



February 7, 2017

VIA REGULAR AND ELECTRONIC MAIL

Superintendent William Webster
Superintendent's Office
Lewiston School Department
36 Oak Street
Lewiston, Maine 04240
superintendent@lewistonpublicschools.org

Re: Race and Disability Accommodation by Lewiston School District

Dear Superintendent Webster:

For over two years, we have been investigating issues related to race and disability in the Lewiston School Department (“the Department” or “the District”), and we are writing to share the results of that investigation. We request that the Department engage independent experts who can assist the Department in

developing and adopting reforms to address the problems we have identified. We would be willing to assist the Department in connecting with regional and national experts in these areas. We have previously and are currently representing clients in cases involving all of the problems we have identified. On an individual basis, the District has addressed some of the problems; however we believe it is important to address the issues systemically rather than only on a case-by-case basis.

Our investigation included analysis of data produced by the Department itself, as well as discussions with members of the Lewiston community. Our research has lead us to conclude that the Department is in violation of the U.S. Department of Education's regulations interpreting Title VI of the Civil Rights Act of 1964,¹ the Equal Educational Opportunities Act of 1974,² the Americans with Disabilities Act of 1990,³ the Individuals with Disabilities Education Improvement Act of 2004,⁴ and Section 504 of the Rehabilitation Act of 1973,⁵ due to the following deficiencies:

1. Students of color and students with disabilities are disproportionately subject to suspension and other exclusionary measures, such as removals pending a risk assessment and placement on shortened school days;
2. Students of color are inadequately screened for learning disabilities;

¹ 42 U.S.C. §§ 2000d-2000d-7

² 20 U.S.C. § 1701 et seq.

³ 42 U.S.C. § 12101 et seq.

⁴ 42 U.S.C. § 1400 et seq.

⁵ 29 U.S.C. § 794

3. English Language Learner students, particularly high school students, are stuck in elective-credit classes, therefore not gaining core credits required for graduation, and are subjected to unnecessary segregation;
4. Parents with limited English proficiency are denied meaningful language access to the programs and activities of the Department; and
5. Students are denied the opportunity to learn from teachers who share their cultural background.

Taken together, these problems create what amounts to a hostile learning environment for minority students in the District, with the most troubling impact being felt by students at the intersection of more than one minority category: race, ethnicity, religion, national origin, or disability. In this letter, we will discuss some of the problems identified, some of the laws implicated by these problems, and some of the solutions we propose for the District to pursue. One thing we wish to note at the outset: we spent no time or energy attempting to assess blame or fault for these deficiencies, and we have no interest in pursuing such an inquiry. Our only interest is in fixing problems for the future, not in redressing grievances from the past. To that end, we have identified you as the person with the ability and responsibility to fix these problems, whatever their origin.

A. Discussion of Problems Identified

As indicated above, we have concluded that Lewiston's school discipline and disability screening policies and practices; failure to fully integrate ELL students;

failure to communicate meaningfully with parents; and failure to hire personnel whom the students can relate to, raise significant concerns about the Department's compliance with several federal civil rights statutes and the regulations implementing these statutes. We will briefly discuss each area of concern.

I. Race, Disability, and Discipline

As you are aware, the District (and every school district in the nation) reports data to the U.S. Department of Education every two years on various subjects, including demographics of student populations; disability services; and school discipline. We undertook an analysis of the 2013-14 data—the most recent set available—for the District, and what we found was extremely troubling.

- Black students in the District were nearly three times as likely to receive an in-school suspension as their White classmates (15.08% compared to 5.19%);
- Black students were nearly twice as likely to receive an out-of school suspension as their White classmates (10.52% compared to 5.35%);
- Students with disabilities⁶ were more than three times as likely to receive an out-of-school suspension compared to students who do not have disabilities (17.02% as compared to 5.15%);
- Black students with disabilities were suspended at nearly twice the rate of White students with disabilities (26.4% compared to 15.85%)

⁶ For this data, we looked at students who have been identified by the school as qualifying for protection and services under the Individuals with Disabilities Education Act (“IDEA”).

and eight times the rate of White students without disabilities (26.4% as compared to 3.22%).

Lewiston’s approach to school discipline is not supported by research on best education practice. To the contrary, research indicates that relying on out-of-school suspensions undermines, rather than enhances, the goal of providing a safe and productive learning environment.

As interpreted by U.S. Department of Education regulations, Title VI and Section 504 prohibit government practices that have the effect—even if not the intent—of discriminating by race and/or disability. Under this “disparate impact” theory, a public school district’s disciplinary policies and practices are unlawful if they disparately harm students of color or students with disabilities, unless the policies are justified by educational necessity and there are no less discriminatory means of achieving the same goals.⁷

United States Department of Education regulations implementing these statutes prohibit practices that have a disparate impact by race or disability, whether or not there is proof of discriminatory intent. These regulations specifically prohibit school practices and procedures that have “the effect of subjecting [people] to discrimination,” whether on the basis of race or disability and, further, prohibit conduct that has “the effect of defeating or substantially impairing accomplishments of the objectives of the [school’s] program” with respect to students of a particular race or students with disabilities. 28 C.F.R. § 41.51(b)(3); 34 C.F.R. § 100.3(b)(2).

⁷ 34 C.F.R. §100.3(b)(2); 28 C.F.R. § 41.51(b)(3).

In the education context, the “disparate impact” analysis proceeds in three steps: first, ascertain whether a school district’s facially neutral practice has a disproportionate and adverse impact on children of a particular race and/or children with disabilities; second, determine whether the district can prove that practice serves an educational necessity; and third, determine whether an equally effective and less discriminatory alternative practice is available. If the practice has a disproportionate and adverse impact on children of a particular race and/or children with disabilities, the practice is unlawful if the district cannot prove educational necessity. And, even when there is educational necessity, the practice is still unlawful if there is an equally effective and less discriminatory alternative available to satisfy the educational necessity.

In Lewiston, this analysis leads to the conclusion that the district’s disciplinary practices, disability screening practices, hiring practices, and language-access procedures have the unlawful effect of discriminating by race and disability.

Lewiston School District’s use of out-of-school suspensions has a disparate impact on students of color and students with disabilities. Even though our investigation did not identify evidence of discriminatory intent, these practices still establish a prima facie case for disparate-impact discrimination under Title VI and Section 504. In addition, Lewiston School District’s disability screening practices have a disparate impact on students of color, including students with Limited English Proficiency, and the district’s failure to screen students of color for

disability services establishes a prima facie case for disparate impact discrimination under Title VI and Section 504.

When data produced by the District are analyzed by race, by disability status, and by the two combined, clear disparities, though, warrant emphasis:

- Keeping students in school is the most important way to ensure educational success and prevent involvement with the criminal justice system. But, in Lewiston, Black students are much more likely to be removed from the school environment than White students. Black students were suspended out-of-school at a rate of 10.52%, while their White classmates were suspended out of school at a rate of 5.35%, according to the most recent data.
- Even for students who are identified as qualifying for additional procedural protections under IDEA, racial disparities persist. Black students with disabilities who are identified as qualifying for IDEA were suspended at a rate of 26.4%, while their White classmates with disabilities were suspended at a rate of 15.85%. The most pronounced contrast is between Black students with disabilities—suspended at a rate of 26.4%—and White students who do not have identified disabilities—only suspended at a rate of 3.22%.

This evidence cannot be controverted by a showing that, for example, students with disabilities actually engage in a disproportionate share of behaviors punishable by suspensions, even if such evidence were available. Regulations enforcing Title VI and Section 504 prohibit unjustified practices that have the “effect” of discriminating on the basis of race or disability, even when these

practices are facially neutral and applied in a neutral manner.⁸ The only way for the District to overcome this showing is to demonstrate that out-of-school suspension in general, and for the conduct at issue, is an educational necessity, and that there is no equally or more-effective response that is less discriminatory.

The District is unlikely to be able to make such a showing. The District's frequent use of out-of-school suspensions is not educationally necessary because the relevant research supports imposing out-of-school suspensions only as a last resort. Research does not suggest that there is an educational purpose to out-of-school suspensions, which deny students access to education and make students more likely to interact with the criminal justice system, for anything less than the most serious offenses. For example, the American Psychological Association has determined that out-of-school suspension is not only ineffective as a form of discipline but, for some students, actually likely to reinforce misbehavior.⁹

A diligent literature review has found no research linking frequent out-of-school suspensions with improvements in school safety or student educational performance. This review confirms the findings of previous literature reviews by the Civil Rights Project at UCLA and by the American Psychological Association, which found no evidence that zero-tolerance disciplinary policies, as applied to mundane

⁸ 34 C.F.R. §100.3(b)(2); 28 C.F.R. § 41.51(b)(3).

⁹ American Psychological Association Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations, Vol. 63 No. 9 American Psychologist 852, 854 (2008) at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

and non-violent misbehavior, improve school safety or student performance.¹⁰ Research has shown, though, that when school officials have discretion to decide what conduct will result in what punishments, Black students will be punished more frequently and more harshly than White students for the same behavior.¹¹

Far from serving an educational necessity, frequent out-of-school suspensions actually exacerbate the problems they are meant to cure. A longitudinal study by the Council of State Governments, conducted on over one million middle-school students over a six-year period, linked suspensions to dropping out of school and becoming involved with the juvenile justice system.¹² In contrast, an Indiana study showed that schools with low-suspension rates achieved higher standardized test scores, across racial and economic lines.¹³ Both the American Psychological Association and the American Pediatrics Association have concluded that out-of-school suspensions do not work.

Even if the District's suspension practices conferred some benefit on District students—and they do not—they would still violate Title VI and Section 504 because the District can improve educational outcomes and school discipline

¹⁰ *Id.* at 853-54. *See also*: Civil Rights Project and Advancement Project, “Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline” (2000) at <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies>

¹¹ Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, Council of State Governments Justice Center (2011), at http://knowledgecenter.csg.org/drupal/system/files/Breaking_School_Rules.pdf.

¹² *Id.*

¹³ M. Karega Rausch & Russell Skiba, *Discipline, Disability, and Race: Disproportionality in Indiana Schools*, Center for Evaluation & Education Policy (2006), http://www.indiana.edu/~equity/docs/discipline_disability_race_indiana.pdf.

through practices that do not disproportionately harm students of color and students with disabilities. We are aware that the District has reduced its use of suspensions, but it still suspends students at a higher rate than the national average and it suspends students of color at a higher rate than White students. Responding to students who exhibit challenging behaviors in ways that keep them in school, in contact with teachers and other certified personnel, is a less discriminatory way of accomplishing the school's goals of a safe effective school environment.

II. ELL students and Disability Screening.

White students in the District were more than twice as likely to be identified as qualifying for protection and services under the Individuals with Disabilities Education Act compared to their Black classmates (16.87% compared to 8.38%). Disabilities are blind to race, religion, and ethnic origin. Yet, the District has identified a disproportionate number of White students as having disabilities as compared to Black students. Screening for disabilities is incredibly important, as it qualifies students for services and supports to enable them to access the general education curriculum, and it qualifies students for procedural protections against discriminatory discipline.

At the outset of our investigation, we heard from a number of sources that the District lacks adequate instruments to use for screening students with limited English proficiency for disabilities. We also learned that none of the people responsible for disability screening in the district spoke any languages other than

English. Additional concerns identified included practices that resulted in delayed evaluations and/or a failure to consider whether ELL students might also have learning disabilities that would qualify them for special education services. So, even when ELL students were eventually identified as eligible for special education services, there were concerns that they were not evaluated in all areas of suspected disability.

Both the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act require schools to affirmatively identify and evaluate students with disabilities who might need special education and related services. Assessments should be administered in the native language of the child and in the form most likely to yield information on what the child can do academically, developmentally and functionally. Based on the information we have gathered to date, we are concerned that the District is not meeting its obligations in these areas. And, without adequately identifying and evaluating a student in all areas of suspected disability, it is not possible to develop an appropriate program.

In the 2011 data, Limited-English Proficiency (“LEP”) students were the least likely to have been identified as qualifying for IDEA (only 4.85% as compared to 16.78% for White students and 13.67% for students overall). The District has improved that number. In 2013, there was a 10.21% likelihood that an LEP student qualified for IDEA—still short of the 16.87% likelihood for White students, or the 14.64% likelihood for students overall, but an improvement.

The high and disparate rates of under-identification of students of color/LEP students for IDEA, and the high and disparate rates of discipline by race and disability status are not, as far as we can tell, due to written policies that intentionally discriminate against students of color and/or students with disabilities, and we are not here alleging intentional discrimination with regard to disability screening. But, Lewiston’s practices with regard to disability screening have an undeniable discriminatory effect, and that is prohibited under federal civil rights law. These practices also appear to fall short of the Department’s affirmative “child find” obligation under the Individuals with Disabilities Education Act, which requires that all students who might have a disability and might need special education services are appropriately evaluated in all areas of suspected disability.

III. English Language Learners Stuck In Non-Credit Classes

In the course of our investigation, we heard numerous stories of high-school age students who become stuck in the English Language Learner (“ELL”) program. Students complain of being stuck in the basement for this program. They, and their parents, are concerned that they do not earn credit in the ELL program, and that they are not provided with a clear path out of the ELL program and into credit-earning classes. ELL classes only qualify a student for elective credits, therefore preventing core credits from being earned that are required for graduation. And, a number of students said that ELL teachers have suggested to them that they are

old enough to leave school if they want, even though they had not earned enough credits to graduate.

Many of these students spoke English well enough to communicate with us without an interpreter, suggesting that the ELL program has been successful at teaching, but not successful at evaluating and transitioning. And, despite their traumatic personal histories, many of these students had impressive histories of academic success. This further underscores the need to move the students out of the basement, and into credit-eligible classrooms. For some ELL students, English will be their third or fourth language, and their academic success will bring benefits to them as well as to their community, because they will be able to act as a bridge to older generations who have not had the benefit of American schooling. The Department's current practices in these areas appear to violate Title VI and the Equal Educational Opportunities Act ("EEOA"), both of which prohibit discrimination, including unnecessary segregation, on the basis of race and national origin. Both have been interpreted to require schools to take affirmative steps to overcome language barriers that impede equal participation by students in their educational programs.¹⁴

IV. Language Access For Parents And Caregivers

During our investigation, we repeatedly asked parents, caregivers, and members of the immigrant communities whether they had brought their concerns

¹⁴ See: Department of Justice and Office for Civil Rights, Joint Dear Colleague Letter - English Learner Students and Limited English Proficient Parents (January 7, 2015) at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>

directly to the school or District administration. In response, we were told that there are substantial language barriers both at the District office and at individual school administration offices—*e.g.* that very few people who regularly work at the District office or in the school administrative offices speak Somali, and that almost none of the staff know how to use the interpreter phone service.

We are aware that, as part of the consent decree with the U.S. Department of Justice in 2007, the District agreed to “take appropriate action to overcome barriers that impede equal participation by its students in its instructional programs.” While that consent decree has been dissolved, we hope that the District’s commitment to overcoming barriers that impede equal participation by immigrant students has not. Parental involvement is an important key for academic success, but if parents cannot communicate with teachers, principals, and District administrators about academic and discipline concerns, and if they do not have access to the same information provided to English speaking parents about the programs and activities of the Department, students are not able to participate on equal footing with their peers. Providing language access for students and parents is not just the right thing to do - it is required under Title VI and the EEOA.

V. Teachers, Students, and Commonality

One of the most common, and most troubling, concerns we heard from students and recent graduates from the immigrant community was that it was possible to start in elementary school in the District, attend school all the way

through graduation from high school, and never have a teacher of color. According to the 2014 OCR data, nearly 30% of students in the District are Black. Not one of the students we spoke to had ever had a Black teacher in the District schools. None of the students knew of a Somali teacher, or a teacher who comes from a refugee family, anywhere in the District.

This makes a difference to the students. It prevents them from feeling integrated in the school system. And, many of these students have firsthand experiences with severe trauma: witnessing killings, fearing for their lives and the lives of their families, leaving home and travelling thousands of miles. It would be extremely helpful to these students to have a teacher or two over the course of their career who has some personal understanding of what that means. Even for students who have little or no firsthand experience with such trauma (because they were born in Lewiston, or they came to Lewiston when they were very young), there is the experience of being raised in a family that experienced such trauma. Not having teachers, or any equivalent person, in their school environment who understands what that means, in a direct and personal way, denies these students a necessary component for academic success. Some students will succeed anyway, but by denying students of African descent any opportunity to learn from teachers who share their cultural background, the District is undermining its own mission.

B. Relief Requested.

The problems that we have identified are substantial, and we do not anticipate that they will be solved overnight. But, there are a number of immediate steps that we believe the Department needs to take in order to begin the process of alleviating the hostile school environment in which many students of color now find themselves. In working to address these concerns, we believe it is imperative that the Department recognize that these are difficult problems, and that it signal this recognition by engaging regional and national experts with proven success in working with school districts to address them.

1. Launch an aggressive recruitment campaign for teachers, support staff, and administrators who share the culture and ethnicity of 1/3 of your student body. It is not unreasonable for a student in your school system to expect that at some point between kindergarten and twelfth grade they will have a teacher who looks like them, speaks their same language, and understand on a personal level what they and their families went through to get to and thrive in America. Given the ethnicity of the student body, and the community, it is difficult to justify the absence of teachers, staff members, and administrators of color across the District.
2. Ensure that qualified interpreters are available to speak to parents at school offices and at the District office, and ensure that staff members who interact with members of the public are all trained to competently use the interpreter phone service. Having parents involved in a student's academic life is a key to

success, but if parents are unable to get information from school officials because of language barriers, those parents will not be able to meaningfully participate. And, when students are accused of breaking school rules, parents need to be able to communicate with school officials to understand what happened.

3. Develop a concrete set of strategies, objectives, and timelines to eliminate race and disability disparities in school discipline. A necessary component of this is active ongoing monitoring of these disparities, which will allow the District to intervene with particular schools or school officials who are responsible for the disparities. Right now, the only available data is two years old. It is clear enough to reveal a problem, but not clear enough to diagnose its cause. The District needs to involve members of the community in this monitoring, as they have the highest stake in ensuring that the District administers all its practices, including the disciplining of students, in manner that does not illegally discriminate.
4. Invest in disability-screening technology for Somali and other non-native communities. Federal disability protections apply to all students, whatever their first language may be. The District is not satisfying its responsibility under those laws if it does not adequately and appropriately screen non-English speakers for disabilities. In addition to testing material, the District should hire screeners with linguistic and cultural familiarity with the immigrant community. The District must also take steps to ensure that all

students suspected of having a disability receive a comprehensive evaluation in all areas of suspected disability and that the procedures are not racially or culturally discriminatory. Disability does not discriminate and screening and assessment for people with disabilities should not either.

5. Upgrade the ELL program for high school-age students to ensure that students are not marginalized, students do not become stuck in non-credit classes, and students are not encouraged to leave school without a degree. Environmental cues send a strong message, and when ELL students are kept isolated in the basement of the high school, they understand it to mean that they are not a real part of the community. Nobody believes that learning English as an older student is easy, but it is precisely because it is so challenging that the District needs to pay extra attention to it.

The District has received some well-deserved positive attention from the success of the boys' soccer team in the state championships in 2015. Making the changes presented in this letter will show Maine, and the entire country, that the soccer team's success is only one marker of the success that Lewiston as a city has had in integrating its refugee community, and the success that the refugee community has had in improving the community in which they settled. There are many people and groups in Lewiston who want to work with you to bring about these changes, and we look forward to working with you as well.

Respectfully,

/s/ Zachary L. Heiden
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American Civil Liberties Union
of Maine Foundation

/s/ Courtney Beer
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