

Office for Civil Rights, Atlanta Office
U.S. Department of Education
61 Forsyth St. SW, Suite 19T70
Atlanta, GA 30303-8927
Via email to OCR.Atlanta@ed.gov

September 15, 2017

Re: Racially discriminatory policies and practices of the Lee County (Fla.) School District

To the OCR Atlanta Office:

In the Lee County (Fla.) School District, students of color are drastically overrepresented in the school-to-prison pipeline as a result of the school district's current disciplinary policies. Compounding this harm, the School Board has refused to redraw its racially discriminatory election districts, denying parents of color the opportunity to elect a candidate of their choice to the School Board to address the disproportionate disciplinary and academic outcomes their children face.

Students of color now make up the fast-growing majority of the school district and are:

- more likely than white students to be suspended or expelled,
- more likely to be referred to law enforcement for misbehavior in school,
- more likely to be removed from the classroom and placed in alternative education programs,
- more likely to be designated as having a disability,
- more likely to be retained or drop out,
- less likely to be enrolled in gifted programs, and
- less likely to graduate.

Not surprisingly, racial achievement gaps in Lee County lag behind the state average in every category for which data is available. Yet when confronted with this reality and asked to adopt policy reforms, the school district has been non-responsive. Never in the history of the School Board has a candidate of color been able to win election to the Board, an exclusionary pattern that dates to Reconstruction.

To address the ongoing pattern of racial discrimination and inequitable practices in the Lee County School District, and in response to the School Board's recent decision to deny even incremental relief to students of color and their families by improving their representation on the Board, the Lee County Branch of the NAACP ("Lee County NAACP") files this complaint.

I. Jurisdictional and administrative facts

A. Complainant

The Lee County NAACP brings this complaint on behalf of its members, as well as the students of color and their families who continue to be subjected to racial discrimination and inequitable practices in the public school system and at the ballot box. The NAACP is one of the nation's oldest and largest grassroots civil rights organizations. Both it and its branch in Lee County are nonpartisan, nonprofit membership organizations whose core mission includes advancing and defending the rights of African-American students and families to be free from discrimination in education and in elections.

B. Timeliness

This complaint is timely filed within 180 days of the School Board's March 21, 2017 decision to abandon the redistricting process it had begun to provide better representation on the Board for families of color at the request of the Lee County NAACP and its community partners. That decision represents the most recent discriminatory action taken by the Board in its ongoing pattern of racial discrimination and inequitable practices as documented in this complaint.

C. Federal financial assistance

The Lee County School District has been a recipient of federal funding for years and currently receives 9% of its total revenue from the federal government, according to its most recent annual report.¹ Thus, the school district and the School Board that administers the district are required to comply with Title VI of the Civil Rights Act.

D. Exhaustion of administrative remedies

Complainant appeared before the School Board multiple times in each of 2014, 2015, 2016, and 2017 to request that the Board address racial discrimination and inequity in the school system and in school board elections. In 2015 and 2017, Complainant retained counsel to draft and present a redistricting proposal to the School Board, and in 2016 that redistricting proposal won the unanimous support of the School Board's Equity and Diversity Advisory Committee. Nonetheless, the School Board voted on March 21, 2017 to abandon the redistricting effort with no public debate, and the Board has been unresponsive to Complainant's request that the School Board reconsider its March 21 vote.

E. No other pending proceedings

There are no other pending actions pertaining to this matter. Complainant has not filed a lawsuit raising its claims in state or federal court, nor are its claims being investigated by another federal, state, or local agency.

II. Background

¹ 2014-15 Annual Report, Lee County School District, http://www.leeschools.net/_cache/files/0/8/081a2ee7-0465-4a61-ae14-a9f65c107de4/1C075340325CD5E7DEE9BFB4ADC09E42.annual-report-2014-15---final.pdf (hereinafter "2014-15 Annual Report").

A. School district demographics and population growth

Between 2010 and 2016, Lee County’s population grew by 16.7%.² As the county grows, it is quickly becoming more diverse, dropping from 72% non-Hispanic white as of the 2010 Census to 69.5% non-Hispanic white as of the 2015 American Community Survey.³

Students of color now make up more than 57% of the student population in the public school system—a system in which only 75% of students graduate and 70% of students are now participating in the Free and Reduced Lunch Program, a 20% increase since the 2007-08 school year.⁴ Schools serving concentrations of minority population from Dunbar to Lehigh Acres are particularly struggling: in 2015-16, Lehigh Senior High was downgraded from a B to a C school, Dunbar High was downgraded from a C to a D school, and East Lee County High remained a D school.⁵ The current racial and ethnic composition of the school system is 42.6% white, 35.9% Hispanic, 14.6% black, 4.9% multiracial, 1.7% Asian, and 0.2% other races.⁶

B. Academic and disciplinary outcomes for Lee County students

1. Academic outcomes

The school district disproportionately holds back (or “retains”) black and Hispanic students. As of 2013, the most recent year for which retention data is available, although Hispanic students made up 35.3% of the total student population, they made up 40.7% of students who were held back a year in school.⁷ For black students, who made up 15% of the total student population, the retention rate was 21.5%. For white students, who made up 45.1% of the total student population, the retention rate was 33.5%.⁸

Conversely, black and Hispanic students are underrepresented in gifted and advanced placement enrollment⁹:

Race/Ethnicity	% Total Population	% Gifted Enrollment	% AP/IB Enrollment
White	45.1%	66.6%	57.2%
Hispanic	35.3%	20%	27%
Black	15%	5.7%	9%

² See 2010 Census & 2016 Census Projections, Census Bureau, <https://www.census.gov/quickfacts/fact/table/leecountyflorida/POP010210#viewtop>.

³ 2011-2015 ACS 5-Year Estimates, Census Bureau, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

⁴ 2014-15 Annual Report.

⁵ School Report Cards, Lee County School District, <http://www.leeschools.net/school-performance-grades-by-school>.

⁶ 2014-15 Annual Report.

⁷ See Civil Rights Data Collection, U.S. Department of Education (2013) (hereinafter “CRDC 2013”), <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2013>.

⁸ *Id.*

⁹ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2102>.

According to state data, the school district also lags behind the state average in closing the racial achievement gap for black and Hispanic students, as measured by the percentage point gap in those testing at level 3 or above on standardized tests in English language arts, mathematics, science, and social studies¹⁰:

Table 2: Florida and Lee County Achievement Gaps								
	White-Black Achievement Gap*				White-Hispanic Achievement Gap			
	English	Math	Science	Soc. Stud.	English	Math	Science	Soc. Stud.
State	29	31	32	28	15	16	18	16
County	30	31	34	30	20	18	22	17

* in percentage points

The district’s black and Hispanic students also drop out of school at higher rates than white students. In the 2014-15 school year, the single-year dropout rate was 0.8% for white students, 1.1% for black students, and 1.1% for Hispanic students.¹¹ In that single year, although black students made up 14.78% of the total student population, they made up 18.9% of dropouts.¹² Hispanic students, who made up 34.67% of the total student population, made up 39.8% of dropouts.¹³ White students, who made up 43.95% of the total student population, made up 39.8% of dropouts.¹⁴

Relatedly, the district’s white students graduate at higher rates than its black and Hispanic students, who disproportionately drop out, leave with certificates of completion, or remain enrolled while their peers receive diplomas¹⁵:

Table 3: Program Completion Rates				
	Graduation Rate	% Cohort Dropped Out	% Certificate of Completion	% Remain Enrolled
White	79.5%	4.8%	2.4%	11%
Hispanic	70.7%	6.5%	5.7%	14.2%
Black	62.9%	5.7%	6.8%	19%

2. Disciplinary outcomes

¹⁰ See PK-20 Education Information Portal, Florida Department of Education, 2014-15 (hereinafter “FLDOE 2014-15”), <https://edstats.fldoe.org/SASPortal/main.do>. The information referenced in this complaint is available in this interactive database by clicking on “PK-12 Public Schools,” then selecting the appropriate topic under the “Interactive Reports” heading.

¹¹ Florida’s Single-Year Dropout Rate 2014-15, Florida Department of Education, <http://www.fldoe.org/core/fileparse.php/7584/urlt/DropoutRatesSingle1415.pdf>.

¹² Compare *id.* with 2013-14 Annual Report, Lee County School District, http://www.leeschools.net/_cache/files/0/8/081a2ee7-0465-4a61-ae14-a9f65c107de4/1C075340325CD5E7DEE9BFB4ADC09E42.annual-report-2014-15---final.pdf (hereinafter “2013-14 Annual Report”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See FLDOE 2014-15.

Even in a state with the highest secondary school suspension rate in the nation,¹⁶ which disproportionately burdens black students statewide,¹⁷ Lee County stands out for its disproportionate discipline of black and multiracial students. Of all students who received in-school suspension in 2013, the most recent year for which suspension data by race are available, 30.2% were black and 3.8% were multiracial.¹⁸ Similarly, of all students who received out-of-school suspension, 35.2% were black and 4.4% were multiracial.¹⁹ None of the students expelled that year were white: 50% were black, 25% were Hispanic, and 25% were multiracial.²⁰ This impact is summarized against those students' respective proportions of the total student population below²¹:

Table 4: School Exclusion Rates				
Race/Ethnicity	% Total Population	% In-School Suspension	% Out-of-School Suspension	% Expelled
White	45.1%	33.5%	32.7%	0
Black	15%	30.2%	35.2%	50%
Multiracial	2.5%	3.8%	4.4%	25%

The school district's disciplinary and appeal procedures put students of color at a disadvantage. The suspension procedures currently in place nearly ensure that students will not appeal, and those who do are almost certain to lose. School district policies give school principals and their designees the power to recommend suspension or expulsion for a wide range of infractions. Once a recommendation is made, the School Board sets the date, time, and location of a formal disciplinary hearing.²²

From this moment, a substantial burden of defending the student is placed onto the student and his parents. This burden weighs more heavily on families that cannot afford an attorney, as none is provided. In order to preserve the student's rights, the parents must serve a written request for a due process hearing on the Board attorney within 21 days of receiving notice of the allegations. Failure to request this hearing within 21 days waives the student's right to dispute any facts at the formal hearing in front of the School Board. In these situations, the formal hearing before the Board functions as a sentencing hearing. The principal's allegations against the student are required to be accepted as fact by the Board, and the student and his parents are prohibited from speaking about the facts surrounding the allegation. Instead, the parents are restricted to speaking only about the appropriateness of the expulsion for no more

¹⁶ A 2015 study showed that Florida had the highest suspension rate in the nation with 19% of secondary school students suspended in the 2011-12 school year. *Are We Closing the School Discipline Gap?*, Center for Civil Rights Remedies 24 (Feb. 2015), <http://www.schooldisciplinedata.org/ccrr/index.php>.

¹⁷ A separate 2015 study found that in Florida, black students made up 23% of the public school population but 39% of those suspended. Edward J. Smith & Shaun R. Harper, *Disproportionate Impact of K-12 School Suspension & Expulsion on Black Students in Southern States* 16 (2015), http://www.gse.upenn.edu/equity/sites/gse.upenn.edu/equity/files/publications/Smith_Harper_Report.pdf.

¹⁸ Civil Rights Data Collection, U.S. Department of Education (2013-14) (hereinafter "CRDC 2013-14"), <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2269>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See School Board Policy 1.13, Lee County School District, http://www.leeschools.net/_cache/files/9/5/95aad5a7-ac41-49f8-beb8-1507597c2f8c/4AE357D2DD4C50732361DD2741757790.p1.13-student-disciplinary-hearings-before-school-board.pdf.

than 10 minutes. If a student appeals the final order of the School Board, he may not appeal the decision to impose discipline, only the severity of the discipline imposed.

Whether discipline takes the form of suspension or expulsion, the destructive consequences associated with school exclusion are well documented, including:

- Accelerating the course of possible delinquency by leaving youth with little parental supervision and more opportunities to socialize with deviant peers;
- Increasing the likelihood of dangerous conduct, such as engaging in physical fights, possessing weapons, and using alcohol, tobacco, and drugs;
- Generating feelings of alienation and failure that lead excluded students to unemployment, gangs, and crime;
- Leading to isolation, suicidal ideation, and substance abuse;
- Intensifying conflicts with adults;
- Creating a self-fulfilling belief that a student is incapable of abiding by schools' social and behavioral codes;
- Decreasing motivation to learn;
- Worsening academic performance (including failing grades and retention); and
- Increasing the likelihood of dropping out and not graduating.²³

Short of total exclusion from the education system, the school district also disproportionately places black students in alternative education programs or identifies them as having disabilities. Of the 789 students the school district diverted to alternative education in 2014-15, 36.2% were black, despite black students accounting for only 14.78% of the total student population.²⁴ And in 2013, black students made up 32.7% of students identified as having disabilities.²⁵

²³ See New York Civil Liberties Union, Annenberg Institute For School Reform & Make The Road New York, *Safety With Dignity: Alternatives To The Over-Policing Of Schools 9-11* (July 2009), available at http://www.annenberginstitute.org/pdf/Safety_Report.pdf; Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 Fam. Ct. Rev. 638, 640 (2007); Jane Conoley, et. al, American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* (2006); Action for Children North Carolina (formerly the North Carolina Child Advocacy Institute) *One Out of Ten: The Growing Suspension Crisis in North Carolina* 5 (2005); Advancement Project and Harvard Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, 9-11 (2000); Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 Wash. U. L. Q. 65, 82-83 (2003); Advancement Project, *Out-of-School Suspension and Expulsion—Derailed: The Schoolhouse to Jailhouse Track 7* (2003); Building Blocks for Youth, *Unintended Consequences: The Impact of Zero Tolerance and Other Exclusionary Policies on Kentucky Youth*, 8-9 (2003); NAACP Legal Defense And Education Fund, Inc., *Dismantling The School-To-Prison Pipeline 2-3*, available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf; American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112(5) Pediatrics 1206-07 (2003); Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 Am. U. L. Rev. 1039, 1069-70 (2001); Southern Poverty Law Center, *Alternatives to Out-of-School Suspension*.

²⁴ FLDOE 2014-15; 2013-14 Annual Report.

²⁵ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2126>.

The school district's disproportionate discipline of black students extends into childhood contact with the criminal justice system. In the 2013-14 school year, black students accounted for 33% of the district's referrals to law enforcement, and multiracial students accounted for an additional 7.7%.²⁶ For black and multiracial students identified as having disabilities, the numbers of referrals to law enforcement were even higher.²⁷ And among students with disabilities who were involved in a school-related arrest, 54.7% were black.²⁸

3. *Inadequate or nonexistent response from school district*

Complainant and its members have previously attempted to get the school district to make policy changes to address the academic and disciplinary disparities in the public schools. These attempts have been met with an inadequate or nonexistent response from the school district.

Members of Complainant's Education Committee have conducted field visits to public schools to observe and document day-to-day operations, and attended a series of meetings with the school district superintendent to report problems related to racial disparities and propose solutions to mitigate them. Complainant and its members have also regularly brought racial disparities to the school district administration's attention through participation in the School Board's Equity and Diversity Advisory Committee.

For example, Dr. Shirley Chapman, an NAACP Education Committee member and longtime educator in the public schools, conducted visits to two alternative learning centers in Lee County, one in the heavily African-American community of Dunbar and one elsewhere in the county. Dr. Chapman observed stark differences in the way the center in Dunbar was run, with students permitted to misbehave, sleep during class, and not receiving proper academic instruction. Dr. Chapman then spoke to teachers at some of the students' original schools, who told her that the students were routinely sent back from alternative education after 45 days with exemplary grades but then failing standard tests when they returned to their original schools because they had not received adequate academic instruction while in the alternative education center. When she asked one principal about the behavior being allowed at the Dunbar center, she was told that the disparate treatment the black students were receiving was their own fault because they were simply "a product of their environment," as if students from Dunbar did not possess the same potential to learn and grow as students growing up elsewhere in the county, and were therefore not worth the same educational investment.

Dr. Chapman reported this observation and others to Superintendent Greg Adkins, and the lack of response she has received reinforces that in practice the school district's expectations are different for children of color than for white children. Dr. Chapman and NAACP Education Committee member Stephanie House have requested and attended a series of meetings with the superintendent, and these meetings have fallen into a frustrating pattern of non-action: First, Dr. Chapman and Ms. House report specific racial disparities they have personally observed and relay problems they have heard about from parents and educators of color, identifying the

²⁶ CRDC 2013-14, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2269>.

²⁷ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2130>.

²⁸ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2195>.

educators and schools involved. Second, the superintendent promises them he will look into the issue. Then, at the next meeting, the superintendent is not able to identify any investigation or other steps that have been taken in response to the problem. The specific, actionable concerns of Complainant, parents, educators, and other community members of color have consistently been ignored by the school district administration.

C. Exclusion from School Board

Despite the fact that the public school system is now primarily made up of students of color, no candidate of color has ever been able to win election to the School Board, dating to Reconstruction more than 130 years ago. In every attempt, every candidate of color has been defeated by a white candidate running in a majority-white district. Many of these candidates of color were highly qualified and had the support of voters of color.

In November 2014, as a result of pressure from the Lee County NAACP and other community groups to diversify the all-white School Board, Lee County voters passed a countywide referendum to expand the School Board from five to seven members, two of whom would continue to run at-large and five of whom would run from single-member districts. However, the all-white School Board then refused to redraw its election district lines, instead holding over the racially problematic residency district boundaries used in the previous at-large election system. Those residency district boundaries divided communities of interest, most notably an African-American and Hispanic community of interest encompassing Dunbar, Tice, and parts of Fort Myers and Lehigh Acres, where families from similar socioeconomic backgrounds send their children to school together and where those schools are failing.

In response, the NAACP retained counsel to draw an alternative election district map to propose to the School Board. The proposed map kept the Dunbar-Tice-Ft. Myers-Lehigh Acres community of interest intact, while complying with federal law and traditional districting criteria. The NAACP first presented its proposal to the Board during a meeting on September 22, 2015, but after a two-month campaign by the NAACP, the School Board voted in November 2015 to wait until 2017 to redistrict.

On April 14, 2016, the School Board's Equity and Diversity Advisory Committee unanimously voted to recommend that the School Board adopt the NAACP's proposed map in 2017 to improve representation on the Board for families of color. In the 2016 elections, several candidates running for School Board campaigned on a platform that included a commitment to redistricting to improve representation on the Board for voters of color.

On February 21, 2017, the NAACP went back before the School Board during a regular meeting to present its proposal. In that meeting and subsequent School Board meetings on March 7 and March 21, 2017, all of which were well attended, all but one member of the public who spoke on the redistricting proposal called for the Board to move forward with redistricting to improve representation for voters of color. Board members also acknowledged the need for redistricting to offset persistent white bloc voting that prevents families of color from electing a candidate of their choice to the Board. However, Chairwoman Mary Fischer said the Board was "already doing a lot to address equity," despite the continually dismal statistics to the contrary,

and recommended that the Board wait to redistrict. Following the February 21, 2017 meeting, at the Board’s request, the NAACP provided the Board with academic research showing that diversifying school board representation improves educational and disciplinary outcomes for students of color. Nonetheless, in its meeting on March 21, 2017, without any public debate from the Board members, the all-white School Board voted again to abandon the redistricting effort and retain the discriminatory district lines for use in the 2018 elections. The Board has been non-responsive to requests to reconsider its vote.

III. Violations of federal law

Section VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground or race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁹ Under federal regulations, no recipient of such federal funding may, “on ground of race, color, or national origin”:

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

...

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; [or]

...

(vi) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.³⁰

In providing services or programs under such federal funding, a recipient also may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”³¹

Affirmative action is required “to overcome the effects of prior discrimination” where “the recipient has previously discriminated against persons on the ground of race, color, or national origin.”³² And affirmative action is permitted “[e]ven in the absence of such prior

²⁹ 42 U.S.C. § 2000d; *see also* 34 CFR § 100.3(a).

³⁰ *Id.* § 100.3(b)(1).

³¹ *Id.* § 100.3(b)(2).

³² *Id.* § 100.3(b)(6).

discrimination . . . to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”³³

By acting with discriminatory intent and by taking actions to perpetuate and further discriminatory impacts, the Lee County School District has violated Title VI.

A. Discriminatory intent

The evidence appropriate to an analysis of intentional discrimination by a public body such as a school board was established by the U.S. Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corporation*.³⁴ These factors are:

- Whether the challenged action bears more heavily on one race than another;
- The historical background of the decision, “particularly if it reveals a series of official actions taken for invidious purposes”;
- The specific sequence of events leading up to the challenged decision;
- Whether there were procedural or substantive departures from those normally followed by the decision maker which also might afford evidence that improper purposes are playing a role; and
- Whether there were contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports that indicate their purpose.³⁵

In Lee County, the School Board’s refusal to improve representation on the Board for voters of color by redrawing its election districts bears more heavily on people of color because they have been excluded from the Board for its entire 130-year history. Without exception, the Board has historically held all of its elections in majority-white districts, dating to Reconstruction, and has twice in the past three years rejected well-supported community requests to draw a minority opportunity-to-elect district where it is possible to draw one, revealing an insidious underlying purpose.

The sequence of events leading up to the Board’s latest decision on March 21, 2017 shows that the community supported adoption of a minority opportunity-to-elect district. Lee County voters overwhelmingly approved reconfiguring the Board in a 2014 countywide referendum with the stated goal of diversifying representation on the Board. After the all-white Board in response refused to draw new districts in 2015, a racially diverse coalition of community groups and individual residents expressed its support of the NAACP’s proposal and lobbied the Board to complete the redistricting process in 2017. Further, academic research the Board requested showed that diversifying the Board would improve academic and disciplinary outcomes for students of color. The Board was advised by redistricting experts that drawing a minority opportunity-to-elect district was legal under the Voting Rights Act and Supreme Court precedent. Yet Board members rejected the proposal anyway.

³³ *Id.*

³⁴ 429 U.S. 252 (1977).

³⁵ 429 U.S. at 265-68.

The Board departed from its normal procedures in several ways. First, the Board procedurally delayed its vote from March 7 to March 21, 2017. During those two weeks, the school board attorney made recommendations to Board members privately rather than in a public meeting, as he had committed to doing during the Board’s February 21, 2017 meeting. When the proposal came up for a vote on March 21, the Board did not have any public debate on the proposal before voting not to move forward with redistricting in 2017. The Board did so in defiance of the unanimous recommendation of its own Equity and Diversity Advisory Committee, which is highly unusual.

During February and March 2017, several Board members made contemporaneous statements in their public meetings and in the *Fort Myers News-Press* stating that they did not want to consider the racial disparities that had been brought to their attention, and that families of color could wait four or five more years for representation on the Board. At the Board’s February 21 meeting, Board Chair Mary Fischer acknowledged that several qualified candidates of color had run for the Board in 2016 and lost, and that the Board had been made aware of racial equity issues in the school system. Yet she said voters of color should wait until after the 2020 Census for the opportunity to elect a candidate of their choice to the Board. Other Board members echoed this sentiment at the same meeting and in a March 19 editorial in the *News-Press*, in which Chair Fischer referenced the 2014 referendum to diversify the Board and concluded that “eventually that is going to happen.” Board Member Jane Kuckel—who defeated an African-American longtime school principal in the 2016 primary election to win her seat on the Board—ignored evidence of racial disparities in the school system and on the Board when she concurred: “We don’t want to move forward if there is no reason to redraw the boundaries at this point.”³⁶ On February 21, Board member Steven Teuber publicly described his own election district as “racial gerrymandering,” going on to explain that as a Board member he feels less able to effectively represent the heavily black, urban Dunbar community south of the Caloosahatchee River that after the 2010 Census was drawn into his overwhelmingly white, rural district north of the river. Nonetheless, when asked by the *News-Press* about redistricting in March, he responded, “We don’t have to do it now.”

Taken together, these factors demonstrate that the School Board was motivated by an invidious purpose and intentionally discriminated against residents of color on March 21, 2017 when it rejected the community effort to draw a minority opportunity-to-elect district that would improve representation on the Board for the families of color who make up the majority of the public school system.

B. Discriminatory impact

The non-discrimination requirements of Title VI ensure equal access to educational opportunity for all students. In *Alexander v. Sandoval*, the Supreme Court held that no private cause of action exists to prohibit disparate impact under Title VI, but various agencies continue to maintain disparate impact regulations that are presumptively valid.³⁷ Consequently, this prohibition against disparate impact and the resulting discriminatory effect of a facially neutral

³⁶ Editorial: *Lee County school redistricting dilemma*, Fort Myers News-Press (Mar. 17, 2017), <http://www.news-press.com/story/opinion/2017/03/17/redistricting-dilemma/99259956>.

³⁷ *Alexander v. Sandoval*, 532 U.S. 275, 289-90 (2001).

policy still binds school districts and is still enforceable by the Department of Education's Office of Civil Rights.³⁸

Under a disparate impact theory, a complainant filing a Title VI administrative complaint with the Office of Civil Rights bears the initial burden of establishing a *prima facie* case that a facially neutral practice has a racially disproportionate effect.³⁹ Following the complainant showing statistical evidence to illustrate how a policy has disproportionately harmed or excluded minorities, the burden shifts to the defendant to establish that the policy is justified by an educational necessity.⁴⁰ A complainant may counter and eventually prevail over the defendant's argument by demonstrating that an equally effective alternative practice would result in less racial disproportionality or proving that the legitimate practices are a pretext for discrimination.⁴¹

1. *The school district's disciplinary policies and procedures have a disparate impact on students of color.*

As detailed in Part II(B) above, statistical data from the National Center for Education Statistics, as reported by the school district itself, clearly demonstrate the disproportionate outcomes for students of color that place them in the school-to-prison pipeline as a result of the district's current disciplinary policies and procedures:

- **More school-based discipline:** Although black students represent just 15% of the school district population, they represent 30% of in-school suspensions, 35% of out-of-school suspensions, and 50% of expulsions. By contrast, white students represent 45.1% of the district population but only 34% of in-school suspensions, 33% of out-of-school suspensions, and zero percent of expulsions.⁴²
- **More criminal justice system contact:** Black students represent 33% of referrals to law enforcement. Multiracial students, who make up just 2.5% of the student population, represent an additional 7.7% of referrals to law enforcement.⁴³
- **More disability designation:** Black students account for more than 30% of the students the school district has identified as having disabilities.⁴⁴ Black and multiracial students who are identified as having disabilities are referred to law enforcement at an even higher rate than black and multiracial students in general.⁴⁵ Among students with disabilities who are involved in a school-related arrest, more than half are black.⁴⁶
- **More alternative education referrals:** Black students account for 36% of students taken out of their classrooms and referred to alternative education programs.⁴⁷

³⁸ See 34 C.F.R. § 100.3(b)(2).

³⁹ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

⁴⁰ *Id.*

⁴¹ *Id.*; see, e.g., *Ga. State Conf. of Branches of NAACP v. State of Ga.*, 775 F.2d 1403 (11th Cir. 1985).

⁴² CRDC 2013-14, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2269>.

⁴³ *Id.*

⁴⁴ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2126>.

⁴⁵ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2130>.

⁴⁶ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2195>.

⁴⁷ FLDOE 2014-15; 2013-14 Annual Report.

This disproportionate disciplinary involvement for students of color and resulting time out of the mainstream classroom also contributes to the disparate academic outcomes for students of color in Lee County. Again, as detailed above, statistical data reported by the state and school district demonstrate the disproportionate racial impact of current school district policies:

- **Higher retention and dropout rates:** Black students, who make up 15% of the school district population, represent 22% of students who are held back a year in school and 18.9% of students who drop out in a single year. Hispanic students make up 35% of the student population but 40% of students who are held back and 40% of single-year dropouts. By contrast, white students, who make up 45% of the school district population, represent just 34% of students who are held back and 40% of single-year dropouts.⁴⁸
- **Lower graduation rates:** Black students graduate at a 63% rate, compared to a 71% rate for Hispanic students and an 80% rate for white students.⁴⁹
- **Lower gifted enrollment:** Black students represent just 6% of students who are enrolled in gifted programs. Hispanic students represent 20%. White students represent 67%.⁵⁰
- **Increased racial achievement gap:** The achievement gap between black and white students in Lee County is 30 percentage points or more in all subject areas. For Hispanic students, it's at least 17 percentage points in all subject areas. The district lags behind the state average in all categories.⁵¹

Given the well documented destructive consequences associated with school exclusion and the negative disciplinary and academic impacts on students of color that have followed implementation of such exclusionary policies in Lee County, it is clear that black students in the school district suffer immediate and tangible harms from being disproportionately suspended and disciplined more harshly than their white peers.

Disciplinary and related policies that result in such staggering disparities across the board—in rates of suspension, expulsion, criminal justice referral, disability designation, alternative education placement, retention, dropout and graduation, and gifted enrollment, and in racial achievement gaps that are more severe than the state average in every category—cannot plausibly be justified by any educational necessity. This is particularly true in a school system where students of color account for the rapidly growing majority of the student population. To the contrary, in a school district where the majority of students are currently suffering devastating disparities in academic and disciplinary outcomes as a result of the color of their skin, educational necessity demands the swift adoption of less discriminatory alternative policies. Yet as described above, despite the good-faith efforts of Complainant, educators, parents, and other community members of color to achieve such policy changes, the school district's response has been by turns inadequate or nonexistent.

⁴⁸ CRDC 2013, <https://ocrdata.ed.gov/flex/Reports.aspx?type=district>. *Compare FLDOE 2014-15 with 2013-14 Annual Report.*

⁴⁹ FLDOE 2014-15.

⁵⁰ CRDC 2013, <https://ocrdata.ed.gov/Page?t=d&eid=31624&syk=7&pid=2008>.

⁵¹ FLDOE 2014-15.

2. *The school district's administrative policies and procedures have a disparate impact on students of color.*

Under the governance of the School Board, the school district has refused to reform election districts under its control that systematically exclude candidates of color from service on the School Board. No person of color has been elected to the School Board in its 130-year history, and members of the Board have publicly acknowledged that the current election district lines prevent candidates of color from being elected because of white bloc voting in Lee County.

Certainly no educational necessity justifies excluding candidates of color, including former longtime educators and school administrators of color who have unsuccessfully run for office, from serving on the School Board. And no educational necessity justifies retaining the current discriminatory election district lines, which were originally drawn for use in county commission elections and are in no way tied to school assignment or student performance.

Equipped with this information, and acknowledging the ongoing academic and disciplinary racial disparities in the school district, the School Board has nonetheless repeatedly chosen to retain its current discriminatory election district lines. The Board did so even when presented with a less discriminatory alternative plan drawn by redistricting experts that would improve representation for communities of interest in Lee County and provide voters of color an opportunity to elect their candidates of choice to the School Board. The Board failed to implement this less discriminatory alternative when it was first presented in 2015, following the 2014 referendum in which voters countywide demanded that the School Board be redistricted. The Board failed again in 2017 to implement a less discriminatory alternative plan, despite expressly requesting and receiving information that tied student outcomes to diversity of school board representation. Instead, members of the School Board stated publicly that students of color and their families should have to wait a few more years for representation.

IV. Remedy and request for relief

To remedy these discriminatory policies and their devastating effects on students of color, the school district should (1) adopt more equitable policies based on those that have succeeded in other Florida school districts serving primarily students of color, (2) improve training for staff and administrators, (3) set clearer expectations for student behavior, (4) expand the number of representatives of color on the School Board and its advisory committees, and (5) study the reasons for the current academic and disciplinary disparities to inform additional needed policy reforms.

First, the school district should adopt more equitable policies based on those that have succeeded in other school districts that serve primarily students of color, including a revised code of student conduct and student discipline bill of rights providing adequate due process.⁵² The

⁵² See, e.g., Codes of Conduct, Dignity in Schools, <http://www.dignityinschools.org/resources/codes-conduct> ; 2013 School Discipline Policy and School Climate Bill of Rights, Dignity in Schools, <http://www.dignityinschools.org/sites/default/files/2013%20SD%20Policy%20and%20SCBR%20Resolution%20FINAL.pdf>.

school district should follow the example of Miami-Dade County and abolish suspensions altogether, instead focusing on rehabilitating students who misbehave and allowing schools to create their own solutions for misbehavior in a way that allows students to keep up with their classwork.⁵³ The school district should also explore entering a memorandum of understanding with the local police and sheriff to more compassionately and effectively address students with complex behavior issues.⁵⁴

Second, the school district should improve training for its staff and administrators. Here the school district could emulate reforms introduced in Palm Beach County, which trains administrators about structural racism, has district staff regularly present statistics to school leaders about the disparities in their schools, and trains teachers to better understand differing student cultures and to incorporate more subject matter relevant to students of color.⁵⁵

Third, the school district should set clearer expectations for student behavior. The district could again model these expectations on a best practice in Palm Beach County, which sends behavioral coaches to the schools with the highest suspension rates to ensure that students understand how they are expected to behave.⁵⁶

Fourth, the school district should expand the number of representatives of color on the School Board and its advisory committees. The school district should exercise its control over election district boundaries to adopt a redistricting plan that empowers communities of color to overcome white bloc voting and elect a candidate of their choice to the Board. The School Board should further use its appointment powers to ensure that the composition of its many advisory committees reflects the composition of the student population the school district serves, and allow communities of color to put forth recommendations for nominees to these committees.

Finally, the School Board should study the reasons for the current academic and disciplinary disparities to inform additional needed policy reforms. Here the school district could emulate what Broward County did in 2017, working with the Center for Policing Disparity to survey students, community members, school staff and local law enforcement about biases, work and home environments, policies and other factors that could contribute to gaps in student success. Broward plans to use the results to inform policy recommendations to address the problems it identifies.⁵⁷

⁵³ Jessica Bakeman, *State education leaders target out-of-school suspensions that disproportionately impact black students*, Politico (Jan. 17, 2017), <http://www.politico.com/states/florida/story/2017/01/state-education-leaders-target-out-of-school-suspensions-108780>; Caitlin R. McGlade & Yiran Zhu, *Bias may play part in student suspensions, South Florida school leaders agree* (Feb. 3, 2017), <http://www.sun-sentinel.com/sfl-florida-school-suspension-rates-htlstory.html>.

⁵⁴ *E.g.*, Examples of Memorandums of Understanding (MOU) between Police Departments and Public School Districts, Dignity in Schools, <http://www.dignityinschools.org/resources/examples-memorandums-understanding-mou-between-police-departments-and-public-school-distri>.

⁵⁵ Jessica Bakeman, *State education leaders target out-of-school suspensions that disproportionately impact black students*, Politico (Jan. 17, 2017), <http://www.politico.com/states/florida/story/2017/01/state-education-leaders-target-out-of-school-suspensions-108780>; Caitlin R. McGlade & Yiran Zhu, *Bias may play part in student suspensions, South Florida school leaders agree* (Feb. 3, 2017), <http://www.sun-sentinel.com/sfl-florida-school-suspension-rates-htlstory.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

In conclusion, the school district's current disciplinary policies and administrative policy decisions on redistricting reflect discriminatory intent against families of color and have an unjustified disparate impact on students because of their race, color, and national origin. Both are prohibited by Title VI and the regulations implementing it. Complainant respectfully requests that the Department of Education fully investigate these claims, require the school district to implement less discriminatory alternatives to its election districting plan and advisory committee composition, and adopt disciplinary policies that are administered in a manner that does not disproportionately deny equal educational opportunities to students of color.

Respectfully submitted,

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October 31, 2017

Re: Supplement to September 15, 2017 Title VI complaint on racially discriminatory policies and practices of the Lee County (Fla.) School District

To the OCR Atlanta Office:

On September 15, 2017, the Lee County, Fla. Branch of the NAACP (“Lee County NAACP”) filed a Title VI complaint against the Lee County School District. That same week, Hurricane Irma made a direct hit on Lee County and left thousands without power and other basic services, an extenuating circumstance that disrupted the Lee County NAACP’s work in drafting the complaint and made it impossible to finish conducting interviews and gathering individual examples for inclusion in the complaint before September 15. Because of that extenuating circumstance and the recovery effort that has spanned the weeks since, the Lee County NAACP now respectfully supplements its complaint with the following information.¹

I. Students of color in Lee County are more likely than white students to be suspended, expelled, or referred to law enforcement for misbehavior in school.

For example, ■■■ is a 12-year-old black male student with documented emotional issues that cause him to run away from upsetting situations to calm down. As a result of running away during the school day, he has been suspended from school twice, once in second grade and once in fifth grade. As a result of his coping behavior, he now has a behavioral plan at school, and the administration keeps documentation on this plan and the protocol the school will follow when ■■■ becomes upset at school. When ■■■ becomes upset, the behavioral plan calls for school personnel to allow him to calm down and then speak with him.

In May 2017, ■■■ became upset on a school bus outside his school, and he ran off the bus to calm down in the school cafeteria. In the cafeteria, he was approached by a security guard. ■■■ told the security guard to leave him alone, which she did. However, a guidance counselor then approached ■■■ and would not leave him alone. When the guidance counselor approached and would not back off, ■■■ felt cornered and threatened, and he struck the guidance counselor in the stomach. Although the guidance counselor, who is white, was not hurt and was not following

¹ To protect the identities of the students, parents, and teachers who have shared their personal experiences for inclusion in this complaint, the Lee County NAACP identifies them here by initials only. Upon request, should the Office of Civil Rights open an investigation, the Lee County NAACP would gladly attempt to put the investigators in direct touch with the individuals who have shared their stories in this complaint so that these situations may be fully investigated and remediated.

█'s behavioral plan protocol when he involved himself in █'s situation, he pressed criminal charges. █ was arrested and charged with two felonies. His criminal case is currently pending.

█'s mother successfully fought back against having █ reassigned to an alternative learning center, but █ was not allowed to go back to his school. He now attends school farther away from his home and has to spend an extra 45 minutes riding the bus every day.

Additionally, █'s dream is to join the Army or Navy one day. With two felony charges on his record, his dream is now in danger. His mother says, "He's only 12. He doesn't even know what a felony is. This is a guidance counselor who's supposed to guide these kids into making better choices. And because my son is a different color from him, he wants to push it to the fullest extent of the law."

The same guidance counselor and school administration was involved in a situation in 2013 where █, a female student of color, was struck at school by a white male student. █ was physically injured as a result of the incident and was sent home from school. In that situation, the school administrators spoke to █'s mother and asked her not to press criminal charges against the white student because bringing charges could have ramifications for the white student's academic career and life after graduation. This is a stark departure from the guidance counselor's behavior in █'s situation. █'s mother says, "The school went against us 1,000% and pulled out all the stops to prevent us from getting anything done."

In another example in the spring of 2017, █, a female student of color, was being bullied by a white girl at school. When the administration of their school became aware of the problem, the principal called both girls into the office and presented them with a printed agreement to sign committing that they would stop bullying. The white student refused to sign because her parents were not present, but █, who was the victim of bullying and whose parents were also not present, was made to sign the agreement with the understanding that if she refused, she would be disciplined. The white bully faced no disciplinary consequences for either failing to sign the agreement or for bullying █

II. Students of color in Lee County are more likely than white students to be removed from the classroom and placed in alternative education programs.

For example, █, a black female student who had never been in serious trouble in school, was a senior in high school in the eastern part of Lee County. During her senior year, she was repeatedly singled out by a white teacher and made to leave the classroom for minor behavioral incidents that normally do not result in ejection from class and for which white students were not similarly being punished. █'s trouble with this teacher culminated in the school's attempt to send █ to an alternative learning center for wearing her pants too low on her waist.

█'s mother spoke to the principal, who refused to reconsider the decision to send █ to an alternative learning center. █'s mother ultimately pulled █ out of the public school system, and she finished the year at a charter school. █'s mother says, "I told the principal the punishment did not match the level of the infraction, but I couldn't get him to change his mind."

He did not care. So I pulled my child out and she graduated with a diploma, but she did not graduate from the Lee County School District. Many parents are not able to do that.”

III. Students of color in Lee County are more likely than white students to be designated as having a disability.

For example, in 2014 [REDACTED] was a teacher in an elementary school in Lehigh Acres where the principal created a “bounce room” covered in padding. When a student lost control of his or her behavior, the administration would sometimes isolate the student in the bounce room until the student calmed down. In [REDACTED]’s experience teaching at that elementary school, the special education classroom was made up of about 85% black students, and the overwhelming number of the students sent to the bounce room for behavioral issues were black. In [REDACTED]’s opinion based on his own special education training, some of those students with disability designations could have been in mainstream classes.

The students with disability designations who had been sent to the bounce room included a boy who had been classified as emotionally disturbed. As a result of the boy’s classification, an aide accompanied the boy to his classes. When the boy came to [REDACTED]’s class, he had no problems collaborating with other students under supervision, and the aide’s presence was not necessary. However, when the boy went to other teachers’ classrooms, they required the aide to be present and sent the boy out of the classroom if he began misbehaving rather than finding alternative ways to manage his behavior and keep him in class. Eventually the aide asked why he had to be present in the other teachers’ classrooms when [REDACTED] did not require him to be present, and as a result [REDACTED] faced some backlash from the administration. Although [REDACTED] had training in special education, most of the other teachers who came into contact with the boy did not. Based on [REDACTED]’s experience, that is disproportionately true at schools in Lee County that have a high proportion of black students. [REDACTED] says, “Those kids were the ones who always seemed to be having disciplinary issues. They were special ed kids, and some of them probably could have been mainstreamed.”

In another example, until 2012 [REDACTED] was a special education teacher in an elementary school in Lee County. Her class was primarily made up of black male students who had been labeled as having a behavioral disorder. The reason so many black male students are designated as having a disability in Lee County “has a lot to do with people not understanding students coming from poverty and how they behave differently,” [REDACTED] says. Many of the black male students who had been labeled as having a behavioral disorder did not demonstrate behavioral issues in her classroom. As a mother, she is accustomed to interacting with black boys, whereas many teachers who do not have as much experience as a parent or in classroom management do not know how to manage the behavior of students of color and are inclined to label them as having a disability or disorder.

In [REDACTED]’s experience, once students are labeled as having a behavioral disorder in Lee County elementary schools, they are put in self-contained classrooms with other students with behavioral disorders. From that point on, [REDACTED] says teachers are reluctant to exercise their discretion to put students who have been classified as having a disability back into the mainstream. When these students do get the opportunity to rejoin the mainstream, often the

mainstream classrooms are less structured than the special education classrooms are. In [REDACTED]'s experience, schools with high proportions of black students in Lee County also tend to have disproportionate numbers of new or inexperienced teachers who are still developing their classroom management skills. [REDACTED] says the Lee County School District does not provide training for mainstream teachers on how to manage the behavior of students who are rejoining the mainstream classroom from special education classrooms. As a result of the combination of these factors, students from low-income backgrounds are likely to act out when they rejoin mainstream classrooms and then be sent back to the special education classroom feeling like they have failed. In Lee County, these students are disproportionately students of color.

The situation only becomes more complicated when these students reach middle school. Some Lee County middle schools lack separate classrooms for emotional and behavioral disorders, and as a result students who spent their elementary school years in self-contained classrooms are forced into the mainstream with little support. In turn, they are likely to act out, and without the option of being sent back into a self-contained classroom, they are likely to be suspended or sent to an alternative learning center. [REDACTED] says schools in high-poverty areas, including Lehigh Acres Middle School, have a high proportion of students in this situation, and the statistics on disciplinary and academic outcomes for students of color in those schools support the conclusions she has drawn based on her firsthand experience.

Interviews with parents and teachers demonstrate that these scenarios are not as prevalent in predominately white schools in Lee County, which as a rule are better resourced than schools that serve mainly students of color. The lack of adequate resources in predominately black schools such as Franklin Park Elementary and James Stephens International Academy includes critical support, assistance, and financing. Even basic resources like books are broken or unavailable. Inexperienced teachers and administrators are also more likely to be assigned to high-poverty, underperforming schools, contributing to their low student performance.

Complainant respectfully renews its request that the Department of Education fully investigate the claims made in its September 15, 2017 Title VI complaint and this supplement, and require the Lee County School District to adopt disciplinary and other policies that are administered in a manner that does not disproportionately deny equal educational opportunities to students of color.

Respectfully submitted,

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