



October 27, 2021

The Honorable Ken Paxton, Attorney General
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
Via email: opinion.committee@oag.texas.gov

Re: RQ-0435-KP (Letter brief from Texas Appleseed)

Dear Attorney General Paxton:

Texas Appleseed respectfully submits this letter brief to assist your office in responding to Texas Representative James White's request for an opinion regarding the authority of school districts or educators to choose what disciplinary action to impose on a student because of race, ethnicity, sex, gender, or disability status of the student, RQ-0435-KP.

Federal civil rights laws and the Texas Constitution prohibit public schools and educators from discriminating against students in the administration of student discipline based on certain personal characteristics. The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin. Specifically: Title IV of the Civil Rights Act prohibits discrimination in public elementary and secondary schools based on race, color, or national origin, and Title VI of the Civil Rights Act prohibits the discrimination based on race, color, or national origin by recipients of Federal financial assistance, which includes public schools.¹ Additionally, Title IX of the Education Amendments of 1972 prohibits discrimination based on sex by recipients of Federal financial assistance in their education programs or activities.² Further, Federal laws, particularly: Section 504, Title II of the Americans with Disabilities Act of 1990, and Part B of the Individuals with Disabilities Education Act (IDEA), prohibit discriminatory discipline based on

¹ 42 U.S.C. §§ 2000c *et seq.*, 42 U.S.C. §§ 2000d *et seq.*

² 20 U.S.C. §§ 1681 *et seq.*

disability, religion, sex, and other factors.³ The IDEA contains specific provisions involving the discipline of students with disabilities who are or may be IDEA-eligible and requires an analysis of discipline data disaggregated by race and ethnicity.⁴

Like federal civil rights laws, the Texas Constitution embraces educational practices that seek to acknowledge and address racial inequalities. The Texas Constitution, ratified in 1876, provides an affirmative grant of equal rights and equality under the law in Section 3 and 3a of its Bill of Rights, respectively. Tex. Const. § 3, 3a. These sections establish that no Texan may be denied equal rights and equality under the law based on race, sex, and other immutable characteristics of their personhood and guarantees equal treatment of all Texans in toto.⁵

The Texas Bill of Rights was enacted at a time of unparalleled political participation by Black people in the federal government, state legislatures, and local elected offices.⁶ Towns and communities were built by formerly enslaved people that created avenues for economic power for Black Southerners. Texas was certainly no outlier during this era. As documented by Dr. Andrea Roberts of Texas A&M University through The Texas Freedom Colonies Project Atlas and Study, one million freed people established freedom colonies throughout Texas during Reconstruction, even under the constant threat of white domestic terrorism during this epoch.⁷

The constitution of 1876, and that of 1869, reflected the progressive ideals of Texas legislators at that time, who were intent on enshrining racial equality by law. Indeed, the 1869 constitution went even further than the federal constitution by providing for a uniform system of public education that was accessible to all children in the state, regardless of sex or race.⁸ This more egalitarian document, as compared to its predecessors, owed its progressivism to the ten Black men who served as delegates to the Texas State Constitutional Convention of 1868-69.

The gains of Black Texans during the Reconstruction era were swiftly met with backlash from the white establishment. As described above, beginning in the 1870s, Black Texans saw a widespread curtailment of their civil and political rights. The Compromise of 1877, which led to the election of Rutherford B. Hayes, eviscerated federal support of desegregation efforts and plunged Black Southerners right into the merciless and incessant threat of white domestic terrorism for generations. In the final decades of the nineteenth century, the insidious nature of Jim Crow laws in Texas steadily eroded the progress that was made during this era; by 1891, only a handful of

³ 29 U.S.C. § 794 (2015); 42 U.S.C. §§ 12131 *et seq.*, (1990); 20 U.S.C. §§ 1412(a)(22), 1415(k), 1418(d) (2015); 24 C.F.R. § 3200.530(e)-(g).

⁴ U.S. Department of Education, Office of Civil Rights, Joint “Dear Colleague” Letter, Jan. 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

⁵ James C. Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 Texas Tech Law Review 1487 (1986).

⁶ See generally *The Reconstruction Generation, 1870-1887*, History, [Art & Archives: United States House of Representatives, https://rb.gy/rcnaur](https://rb.gy/rcnaur).

⁷ *The Texas Freedom Colonies Project Atlas and Study*, <https://rb.gy/f00ux9>.

⁸ S.S. McKay, revised by Carl H. Moneyhon, *Constitution of 1869*, [Texas State Historical Association: Handbook of Texas, https://rb.gy/6xhmfw](https://rb.gy/6xhmfw).

Black members served in the Texas Legislature, and the 22nd Legislature passed an infamous Jim Crow law that mandated separate railroad coaches for Black Texans.⁹ This brutal regime governed Texas affairs for generations, and its effects are still acutely felt by the descendants of enslaved Texans. This history cannot be divorced from the racial inequality that persists in all aspects of American life, well into the twenty-first century.

Nearly 150 years after this pivotal occurrence, people of all races in Texas and across the nation rose up together to confront the unfulfilled promise of eradicating racial discrimination, following the death of native Texan: George Perry Floyd. Mr. Floyd's far-too-short 46-year life shows how every facet of American life fails Black people in the twenty-first century, including opportunities in education.¹⁰ Presently, millions of people of color in Texas face the unaddressed legacy of slavery and Jim Crow segregation in their daily lives, including gross inequalities in the public education system. Rarely has such an opportune moment arisen for the state government of Texas to meaningfully address systemic inequalities in education. Moreover, the three branches of the Texas state government could work to develop retroactive and prophylactic measures that acknowledge the pernicious impact of racism in every facet of modern society, including in the classroom.

I. The administration of student discipline must be free from unlawful discrimination, and educator training in diversity, equity, & inclusion (DEI), implicit bias, and deficit thinking is urgently needed.

Most disciplinary systems involve educators assessing the student conduct and determining whether to address the conduct educationally through school administration or criminally involving school police, or both such that the student receives dual consequences. This process permits discretion and invites subjective interpretation based on subjective standards of the educator, be it a teacher or a school administrator or district leaders. Educators often have different life experiences, cultural backgrounds, and philosophies than those of the students or communities they serve, resulting in the inability to comprehend the complexities of the lives of their students and be compassionate and sympathetic to their struggles. Seldom do educators receive evidenced-based, reflective professional development or training to address this very real concern.

The reality is we do not live in a color-blind society where race is ignored. Unlawful discrimination in violation of Title IV and Title VI is occurring every day in our schools in the application of different treatment and policies or practices resulting in disparate impact. Statistical analysis may provide an accurate picture of the problem and where investigations and deliberate effort must be focused, but the resolution requires a more in-depth inquiry beyond the quantitative data - accounts that cannot be properly captured by numbers. Simply stated, we cannot give school administrators

⁹ The 1890s: *Jim Crow Laws*, Texas State Library and Archives Commission, <https://rb.gy/qqelli>.

¹⁰ See, e.g., The Washington Post Staff, *George Floyd's America*, The Washington Post (Oct. 26, 2020), <https://rb.gy/5jfndu>.

unchecked power whose subjective application can turn on the whim of the individual school administrator given their experiences and perspectives. This disciplinary student process stands to deepen the discipline racial disparities precisely because they depend on subjective judgments, producing the same, or may likely worsen, the discriminatory and uneven effects on student discipline.

To begin to remedy the racism ingrained in public education requires a re-training and re-tooling of policies and practices. Educator training and professional development is urgently needed on the awareness of diversity, equity, & inclusion and implicit biases, its impacts on the administering of school discipline, and the dismantling of deficit thinking policies and practices. The letters of Title IV and Title VI are simply words on a page without a deep understanding from daily practitioners in schools across Texas. While the Departments' documents reference the need for training of school officials in select circumstances, the training seems to be on Title IV and Title VI and discipline policies or rules. This education does little to nothing to inform the educator on how to eradicate the harmful effects of discriminatory policies and practices. In addition to learning the laws related to discrimination and related policies, educators ought to be educated on the awareness of implicit bias and how to examine, identify, and dismantle deficit thinking. Because growth and development in this area is a process and not just a one-time training, and because such training will facilitate the prevention of racial discrimination, the training with advancing concepts ought to be conducted on an annual basis with current and future educators.

Deficit thinking is the dominant paradigm that largely shapes American educators' perspectives for the widespread and persistent failure among historically underserved students. It cites internal deficits in students that manifest in limited intellectual abilities and other shortcomings, resulting in lack of motivation and immoral behavior.¹¹ Schools produce failures among economically disadvantaged students and students of color and then use these failures as evidence that the problem lies with the students, their families, their genetics, their culture, and their neighborhoods, rather than the educational system and its deficit assumptions.¹² This self-perpetuating cycle is commonplace in today's public schools.¹³ It is pervasive and implicit and is nothing short of dehumanizing.

Deficit thinkers treat people as the problem and, rather than focusing on remedying oppressive and disabling systems, they focus on "fixing" people.¹⁴ The responses of school districts have exacerbated injustices suffered by students of color. Under the guise of better understanding poverty, school leaders offer damaging professional development riddled with deficit thinking,

¹¹ See RICHARD R. VALENCIA, *THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 2* (1997).

¹² See, e.g., *id.*

¹³ See, e.g., *id.*

¹⁴ E.g., Lori Patton Davis & Samuel D. Museus, Nat'l Ctr. for Institutional Diversity, *Identifying and Disrupting Deficit Thinking*, MEDIUM (July 29, 2019), <https://medium.com/national-center-for-institutional-diversity/identifying-and-disrupting-deficit-thinking-cbc6da326995>. (last visited on October 27, 2021)

further perpetuating the cycle of deficit thinking and promoting a culture of oppression by “blaming the victim.”¹⁵ To achieve school discipline that is free from racial discrimination, there must be a call to examine core systemic barriers that oppress and a heroic attempt to dismantle deficit thinking in public schools. Accordingly, it is incumbent upon school leaders and administrators to develop a tool-box with positive behavioral strategies underscored with an awareness of diversity, equity, and inclusivity (DEI), implicit bias, and deficit thinking to help train, or retrain, current and future educators. This training is urgently necessary to ensure that all students, regardless of race, ethnicity, sex, gender, or disability, receive equal educational opportunities under the law. Such an effort requires for all available tools to be put into action -- including clarifying guidance from the Biden Administration.

II. Making student-disciplinary decisions to produce or maintain statistical parity in the allocation of disciplinary action between groups of students in various racial ethnic, sex, gender, or disability classifications adversely affects data quality, integrity, reliability, and validity.

A critical part to ensuring the administration of school discipline is nondiscriminatory is robust data collection and analysis. This includes all school discipline data and school police data comprising student arrests, citations, and officer restraint or use of force data. Schools and educators must be required to collect all vital student discipline and law enforcement data to identify disparities in school discipline. This collection process must be monitored to ensure it is, in fact, happening. Anything less would negatively affect the utility and accuracy of the data.

Transparency is also a key component to producing and maintaining statistical integrity, reliability, and validity. School discipline and school police data ought to be made available to the public. Respecting Family Educational Rights and Privacy Act (FERPA) and student privacy guidelines, schools and educators should be required to make available student discipline and school police data in aggregate and disaggregate form, by school, by teacher, by school administrator, by school police, with student sub-population breakdowns by race, ethnicity, gender, special education status, and other categories. This will permit all relevant student discipline data to be examined, analyzed, and outcomes measured to ensure no unlawful discrimination. And when racial discrimination is investigated and exposed, swift and decisive action must be taken to mitigate the damage and harm caused by the institution and individuals -- including action from the state government and the federal government.

Data quality and integrity are fundamental characteristics to high-quality educator data-driven decision-making. If school discipline data is manufactured to produce or maintain statistical parity in the allocation of disciplinary action between groups of students in various racial ethnic, sex, gender, or disability classifications, the administration of school discipline will be based on

¹⁵ RICHARD R. VALENCIA, DISMANTLING CONTEMPORARY DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 68-100 (2010).

external, irrelevant factors pertaining to the student misconduct and outside the students' control. Prejudiced by educators and administrators and their personal philosophies and experiences, students would receive disciplinary action based on the color of the students' skin, for example, rather than on the seriousness of the incident, student intent, student's disciplinary history, and other relevant considerations. This improper modification and influence would lead to questionable and openly discriminatory outcomes in disciplinary actions. Educators and administrators would be empowered to overtly and publicly hold their prejudices and biases, like a badge of honor, perpetuating a system that uplifts implicit biases and deficit thinking, further eroding the culture in our public schools. Any data collected by this artificial means - the equivalent of 'placing a thumb on the scale'- would make data results unreliable and invalid ultimately adversely affecting data-driven decision-making in public schools and any analysis from outside agencies.

III. The U.S. Departments of Education and Justice will act properly by issuing updated guidance on the nondiscriminatory administration of school discipline, condition the availability of federal funding to public schools on the administering of student discipline that is free from unlawful discrimination, and investigate and enforce actions under Title IV and Title VI.

In July 2021, Appleseed Network and several Appleseed Centers across the United States, including Texas Appleseed, collaborated to submit comments in response to the Office for Civil Rights, U.S. Department of Education's request for information regarding the nondiscriminatory administration of school discipline, docket ID ED-2021-OCR-0068.¹⁶ In the response, we urged the U.S. Department of Education to actively enforce Title IV and Title VI of the Civil Rights Act of 1964 to vindicate the civil rights of millions of young people in schools across the country.

The U.S. Departments of Education and Justice, hereafter 'Departments', have issued various guidance for schools on racial discrimination and school discipline: namely, the 2014 guidance, the 2018 Dear Colleague letter, and the 2018 Questions and Answers. While each document was well-intentioned to provide some value under its respective administration, individually and collectively they did not sufficiently tackle matters central to racial discrimination in the administering of school discipline. However, with concentrated emphasis on the issues discussed herein, supplementary guidance may prove meaningful to addressing the real issues and thus remedying discriminatory discipline prevalent in American schools.

Distinctively, the 2014 guidance provided an overview of racial disparities in the administration of school discipline demonstrating that certain racial or ethnic groups were disciplined and referred

¹⁶ Appleseed OCR Comments - Nondiscriminatory Administration of School Discipline, Comment ID: ED-2021-OCR-0068-2573, [Regulations.gov](https://www.regulations.gov).

to law enforcement more than their peers¹⁷, a trend that continues still today. The document explains that discrimination in administering of school discipline results from either the student receiving different treatment based on the student’s race, termed intentional discrimination, or when the administration of discipline has the effect of discriminating, termed disparate impact. Title IV and Title VI not only prohibit schools from intentionally disciplining students differently based on race, but that schools may also may violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students based on race.¹⁸ Disparate impact results in adversely impacting certain racial groups evidenced by discipline data, where select racial groups, often Black and Brown students, are disproportionately disciplined at higher rates and more harshly than their peers.¹⁹

The Departments, through the Office for Civil Rights (OCR) and Civil Rights Division (CRT), enforce civil rights laws that prohibit discrimination in programs and activities that receive federal funding.²⁰ The Departments of Education and Justice serve a critical role in addressing educational inequities and use investigation and litigation to address disparities in treatment and violations of students’ civil rights either are caused by or are unresolved by school districts and states.²¹

We acknowledged “[t]he Departments are firmly committed to vigorously enforcing civil rights protections on behalf of all students,” as expressed in the 2018 Dear Colleague letter. Thus, the development of practical guides is imperative to ensuring that administration of school discipline is free from race, color, or national origin bias and free from unlawful discrimination in violation of Title IV and Title VI. To be effective and functional for schools to remedy discriminatory discipline, we proposed the Departments’ guidance must do the following:

1. Deliver evidenced-based, intervention-focused behavior management strategy tool kits, videos, fact sheets, and/or other resources while requiring their use in lieu of punitive systems that rely on exclusionary discipline and involvement of law enforcement;
2. Develop a system for the identification of racial discrimination in school discipline and compel school officials and their school police to self-evaluate, examine, and identify root causes of racial discrimination in school discipline;

¹⁷ U.S. Department of Education, Office of Civil Rights, Joint “Dear Colleague” Letter, Jan. 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ U.S. Department of Education, Office of Civil Rights, Protecting Students Overview, <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/protectingstudents.html>, last visited on Oct. 26, 2021.

²¹ Learning Institute Policy, Protecting Student Civil Rights: The Federal Role in School Discipline, May 1, 2019, https://learningpolicyinstitute.org/sites/default/files/product-files/Protecting_Student_Civil_Rights_20190501_PRESENTATION.pdf

3. Establish and require annual evidenced-based professional growth and training with advancing concepts for teachers, school administrators, school police, and education leadership on awareness of implicit bias and dismantling deficit thinking;
4. Require transparency and access to data collection, analysis, and measured outcomes of school discipline as an organization and as individuals for every individual involved in the student discipline process - i.e., districts, schools, teachers, school police, community police officers, and school administrators;
5. Enforce answerability by holding parties accountable and applying significant sanctions to institutions and individuals for unlawful discriminatory discipline in violation of Title IV and Title VI.

System practices in public education perpetuate racial inequality and discriminatory application of school discipline. For many schools, data show that school discipline policies and practices disproportionately impact students of color, compromising their educational outcomes. The data show Black and Brown students continue to be overrepresented and disproportionately removed from the traditional classroom environment in the administering of exclusionary discipline tools to in-school suspension (ISS), out-of-school suspension (OSS), a discipline alternative education program (DAEP), and expelled to a juvenile justice alternative education program (JJAEP). Of equal concern is where data shows Black and Brown students receive harsher discipline when compared to their peers. Recognizing that this is the current state of affairs in many schools and a reality for many students of color, it is incumbent upon the Office of the Texas Attorney General to honor guidance issued by the Biden Administration, take immediate action to elevate the dimension of school discipline applied in schools, and push for systems to advance and evolve from punitive and harmful to intervention-based and restorative.

Accordingly, rather than simply ejecting students from the traditional classroom setting and referring them to school police, meaningful, multi-dimensional, intervention-focused approaches are needed to assess the causal nature of the student behavior and provide the needed support to help guide the student back on track. Effective and evidenced-based behavior management programs are inclusive, restorative, supportive, serve to educate, and provide students an opportunity for ascension. Some of these programs include: restorative practices, trauma-informed practices and referral for services as necessary, social and emotional learning, and positive behavioral intervention and support (PBIS) strategies. The Departments' guidance will be useful to Texas schools surrounding these programs and require their adoption and implementation in lieu of exclusionary discipline and referrals to law enforcement. Resources may include tool-kits, videos, facts sheets, and other resources. Intervention-based school discipline alternatives are urgently needed, especially as students transition back into the brick- and-mortar classrooms, many still struggling to deal with the trauma of the last 18 months.

In addition to receiving harsh, punitive educational consequences at school, Black and Brown students are referred to school police for criminal penalties with greater frequency when compared

to their peers, further strengthening the school-to-prison pipeline. This zero-tolerance, penalizing process serves to further “harden” schools and criminalize routine, age-appropriate behavior with utter disregard to providing meaningful intervention. This overreliance on school police officers, not only pushes students into the criminal legal system, but manifests into emotional, psychological, and physical abuse for students. In a recently published Texas Appleseed report - [Education Transformed](#),²² the authors contend that racist actions and implicit biases that pervade our policing institutions also materialize within the walls of our public schools culminating in police misconduct and excessive force directed at our students - resulting in disastrous outcomes. With the intention of providing a safe learning environment, most school districts contract with local law enforcement departments or elect to hire their own police force with licensed peace officers or resource officers. However, these police officers have little to no training on how to effectively work with young people and frequently monitor the halls of school buildings as if patrolling within the walls of an unruly prison. [Education Transformed](#) cites several cases of maltreatment of students at the hands of school police exposing the abuse that young people endure within American schools each day.

Inspired by Mr. George Floyd’s death, there continues to be a call for needed reform requiring diversity, equity, & inclusion (DEI) and implicit bias and training for many professions. Public education is very much part of the discussion for needed training involving implicit bias.²³ In the wake of the police-led killings of Mr. Floyd and others, and the disproportionate effects of COVID-19 on the communities of color, there has been a harsh look at the reality that schools perpetuate systemic racism.²⁴ Educators are just as likely to show racial biases as any other American adult.²⁵ Unfortunately, the research is unclear as to how best to train staff to avoid racial and other biases that affect their relationships with students.²⁶ One thing is certain: without acceptance and understanding that systemic racism exists within schools, there is little hope of achieving education justice. Affirmative guidance from the federal government can help bridge that gap.

A transformational paradigm shift is needed in the world of public education, as it relates to student discipline. One that acknowledges and confronts the ingrained inequities and systemic barriers that result in further marginalizing some students. In order to achieve school discipline that is free from racial discrimination, it is essential that all levels of government require schools and educational leaders to self-evaluate, examine, identify, and dismantle core systemic barriers that oppress and to activate needed equitable reforms within their school institutions, which most certainly includes

²² ANDREW R. HAIRSTON, DR. VICKY L. SULLIVAN & DR. ELLEN STONE, TEXAS APPLESEED, EDUCATION TRANSFORMED: THE K-12 EXPERIENCE IN TEXAS DURING THE CORONAVIRUS PANDEMIC (2021), https://www.texasappleseed.org/sites/default/files/EducationTransformed_Report032921-Fin.pdf.

²³ E.g., Sarah D. Sparks, *Training Bias Out of Teachers: Research Shows Little Promise So Far*, EDUC. WK. (Nov. 20, 2020), <https://www.edweek.org/leadership/training-bias-out-of-teachers-research-shows-little-promise-so-far/2020/11>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

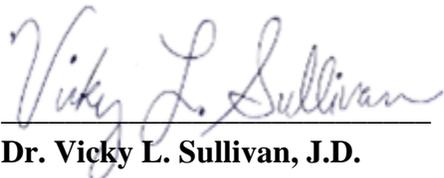
professional growth and development in the areas of DEI, implicit bias, and deficit thinking, as discussed in the prior section.

Ultimately, the usefulness of any Departments' documents can be determined by compliance from state and local governmental entities. The guidance can provide clear instruction or direction for all relevant stakeholders, consist of measured outcomes that are routinely monitored, and hold schools, school officials, and supervising agencies accountable, independently and collectively where appropriate. Not only is transparency and access to all student discipline data key to the evaluation process, but so is examining every data layer of involvement in the student discipline process.

In closing, to be effective, the documents must address the many factors that are causal to the problem of the racial disparities in the administration of student discipline; they must communicate the basis of what can be done to prevent discriminatory processes from happening in schools; they must provide specific guidance on training involving DEI, implicit bias, and deficit thinking; and they must provide school discipline programmatic remedies or approaches for schools to adopt and implement. To remedy racial discrimination in the administration of school discipline, it necessitates more than data collection and analysis; more than investigating disproportionate representation of students of color in exclusionary discipline and law enforcement referrals; more than implementing intervention-focused discipline strategies to avoid perpetuating the school-to-prison pipeline; it demands confronting the root causes of the discriminatory administration of the student discipline, attacking the systemic racial discrimination that occurs by implicit bias and deficit thinking in our schools, and valiantly activate a fundamental transformation that is free of racial discrimination. In this moment of history, such a goal should be the primary mission of the state of Texas.

Feel free to contact our office with any questions you may have as you prepare to issue an opinion on these greatly important issues.

Respectfully Submitted,



Dr. Vicky L. Sullivan, J.D.
Senior Staff Attorney,
Education Justice Project
Texas Appleseed
1609 Shoal Creek Blvd., Ste. 201
Austin, Texas 78701
vsullivan@texasappleseed.org



Andrew R. Hairston, J.D.
Director, Education Justice Project
Texas Appleseed
1609 Shoal Creek Blvd., Ste. 201
Austin, Texas 78701
(512) 473-2800
ahairston@texasappleseed.org