CENTER FOR DEMOCRACY & TECHNOLOGY

July 23, 2021

Via Regulations.gov.

Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Protecting Privacy Rights and Ensuring Equitable Algorithmic Systems for Students of Color and Students with Disabilities

The Center for Democracy & Technology (CDT) is a nonprofit advocacy organization that champions civil rights and civil liberties in the digital age. Building on its 25-year history, CDT is committed to advancing these goals by shaping technology policy and architecture, including in education.[1] CDT's Equity in Civic Technology Project engages with educators, school administrators, and policymakers at all levels to ensure that schools can best serve families and their students while also protecting their privacy. That engagement includes ensuring that student data is used equitably and ethically.

CDT supports efforts by the U.S. Department of Education (ED) to address discrimination in the discipline of students in K-12 institutions.[2] We encourage ED to use this opportunity to protect the civil rights of students of color and students with disabilities, including their rights to privacy and the ethical, responsible use of their data. In particular, ED should begin efforts to address the discriminatory effects of some algorithmic systems on students of color and students with disabilities and develop guidance for schools to address the discriminatory effects of certain forms of data sharing with law enforcement.

ED Should Address the Use of Discriminatory Algorithmic Systems

Privacy, autonomy, and self-determination are central pillars of civil rights in the United States.[3] Those protections are codified for students of color and students with disabilities in Title VI of the Civil Rights Act of 1964,[4] Section 504 of Rehabilitation Act of 1973,[5] and Title II of the Americans with Disabilities

[1] For more about CDT's policy priorities, please see our vision for the Biden Administration and the 117th Congress at https://cdt.org/insights/cdt-recommendations-to-the-biden-administration-and-117th-congress-to-advance-civil-rights-civil-liberties-in-the-digital-age/.

[2] Request for Information Regarding the Nondiscriminatory Administration of School Discipline, 86 Fed. Reg. 30449 (June 8, 2021), *available at* https://www.federalregister.gov/documents/2021/06/08/2021-11990/request-for-information-regarding-the-nondiscriminatory-administration-of-school-discipline.

[3] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Silverman v. United States, 365 U.S. 505, 511 (1961).

[4] 42 U.S.C. § 2000d.

[5] 29 U.S.C. § 794(a).

Act.[6] Those statutes protect students not only from intentional discrimination, but also from discriminatory effects[7] caused when an "otherwise neutral policy or practice . . . has a disproportionate and adverse effect on individuals"[8] due to their race, color, national origin,[9] or disability.[10]

ED should begin to address the discriminatory effects of some algorithmic systems on students of color and students with disabilities. An algorithm is a process performed by a computer to answer a question or carry out a task, such as sorting students into schools, analyzing social media posts, or flagging students at risk for dropping out.[11] Algorithmic systems, however, are not neutral decision-makers. Subjective human judgments dictate the purpose, design, and function of an algorithm and influence its outcomes. Moreover, data used to train algorithms may itself implicitly embed biases and exacerbate inequities that already exist in society. Consequently, algorithmic systems must still be vetted for discriminatory effects, including on students of color and students with disabilities.

An increasing amount of evidence suggests that some algorithmic systems are having discriminatory effects on students of color and students with disabilities:

- Schools are increasingly using facial recognition technology, which relies on algorithmic software, with the hope of protecting student safety, monitoring unusual behavior, or even enforcing health and safety measures such as social distancing.[12] Facial recognition technology, however, disproportionately misidentifies students of color, especially Black students,[13] and may further marginalize them by subjecting them to increased interactions with police and school disciplinary systems.[14]

---

[6] 42 U.S.C. § 12132.

[7] 34 CFR § 100.3(b)(2) (Title VI); 34 CFR § 104.4(b)(4) (Section 504); 28 CFR § 35.130(b)(3) (ADA).

[8] Department of Justice, *Title VI Child Welfare Guidance* (2019), *available at* https://www.justice.gov/crt/title-vi-child-welfare-guidance.

[9] 34 CFR § 100.3(b)(2).

[10] 34 CFR § 104.4(b)(4); 28 CFR § 35.130(b)(3)(i).

[11] Hannah Quay-de la Vallee & Natasha Duarte, Center for Democracy & Technology, *Algorithmic Systems in Education* 6 (2019), *available at* https://cdt.org/insights/algorithmic-systems-in-education-incorporating-equity-and-fairness-when-using-student-data/.

[12] Rebecca Heilweil, *The Dystopian Tech That Companies Are Selling to Help Schools Reopen Sooner*, Recode (Aug. 14, 2020), https://www.vox.com/recode/2020/8/14/21365300/artificial-intelligence-ai-school-reopening-technology-covid-19; Alfred Ng, *Facial Recognition in Schools: Even Supporters Say It Won't Stop Shootings*, CNET (Jan. 24, 2020), https://www.cnet.com/features/facial-recognition-in-schools-even-supporters-say-it-wont-stop-shootings; Emily Tate, *Safety in Mind, Schools Turn to Facial Recognition Technology. But at What Cost?*, EdSurge (Jan. 31, 2019), https://www.edsurge.com/news/2019-01-31-with-safety-in-mind-schools-turn-to-facial-recognition-technology-but-at-what-cost.

[13] Shobita Parthasarathy et al., University of Michigan, *Cameras in the Classroom* 31 (2021), *available at* http://stpp.fordschool.umich.edu/technology-assessment.

[14] *Id.* at 32, 44.

- Proctoring software used to monitor students taking exams remotely often uses algorithmic technology to detect students' gaze, movements, or sounds in the room;[15] those technologies struggle to recognize students of color, especially Black students,[16] and disproportionately flag the behavior of students with disabilities, whose movements or accommodations may be flagged by the algorithm as suspicious.[17]
- Algorithmic systems are also being used by schools to scan students' messages, documents, and social media posts for signs of self-harm or bullying.[18] Those technologies, however, disproportionately flag speech by Black and Muslim students for review, exposing them to increased scrutiny and surveillance.[19]

Algorithmic systems used outside of the discipline context also adversely affect students of color and students with disabilities. For example:

- Some schools are utilizing algorithmic systems to place students into academic tracks or flag early signs of academic difficulties, which may rely on data that disproportionately steers Black

[15] Rebecca Heilweil, *Paranoia About Cheating Is Making Online Education Terrible for Everyone*, Recode (May 4, 2020), https://www.vox.com/recode/2020/5/4/21241062/schools-cheating-proctorio-artificial-intelligence; Jason Kelley & Lindsay Oliver, *Proctoring Apps Subject Students to Unnecessary Surveillance*, EFF (Aug. 20, 2020), https://www.eff.org/deeplinks/2020/08/proctoring-apps-subject-students-unnecessary-surveillance.

[16] Shea Swauger, *Software That Monitors Students During Tests Perpetuates Inequality And Violates Their Privacy*, MIT Technology Review (Aug. 7, 2020), https://www.technologyreview.com/2020/08/07/1006132/software-algorithms-proctoring-online-tests-ai-ethics/; Shea Swauger, *Our Bodies Encoded*, Hybrid Pedagogy (Apr. 2, 2020), https://hybridpedagogy.org/our-bodies-encoded-algorithmic-test-proctoring-in-higher-education/.

[17] National Disabled Law Students Association, *Report on Concerns Regarding Online Administration of Bar Exams* 3-4, 14-22 (2020), *available at* https://ndlsa.org/wp-content/uploads/2020/08/NDLSA_Online-Exam-Concerns-Report1.pdf ("I am definitely very concerned that the AI will include a racial and/or disability bias."); Mary Retta, *Exam Surveillance Tools Monitor, Record Students During Tests*, Teen Vogue (Oct. 26, 2020), https://www.teenvogue.com/story/exam-surveillance-tools-remote-learning ("Neuro-divergent students such as myself, who exhibit behavior related to our condition like high rates of eye movement, are consistently punished. This software serves to disproportionately penalize those whose behaviors deviate in any way from what is considered the 'norm.'").

[18] Cody Venzke & Hannah Quay-de la Vallee, Center for Democracy & Technology, *Closing the Homework Gap While Protecting Student Privacy* 12-18 (2021), *available at* https://cdt.org/insights/issue-brief-closing-the-homework-gap-while-protecting-student-privacy/.

[19] Shirin Ghaffary, *The Algorithms that Detect Hate Speech Online Are Biased Against Black People*, Vox (Aug. 15, 2019), https://www.vox.com/recode/2019/8/15/20806384/social-media-hate-speech-bias-black-african-american-facebook-twitter; Alex Hern, *Palestinian Man Questioned By Israeli Police After Embarrassing Mistranslation Of Caption Under Photo Of Him Leaning Against Bulldozer*, The Guardian (Oct. 24, 2017), https://www.theguardian.com/technology/2017/oct/24/facebook-palestine-israel-translates-good-morning-attack-them-arrest; Lindsey Barrett, UNICEF, *Governance of Student Data* 2 (2020), *available at* https://www.unicef.org/globalinsight/media/1421/file/%20UNICEF-Global-Insight-DataGov-StudentData-issue-brief-2020.pdf.

students and students with disabilities away from more challenging academic routes.[20]

- During the pandemic, educational institutions utilized algorithmic systems to predict students' grades or likelihood of success in collegiate academics in lieu of in-person exams; however, those systems disproportionately assigned lower scores to students of color and students from lower socioeconomic backgrounds.[21]

Those harms can run afoul of protections against discriminatory effects in education.[22] As noted above, Title VI, Section 504, and the ADA prohibit schools from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, [] national origin"[23] or disability.[24] Students of color and students with disabilities are already over-surveilled and disproportionately disciplined.[25] Exacerbating those disparities through the use of algorithmic technology creates additional, unnecessary barriers for those students and unduly increases their interactions with school disciplinary systems and law enforcement.

Given these harms, ED should begin to address the impact of algorithmic systems in its efforts to protect students of color and students with disabilities from discrimination along two dimensions:

- Efforts to address algorithmic bias should be rooted in research and factfinding. Because algorithmic systems are increasingly being used throughout education and have the potential to provide benefits for, as well as harm to, students and families, it is important that ED research questions such as which types of algorithmic systems can have disparate impacts on students of

---

[20] Jeffrey R. Young, *Researchers Raise Concerns About Algorithmic Bias in Online Course Tools*, EdSurge (June 26, 2020), https://www.edsurge.com/news/2020-06-26-researchers-raise-concerns-about-algorithmic-bias-in-online-course-tools; Todd Feather, *Major Universities Are Using Race as a "High Impact Predictor" of Student Success*, The Markup (Mar. 2, 2021), https://themarkup.org/news/2021/03/02/major-universities-are-using-race-as-a-high-impact-predictor-of-student-success.

[21] Meredith Broussard, *When Algorithms Give Real Students Imaginary Grades*, N.Y. Times (Sept. 8, 2020), https://www.nytimes.com/2020/09/08/opinion/international-baccalaureate-algorithm-grades.html; *A-levels and GCSEs: How Did the Exam Algorithm Work?*, BBC News (Aug. 20, 2020), https://www.bbc.com/news/explainers-53807730; Rebecca Koenig, *Can Algorithms Select Students "Most Likely to Succeed"?*, Slate (July 10, 2020), https://slate.com/technology/2020/07/college-admissions-algorithms-applications.html.

[22] As CDT noted in its previous comments to ED on Title IX, students who identify as lesbian, gay, bisexual, transgender, and gender nonconforming are often subject to algorithmic bias that ED should begin addressing in its efforts under Title IX. *See* Elizabeth Laird & Cody Venzke, Center for Democracy & Technology, *CDT Comments on Protecting Privacy Rights and Ensuring Equitable Algorithmic Systems for Transgender and Gender Non-Conforming Students* (2021), *available at* https://cdt.org/insights/cdt-comments-on-protecting-privacy-rights-and-ensuring-equitable-algorithmic-systems-for-transgender-and-gender-non-conforming-students/.

[23] 34 CFR § 100.3(b)(2).

[24] 34 CFR § 104.4(b)(4); 28 CFR § 35.130(b)(3)(i).

[25] Office for Civil Rights, U.S. Department of Education, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year* 12-13, 26-17 (2021), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf.

color and students with disabilities, what categories of training data can lead to discriminatory outcomes, and what mitigating steps can help reduce the potential for discrimination. Thus, research and factfinding will be essential components of ED's efforts. ED's Office of Educational Technology leads research and guidance on the impact of artificial intelligence on teaching and learning, which may support ED's efforts to bolster protections for students of color and students with disabilities.

- Informed by research and factfinding, ED should provide resources for schools, create guidance, and/or engage in rulemaking to help detect, mitigate, and avoid algorithmic bias on students of color and students with disabilities. Because algorithmic systems are increasingly utilized throughout education, it is important that the scope of the guidance or rules — if any — is appropriately tailored to the harms algorithmic systems pose.

ED Should Also Address Data Sharing With Law Enforcement

The increased focus on racial equity over the course of the past year has brought some schools' practice of voluntarily sharing data with law enforcement under public scrutiny. Because of the discriminatory effects of some of those data sharing programs, ED should develop guidance for schools on best practices and legal requirements for data sharing with law enforcement entities.

Sharing education data with law enforcement may occur for several reasons. Sometimes data sharing may be mandated to satisfy legal requirements like truancy enforcement or to comply with a court order or subpoena. On other occasions, data sharing may be voluntary. For example, local education agencies have explored partnering with local law enforcement agencies around voluntary programs aimed at keeping students safe like threat assessments aimed at preventing acts of mass violence, supporting students who are potentially off track and deemed at-risk of committing a crime (e.g., predictive policing programs), or coordinating responses to school and community safety emergencies.

However, voluntary data sharing with law enforcement, even with positive intentions, has disproportionately affected students of color, especially Black students, and resulted in increased police interactions for already over-surveilled and disproportionately disciplined groups. Discriminatory effects may arise from data sharing for a number of reasons including, for example:

- Data being shared may be biased due to existing, disproportionate discipline actions taken against students of color. Students of color are disciplined at a greater rate than their peers (both in terms of number of infractions as well as the severity of consequences),[26] so sharing discipline data with law enforcement will likely result in the over-identification of students of color, which could increase their interactions with law enforcement and exacerbate the "school-to-prison pipeline."[27]

[26] Office for Civil Rights, *Exclusionary Discipline Practices* at 12-13, 26-17.

[27] Parthasarathy et al., *Cameras in the Classroom* at 60-61.

- Data sharing programs risk amplifying false assumptions about marginalized groups of students. For example, one bill required school officials to report "suspicious, unsafe or unlawful" behavior to law enforcement, which would likely lead to an over-reporting of students with disabilities whose behavior may be perceived as atypical.[28] Similarly, disproportionate numbers of Black, Latinx, and low-income families have been reported to state agencies for "neglect" due to students' absenteeism during virtual learning, often due to a lack of reliable access to broadband.[29]
- Data shared with law enforcement may result in increased interactions with law enforcement and school disciplinary systems. In one example, the sharing of old discipline records prompted law enforcement to visit a home and conduct a search, leading to the student's arrest and years of visits from law enforcement.[30] Those increased interactions may, in turn, create a "feedback loop" of biased data that further leads to increased surveillance and discipline for marginalized students,[31] and the resulting data may be shared with other agencies, including immigration authorities, leading to further disproportionate effects on people in marginalized communities.[32]
- Amassing large amounts of data on individuals makes for a more attractive target for hackers and the consequences of a data breach even more dire. Every sector is experiencing increased cybersecurity attacks, and education is no exception. Sharing education records to be compared with police data may subject that data to increased risks of data incidents.[33]
- Research by CDT has shown that parents of color, especially Black parents, are concerned about student privacy and data sharing in general and data sharing with law enforcement in particular.[34] Compared to 56% of parents overall, 61% of Black parents and 60% of Hispanic

---

[28] Adarsh Mahesh & Greg Nojeim, *Georgia's Governor Vetoes Harmful School Safety Bill*, Center for Democracy & Technology (May 23, 2019), https://cdt.org/insights/georgias-governor-vetoes-harmful-school-safety-bill/; Hope Ford, *Proposed School Safety Bill Could Create Student Profiles Based on Risk Factors*, 11 Alive (Feb. 11, 2019), https://www.11alive.com/article/news/proposed-school-safety-bill-could-create-student-profiles-based-on-risk-factors/85-e982ec3f-7e9a-481a-99d3-b8d3f21052de.

[29] Bianca Vázquez Toness, *Your Child's a No-show at Virtual School? You May Get a Call From the State's Foster Care Agency*, Boston Globe (Aug. 15, 2020), https://www.bostonglobe.com/2020/08/15/metro/your-childs-no-show-virtual-school-you-may-get-call-states-foster-care-agency.

[30] Olivia Solon & Cyrus Farivar, *School Districts Are Sharing Students' Records with Law Enforcement. Is That Legal?*, NBC News (June 6, 2021), https://www.msn.com/en-us/news/us/school-districts-are-sharing-students-records-with-law-enforcement-is-that-legal/ar-AAKKOrv; Neil Bedi & Kathleen McGrory, *Pasco's Sheriff Uses Grades and Abuse Histories to Label School Children Potential Criminals*, Tampa Bay Times (Nov. 19, 2020), https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/school-data/.

[31] Parthasarathy et al., *Cameras in the Classroom* at 33, 60-61.

[32] Hannah Dreier, *He Drew His School Mascot — and ICE Labeled Him a Gang Member*, ProPublica (Dec. 27, 2018), https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/.

[33] Elizabeth Laird, *Endangering Student Privacy in the Name of School Safety*, Center for Democracy & Technology (Sept. 10, 2018), https://cdt.org/insights/endangering-student-privacy-in-the-name-of-school-safety/.

[34] Center for Democracy & Technology, *Teacher, Parent, and Student Views on Education Data, Technology, and Student Privacy* 19, 21 (2020), *available at* https://cdt.org/wp-content/uploads/2020/10/CDT-student-privacy-parents-teachers-students-research-slides.pdf.

parents expressed concern over data sharing with law enforcement. Failure to address those concerns may erode trust in schools as stewards of student data.

To address the disproportionate effects of data sharing on students of color and students with disabilities, ED should develop guidance for schools on best practices and legal requirements for data sharing with law enforcement entities including:

- Provide guidance clarifying and emphasizing that the disparate impact provisions of Title VI, Section 504, and the ADA apply to data sharing with law enforcement that causes discriminatory effects for students of color and students with disabilities — particularly if the data over-identifies students of color or students with disabilities or results in disproportionate contact with law enforcement for those students. The guidance should include examples of how OCR might analyze data sharing programs that cause discriminatory effects in applying Title VI, Section 504, and the ADA.[35]
- Clarify limitations of the school official and health and safety emergency exceptions of the Family Educational Rights and Privacy Act[36] (FERPA) as applied to data sharing programs between education and law enforcement.
- Conclude the investigation into the potential violation of FERPA by Pasco County Schools' data sharing with local law enforcement for predictive policing purposes, impose any appropriate remediation, and provide guidance to school and district officials based on the findings of the investigation.

CDT supports ED's efforts to protect the rights of students of color and students with disabilities. We urge ED to adopt measures to protect student privacy, prevent discrimination, and ensure responsible, ethical data practices as an integral part of those efforts.

Sincerely,

Elizabeth Laird
Director, Equity in Civic Technology

Cody Venzke
Policy Counsel, Equity in Civic Technology

[35] ED took a similar approach in supplying examples in its 2014 "Dear Colleague" letter regarding school discipline, and such concrete guidance may help schools understand the scope of their obligations under Title VI, Section 504, and the ADA. *See Dear Colleague Letter on Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014), *available at* https://www2.ed.gov/policy/elsec/guid/secletter/140108.html (rescinded).

[36] *See* 34 CFR §§ 99.31(a)(10), 99.36.