroom and denied him the basic dignity of being recognized by his school as the young man he is.

At the school board meeting that led to the adoption of this discriminatory policy, Gavin and his parents sat while strangers pointedly referred to him as “a young lady” to deliberately undermine his gender identity. One speaker called Gavin a “freak” and compared him to a person who thinks he is a dog and wants to urinate on fire hydrants.

Throughout the rest of high school, Gavin was segregated from his peers by being forced to use separate restrooms that no other student was required to use. The degrading and stigmatizing policy singled Gavin out as unfit to use the same restrooms that were available to every other student. Shockingly, the school board continues to discriminate against Gavin to this day—even though he has now graduated—by refusing to update his official school transcript to match the male sex on his birth certificate. As a result, every time Gavin is required to provide a copy of his high school transcript to a college or potential employer, he must provide a transcript that – unlike all his other identification documents – wrongly declares that his sex is “female.”

Following the adoption of the discriminatory policy by the Gloucester County School Board, Gavin wrote the following:

I am boy, and it is important to me to live life like other boys do, including using the boys' bathroom. I am disappointed that the school board decided to ignore my best interest, including others in the same situation, and chose to adopt a policy that is discriminatory and spreads fear and misinformation. This needs to stop.²⁸

Discriminatory Policies Affecting Students with Disabilities

²⁸ Gavin Grimm, *I'm a Boy, so Why Won't My School Allow Me to Use the Boys' Bathroom?*, ACLU, Dec. 22, 2014, <https://www.aclu.org/blog/speakeasy/im-boy-so-why-wont-my-school-allow-me-use-boys-bathroom>.

Students with and without disabilities deserve the opportunity to access a high-quality education within the general education environment. But Congress and the Department of Education need to be vigilant about the use of special education as a tool of educational segregation, not only because it corrupts the intent and promise of the Individuals with Disabilities Education Act (IDEA) for all students, but because of stark racial disparities that exist within special education.

Nationally, 13.41% of students with disabilities ages 6 to 21 spend less than 40% of their day in the general education classroom and 2.87% of students with disabilities ages 6 to 21 are placed in a separate school.²⁹ However, these rates vary dramatically from state to state, suggesting that educational placement is driven by political factors rather than educational need. Segregation of students because of disability type is also of great importance. For example, 33.39% of autistic students are in the general education classroom for less than 40% of the day, and 7.37% are in separate schools altogether. Similarly, almost half of all students with intellectual disabilities spend less than 40% of their day in the general education classroom while approximately 6% are in separate schools.

In 2016, the Department of Education recognized these disparities in the identification, placement, and discipline of children with disabilities, issuing the Equity in IDEA regulations. These regulations responded to how incompletely and inconsistently states collected and examined data to determine if significant disproportionality based on race and ethnicity is occurring in the identification of children with disabilities, the placement of children in particular educational settings, and disciplinary actions. For instance, students of color are more likely to be identified as having disabilities than are their peers — nationally, Black students are 40 percent more likely, and American Indian or Alaska Native students are 70 percent more likely, to be identified as having disabilities than are their peers.³⁰ Despite this, in 2010, only 2 percent of all districts were identified as having significant disproportionality.³¹ The Equity in IDEA regulations require a common standard for identifying significant disproportionality in representation of students within special education, giving states until July 1, 2018 to comply.

Troublingly, the Department of Education has attempted to push back these regulations, issuing a rule last June to delay them by two years. As we wrote in comments to the Department opposing the proposal, the “proposed delay in these regulations is not a harmless administrative change – it has concrete and real

²⁹ U.S. Dep’t of Educ., Office of Special Education and Rehabilitative Services, *Child Count and Educational Environment. IDEA Section 618 Data Products: State Level Data Files*.

³⁰ U.S. Dep’t of Educ., *Thirty-Eighth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Parts B and C. 2016*, <https://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html>.

³¹ U.S. Gov’t Accountability Office, *Individuals With Disabilities Education Act: Standards Needed to Improve Identification of Racial and Ethnic Overrepresentation in Special Education*, GAO-13-137, Feb. 27, 2013, <https://www.gao.gov/products/GAO-13-137>.

consequences for students with and without disabilities. There are actual children who will be harmed.”³²

On March 7, the U.S. District Court for the District of Columbia ruled that the Trump administration violated federal law by delaying the Equity in IDEA regulations, finding that the Department had failed to provide a reasoned explanation for the delay and that it failed to consider the burdens the delay imposed on parents and their children with disabilities, State education agencies (SEAs), local education agencies (LEAs), and society. The ruling invalidated the delay and required the 2016 regulations to go into immediate effect.³³ Yet, the Department of Education has resisted implementation, saying nearly a month after the court decision that it was “reviewing the ruling and considering our options,”³⁴ before filing a notice to appeal the decision.³⁵

It is past time for the Department to look forward and ensure compliance with the regulation. States and schools need certainty about the expectation to implement the methodological requirements of the Equity in IDEA regulations, as well as requirements regarding disparities in discipline of students with disabilities, and requirements of what SEAs must do when significant disproportionality is found. More importantly, the children who are currently being disproportionately identified, placed in restrictive settings, and disciplined need the regulation’s protections put in place to ensure they are receiving appropriate and equitable educational services. The Department should abandon its appeal, as well as abandon plans announced in the Fall 2018 Unified Agenda to issue a proposal to further amend the Equity in IDEA regulation.³⁶

We are also concerned by the continued use of restraint and seclusion against students with disabilities and students of color. According to the U.S. Department of Education’s 2015-16 Civil Rights Data Collection, while students with disabilities made up 12 percent of enrolled students, they made up 66 percent of students

³² American Civil Liberties Comment to the U.S. Dep’t of Educ. On Proposed Rule: Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, RIN 1820-AB77, available at <https://www.regulations.gov/document?D=ED-2017-OSERS-0128-0289>.

³³ Council of Parent Attorneys and Advocates, *COPAA Victorious in Lawsuit Against Secretary DeVos*, ED, Mar. 7, 2019, <https://www.copaa.org/news/441156/COPAA-victorious-in-lawsuit-against-Secretary-DeVos-ED.htm>.

³⁴ U.S. Dep’t of Educ., Individuals with Disabilities Education Act, *Update on Judicial Decision Regarding Significant Disproportionality*, April 4, 2019, <https://sites.ed.gov/idea/update-on-judicial-decision-regarding-significant-disproportionality/>.

³⁵ Council of Parent Attorneys and Advocates, *States Still Required to Implement Equity in IDEA Regulations*, May 8, 2019, <https://www.copaa.org/news/450358/States-Still-Required-to-Implement-Equity-in-IDEA-Regulations-.htm>.

³⁶ Office of Mgmt. & Budget, Executive Office of the President, Significant Disproportionality Part B of the Individuals With Disabilities Education Act (RIN: 1820-AB80), Fall 2018 Unified Agenda, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1820-AB80>.

subject to seclusion and 71 percent of students restrained. Additionally, Black students make up 15 percent of all students, they account for 23 percent of students secluded and 27 percent of students restrained.³⁷

These figures likely underrepresent the problem given that almost 80 percent of districts reported no data on students with disabilities being subject to restraint and seclusion. These practices—which often result in injury and at times even death—represent an appalling example of institutionalized violence against children with disabilities and students of color, particularly Black students.

We appreciate the Department of Education’s new initiative to address the inappropriate use of restraint and seclusion, through Office for Civil Rights (OCR) compliance reviews, efforts to collect accurate data, and technical assistance to schools.³⁸ But we believe this initiative cannot sufficiently address a nationwide issue, particularly because there is no federal law setting national standards for the use of seclusion and restraint, and the patchwork of state laws leaves students in many states vulnerable to these dangerous practices.

Congress should pass the Keeping All Students Safe Act, which would set important minimum standards—including prohibitions on seclusion and the most dangerous forms of restraint, and requirements for training and parental notification. Critically, the legislation would prohibit including physical restraint into an Individualized Education Program, making clear that while physical restraint may be necessary in situations where a student’s behavior poses an imminent danger of serious physical injury, it should not be planned for, and it does not further a child’s education. In addition to setting nationwide minimum standards, the Keeping All Students Safe Act includes provisions that help implement and supplement the minimum standards, including those to provide grant funding to states, to require states to report disaggregated data, and to require that Protection and Advocacy agencies be notified when physical injury or death ensues as a result of any intervention used to control behavior at a school.

Congress must act to ensure our children, especially the most vulnerable, are not subject to practices that push them out of the general education classroom and potentially into the damaging and dangerous school-to-prison pipeline, drastically reducing chances for success later in life. Educational equity demands that students have a safe, positive, and supportive learning environment.

³⁷ U.S. Dep’t of Educ., Office for Civil Rights, *2015-16 Civil Rights Data Collection School Climate and Safety: Data Highlights on School Climate and Safety* 11, 2018, <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

³⁸ U.S. Dep’t of Educ., *U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws*, Jan. 17, 2019, <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Sexual Harassment and Gender-Based Violence

All educational institutions have an obligation under Title IX to respond to gender-based violence and to harassment that is sufficiently severe or pervasive to limit a student's ability to participate in or benefit from school programs or activities. Due to impressive student activism, the issues of sexual harassment and gender-based violence on campus have finally begun to receive the attention they deserve.

Late last year, the Department of Education issued a Proposed Rule to revise regulations implementing Title IX. We believe the Proposed Rule undermines Title IX by substantially reducing the responsibility of institutions to respond to claims of sexual harassment and assault. The Proposed Rule employs an unduly narrow definition of sexual harassment, allows schools not to investigate incidents that they reasonably should have known about, precludes schools from conducting investigations that would often be necessary to determine whether an incident constitutes sexual harassment, relieves schools of the obligation to investigate most student-on-student harassment or assaults that occur off campus even where they have continuing effects on campus, and allows schools to adopt unreasonable responses to complaints, holding them responsible only if their actions are "deliberately indifferent."

We also support many of the increased procedural protections required by the Proposed Rule for Title IX grievance proceedings, including the right to a live hearing and an opportunity for cross-examination in the university setting, the opportunity to stay Title IX proceedings in the face of an imminent or ongoing criminal investigation or trial, the right of access to evidence from the investigation, and the right to written decisions carefully addressing the evidence. Some of these provisions should be modified; several do not go far enough in protecting fair process rights, and others require amendments to ensure equitable treatment of both respondents and complainants and to conform to procedures governing other forms of harassment or discrimination. For instance, the Proposed Rule for responding to sexual harassment under Title IX departs repeatedly from the rules for responding to racial harassment under Title VI, without any explanation for the divergent treatment. There should be no double standard for sex discrimination.

Our comments on the Proposed Rule provide our complete analysis, and for the reasons stated within, the ACLU objects to the Rule as proposed, and recommends that the Department modify the Rule consistent with these comments.³⁹

³⁹ American Civil Liberties Comment to the U.S. Dep't of Educ. On Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, RIN 1870-AA14, Jan. 30, 2019, *available at* https://www.aclu.org/sites/default/files/field_document/2019_1_30_title_ix_comments_final.pdf.

School districts' responses to sexual harassment in the K-12 grades similarly require increased focus, as sexual harassment and assault occur at significant rates in that context as well.⁴⁰ Compared to colleges and universities, school districts are less likely to have formal policies, procedures, and training on the proper response to sexual violence. In addition, K-12 students are rarely educated about their rights under Title IX. For all these reasons, raising awareness about and enforcement of Title IX is vitally important at all levels. Schools must adopt and implement comprehensive sexual harassment and assault policies and must never penalize victims for reporting sexual harassment or assault. OCR must ensure that schools are responding to incidents of sexual harassment and assault through appropriate remedial measures that center the victim's right to learn.

Single-Sex Education

Single-sex classes have been proliferating over the past decade. Many educators—desperate to solve the very real education crisis facing our public schools, particularly for low-income and minority students—have turned to single-sex programs as a sort of a magic bullet. However, the ACLU's investigation has shown that many of these programs are based on invidious sex-role stereotypes and discredited theories about purported differences between the ways boys and girls learn, and that very few are in compliance with the legal requirements under Title IX and its implementing regulations and guidance.⁴¹ Moreover, mounting evidence shows these programs fail to improve academic results. A system that makes crude judgments about learning ability based only on sex limits opportunities for all, and should never be a price we are willing to pay for education reform.

Despite these numerous legal concerns, OCR recently closed an investigation into two single-sex schools in Austin, Texas where male and female students are taught differently based on pseudoscientific claims about their inherent learning differences, resulting in a toothless agreement that leaves it up to the District to monitor its own compliance with Title IX.⁴² Through the closure of this complaint, OCR signaled that schools are free to base their pedagogy on overly broad and harmful sex stereotypes, which is part of a broader pattern of failure to enforce Title IX in a meaningful manner.

⁴⁰ A report by the American Association of University Women found that in grades 7–12, “girls were more likely than boys to be sexually harassed, by a significant margin (56 percent versus 40 percent) . . . both in person (52 percent versus 35 percent) and via text, e-mail, Facebook, or other electronic means (36 percent versus 24 percent).” CATHERINE HILL AND HOLLY KEARL, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL*, 2 (2011) *available at* <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

⁴¹ 20 U.S.C. § 1681; 34 C.F.R. § 106.34; United States Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

⁴² Letter from Timothy D. Caum, Supervisory Attorney, OCR, Dallas Office to Galen Sherwin, Senior Staff Attorney, ACLU, Apr. 5, 2018 (on file with ACLU).

Discriminatory Enforcement of Dress Codes

Schools across the country are enforcing dress codes selectively against female students in a manner that reinforces invidious sex stereotypes in violation of Title IX. Often, female students are pulled out of the classroom because of claims that their clothing or bodies are “distracting” their male peers. This jeopardizes girls’ equal access to education by forcing them to miss important class time, and prioritizes male students’ freedom from “distraction” over female students’ physical comfort and emotional wellbeing. Additionally, the disproportionate enforcement of dress codes against female students reinforces a culture of victim blaming, conveying the message that female students are at fault for experiencing sexual harassment and violence if they make certain clothing choices.

The Department of Education amended its regulations in 1982 to declare that it would no longer investigate violations of Title IX related to rules regarding dress and appearance.⁴³ It is time for the agency to revisit that decision and resume enforcement of Title IX under other existing regulations, including the regulation prohibiting different rules of conduct or discipline based on sex,⁴⁴ in order to ensure that schools are not subjecting female students to systemic disparate treatment through the discriminatory enforcement of dress codes.

Pregnant and Parenting Students

Since 1972, when Title IX was enacted, it has been illegal for schools to exclude pregnant and parenting students from school.⁴⁵ Young people have a right to complete their education regardless of their sex or whether they become pregnant. Students should not have to choose between completing their education and taking care of themselves and their children. Nevertheless, many schools fail to help pregnant and parenting teens stay in school, and some actually exclude or punish them. Only 50 percent of teen mothers receive a high school diploma by age 22, and, evidence suggests that illegal discrimination is a major contributing factor to this high dropout rate.⁴⁶

Congress should pass legislation authorizing the Secretary of Education to establish a formula grant program that provides robust support to state and local education agencies working to ensure the educational success of pregnant and parenting students. At the same time, OCR must vigorously enforce Title IX regulations that bar discrimination against pregnant and parenting students,⁴⁷ as well as the 2013

⁴³ See *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 47 Fed. Reg. 32,526-27 (July 28, 1982).

⁴⁴ 34 C.F.R. 106.31(b)(4).

⁴⁵ 20 U.S.C. § 1681; 34 C.F.R. § 106.40.

⁴⁶ Center for Disease Control and Prevent, Reproductive Health: Teen Pregnancy, <https://www.cdc.gov/teenpregnancy/about/index.htm>.

⁴⁷ 34 C.F.R. 106.21, 106.40.

guidance on how educational institutions can best comply with Title IX in order to support the educational success of pregnant and parenting students.⁴⁸

Ensuring Educational Rights of Immigrant Children and Children of Immigrants

The Department of Education and Congress need to do more to ensure the educational rights of children of immigrants and immigrant children, including undocumented students, who cannot be denied their right to a free public education, or discriminated against on the basis of race, color, or national origin. This includes ensuring that schools are a place where these children encounter a safe, welcoming learning environment and not fear that their families will be ripped apart. For example, in Tennessee—after the single largest workplace raid in a decade—over 500 children, including U.S. citizens, were afraid to go to school.⁴⁹ In Los Angeles, a father was detained after dropping his daughter off at school.⁵⁰ In Houston, an undocumented high school student ended up in immigration detention following an altercation with a fellow student.⁵¹ These incidents are just a sample of the draconian immigration enforcement that is taking place nationwide, and despite Department of Homeland Security’s policies limiting enforcement at schools.⁵²

These families and children aren’t able to live their lives, communities are shaken, and immigrants are worried about being detained, deported, and separated from their families—including mixed-status families—every single day. The Trump White House is taking the infrastructure of American communities and weaponizing it against immigrants and communities of color. Given the serious impact of immigration enforcement on the ability of children to attend school without fear, Congress should consider immigration enforcement to be a matter of educational equity. When students are too fearful to attend school, their equal access to education is denied.

Ensuring the educational rights of immigrant children and children of immigrants also requires recognizing that every child in America has a right to a basic

⁴⁸ United States Dep’t of Educ., Office for Civil Rights, *Supporting the Educational Success of Pregnant and Parenting Students* (Dear Colleague letter), Jun. 25, 2013, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>.

⁴⁹ Jonathan Blitzer, *An ICE Raid Has Turned The Lives of Hundreds of Tennessee Kids Upside Down*, *The New Yorker*, Apr. 24, 2018, <https://www.newyorker.com/news/dispatch/an-icesmall-raid-has-turned-the-lives-of-hundreds-of-tennessee-kids-upside-down>.

⁵⁰ Andrea Castillo, *L.A. father detained by ICE after dropping daughter at school may be deported*, *Los Angeles Times*, July 31, 2017, <http://www.latimes.com/local/lanow/la-me-romulo-avelica-deportation-20170731-story.html>.

⁵¹ Suzanne Gamboa, *In Houston, outrage over a school arrest that landed a student in immigration detention*, *NBC News*, Feb. 15, 2018, <https://www.nbcnews.com/news/latino/houston-outrage-over-school-arrest-landed-student-immigration-detention-n848141>.

⁵² U.S. Immigration & Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrests*, Sept. 25, 2018, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

education, regardless of immigration status.⁵³ During a hearing in this committee on May 22, 2018, Secretary DeVos said it's up to local schools whether they want to report undocumented students to Immigration and Customs Enforcement.⁵⁴

Secretary DeVos was wrong. Any school that reports a child to ICE would violate the Constitution, and her comments make it even more important for Congress to exercise oversight to ensure all students can learn in a safe environment.

The issues and recommendations outlined above are not the only ones necessary to ensure educational equity, but the anniversary of *Brown* is an opportunity to evaluate ways students are denied educational opportunity, as well as the steps Congress and the administration should take to make sure its promise is fulfilled.

If you have any questions, please contact Senior Policy Analyst Michael Garvey at 202-675-2310 or mgarvey@aclu.org.

Sincerely,



Ronald Newman
National Political Director



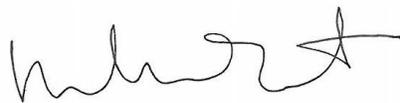
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⁵³ American Civil Liberties Union, *FAQ for Educators on Immigrant Students in Public Schools*, accessed May 14, 2019, <https://www.aclu.org/other/faq-educators-immigrant-students-public-schools>.

⁵⁴ Michael Stratford, *DeVos: Schools should decide whether to report undocumented kids*, Politico, May 22, 2018, <https://www.politico.com/story/2018/05/22/undocumented-children-schools-devos-immigration-603277>