July 22, 2021

Submitted electronically via www.regulations.gov

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

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

Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline

Dear Secretary Cardona and Acting Assistant Secretary Goldberg,

Public Justice is a legal advocacy organization with programs dedicated to protecting civil, consumer, and workers' rights, as well as environmental sustainability and access to the courts. Our Students' Civil Rights Project litigates cases concerning a wide range of forms of sex and race discrimination in schools, including harassment and discriminatory discipline. We write today in response to the Department of Education's Request for Information Regarding the Nondiscriminatory Administration of School Discipline.

In our work representing students in civil rights litigation, we have come across an alarming trend: Schools are disciplining students speaking up about discrimination. Some illustrative examples:

- We, along with Nichols Kaster, PLLP, represent a group of Black students who have experienced discriminatory discipline and a racially hostile environment at a Duluth charter school. One student, "G.H.," was subjected to race-based harassment by her peers, who, for example, called her a monkey and told her she looked like "what's inside a toilet." G.H., like other Black students at the school, often received harsher punishments than her white peers for similar minor rule-breaking. When, for instance, G.H. passed along a note written by a white classmate, G.H. was suspended but the student who wrote the note was not disciplined. After G.H.'s mother expressed concern to the school that G.H. was being discriminated against on the basis of race, G.H. began to receive more disciplinary referrals. Once, when a teacher refused G.H.'s request to sit in a particular chair, G.H. noted that white students were allowed to do so; the teacher referred her for discipline for that comment.[1]

- We, along with The Fierberg National Law Group and Buckley Beal LLP, represent "Jane Doe," a student of color who was sexually assaulted at her high school by a white

[1] *K.R. v. Duluth Public Schools Academy*, No. 0:19-cv-00999-DWF-LIB (D. Minn.). The complaint is available at https://www.publicjustice.net/wp-content/uploads/2019/06/2019.06.11-Doc.-12-First-Amended-Complaint.pdf.

classmate, "MP." When Jane reported to her school the next morning, school administrators suspended her for engaging in prohibited sexual contact on school grounds—that is, for her own rape. The school then conducted a joint disciplinary hearing for Jane and MP to determine whether they had broken the school's rule against sexual activity. During that hearing, Jane was subject to direct cross-examination by both the school district's lawyer and MP's. They asked her to re-enact her rape and to explain why she had not fought MP more strenuously, shouted more loudly, or reported immediately (rather than less than a day later). At the close, the school district determined both students had broken the rule, and Jane was suspended again. Even then, the school did not let up. At MP's mother's urging, school resource officers (SROs) collected and copied sexually explicit photographs that Jane had sent a former boyfriend, who had no connection to the assault, as though Jane's consensual sexual activity with one boy suggested she could not be raped by another. The SROs maintained the photos—child pornography of Jane—for years and provided them to the school district's attorneys to use in litigation. In the course of litigation, the school has insisted its actions were not retaliatory; by its telling, it simply did not believe Jane, and so its decision to suspend her was perfectly reasonable.[2]

- We, along with Correia & Puth, PLLC, and the Ates Law Firm, PC, represent another "Jane Doe" who was sexually assaulted by a classmate, "Jack," on a school trip. When the school interviewed Jane, they told her that she might be suspended for engaging in sexual activity, but never threatened Jack with any discipline. In the course of litigation, the school district has insisted its response was appropriate because, if Jane was lying and had instead engaged in consensual sexual activity, she broke a school rule.[3]

- We, along with Cohen Milstein PLLC, previously represented a student who reported sexual harassment that she had experienced and provided a list of other girls who had been similarly victimized. The school dismissed her concerns and threatened her with punishment for violating a non-existent school rule against "petitioning." Shortly thereafter, the school suspended her for an extended period, nominally for a minor drug offense. The school's retaliatory motive was clear not only from the temporal proximity but from its treatment of comparators: other students found responsible for more serious drug offenses during the same period, and who had not also levied sexual harassment complaints, received significantly shorter suspensions.

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[2] *Jane Doe v. Gwinnett County School District*, No. 1:18-cv-05278-SCJ (N.D. Ga). A recitation of the facts is included in the district court's denial of the school's motion to dismiss. *See Doe v. Gwinnett Cty. Pub. Sch.*, No. 1:18-CV-05278-SCJ, 2019 WL 12336248, at *3 (N.D. Ga. Aug. 22, 2019). The opinion and complaint do not include references to the child pornography because Jane's counsel learned of the photographs when the school produced them during discovery.

[3] A recitation of the facts is available in the Fourth Circuit's recent opinion ordering a new trial. *See Doe v. Fairfax Cty. Sch. Bd.*, 1 F.4th 257, 261-62, 272 (4th Cir. 2021).

We know our clients are not alone. Students across the country, and especially girls of color, are sanctioned when they report harassment and other forms of discrimination.[4] And the problem is not limited to K-12 schools. Too often, college and university students are sanctioned for minor rule-breaking, like drinking alcohol, that comes to light when they report sexual assault.[5] One college student was disciplined and fined for making an audio recording of her own sexual assault because, the school said, she had not received her rapists' consent to record them.[6]

Schools are certainly on notice that retaliation for reporting discrimination is illegal.[7] But the Department should provide more detailed information about when student discipline constitutes such prohibited retaliation. In doing so, the Department should explain that a school discriminates when it punishes complainants or witnesses for minor student conduct violations that must be disclosed in order to report discrimination or that come to light in an ensuing investigation (e.g., substance use, reasonable self-defense, consensual sexual contact, or presence in a restricted part of school grounds) or that the student-victim commits as a result of the reported discrimination (e.g., non-attendance).[8] The Department should also specifically clarify that disciplining a student who reports sexual harassment for the sexual contact that is the subject of the report constitutes sex discrimination.

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[4] *See, e.g.*, Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, The 74 (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/.

[5] *See, e.g.*, Christina Cauterucci, *BYU's Honor Code Sometimes Punishes Survivors Who Report Their Rapes*, Slate (Apr. 15, 2016), https://slate.com/human-interest/2016/04/byu-s-honor-code-sometimes-punishes-survivors-who-report-their-rapes.html.

[6] *Doe v. Manor Coll.*, 479 F. Supp. 3d 151, 159 (E.D. Pa. 2020).

[7] *See, e.g.*, *Retaliation Discrimination* (Oct. 15, 2015), https://www2.ed.gov/policy/rights/guid/ocr/retaliationoverview.html.

[8] Previous Title IX guidance, now rescinded, addressed some of these concerns, if less forcefully and comprehensively than future guidance should. For example, a 2014 guidance encouraged schools to "review" disciplinary action taken against a complaint, such as non-attendance, to consider whether there was a causal relationship between the harassment and the sanctioned conduct. *Questions and Answers on Title IX and Sexual Violence* 35 & n.32 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. The Department has also directed schools to "review [their] disciplinary polic[ies]," including those related to drugs and alcohol, "to ensure [they] do[] not have a chilling effect on students' reporting of sexual violence offenses or participating as witnesses." *Id*. at 42; *see also Dear Colleague Letter on Sexual Violence* 15 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("[S]chools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses").

We appreciate your consideration. If you have any questions, please contact Alexandra Brodsky (abrodsky@publicjustice.net) at Public Justice.

Sincerely,

Public Justice