



January 25, 2013

The Honorable Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

RE: Senate Judiciary Hearing “*What Should America Do About Gun Violence?*”

Dear Chairman Leahy, Ranking Member Grassley, and Members of the Committee:

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

On behalf of the American Civil Liberties Union (ACLU), its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, we offer this statement for the record of your hearing entitled “*What Should America do About Gun Violence?*” We commend you for holding a hearing to address this issue of national importance, and we write to offer our recommendations for ensuring that a federal solution not only protects the physical security of Americans, but also protects their civil rights and liberties.

We urge you to carefully evaluate any potential legislative solutions to ensure that they will not lead to unintended consequences. We are concerned about the increased policing and over-criminalization of young people, including any disproportionate impact on students of color and students with disabilities, the infringement of First Amendment rights, and possible rollbacks of privacy rights. We hope to work with you to craft smart legislation that avoids these pitfalls, while effectively addressing the serious issues we face as a nation.

Over-policing and Criminalization of Students

The recent tragedy at Sandy Hook Elementary School has sparked a long overdue national conversation about gun safety generally and school safety in particular. However, it is important to note that gun violence occurs everywhere, and what happened at Sandy Hook was not the result of a school-specific problem. On January 16, following weeks of deliberation by the gun violence task force headed by Vice President Biden, which met with a wide variety of stakeholders, President Obama released a plan for reducing

gun violence.¹ Included in the plan are a number of proposals aimed at making schools safer through a combination of executive action and legislation.

While we agree with the Administration's statement that "one of the best things schools can do to reduce violence and bullying is to improve a school's climate and increase trust and communication between students and staff,"² we disagree with the portions of their proposal that would lead to increasing police presence in schools. In particular, they urge Congress to appropriate \$150 million to give school districts and law enforcement agencies incentives to hire more police, including school resource officers.

While well-meaning policymakers might assume that adding police, metal detectors and surveillance necessarily makes students safer, experience demonstrates otherwise. In practice, most school police spend a significant portion of their time responding to minor, nonviolent infractions—children who have drawn on desks or talked back to teachers, for example—rather than behaviors that seriously threaten school safety. In New York City, which employs a school security force of over 5,000, schools with permanent metal detectors reported that 77% of incidents in which police personnel were involved during the 2004-2005 school year were classified as "non-criminal."³ Only 4% were classified as "major crimes against persons," and only 2% were classified as "major property crimes."⁴

Criminalizing minor misbehavior that should be handled by teachers or school administrators has serious consequences for kids and only contributes to the school-to-prison pipeline – policies that push kids out of classrooms and into jail cells. When students are arrested just once, their chances of graduating drop dramatically and they face lifelong repercussions as a result.⁵ We must ensure that a legislative solution does not result in children being punished more severely in the name of school safety. We strongly caution against accepting any such proposals aimed at increasing law enforcement in schools because such action can harm educational opportunities by unnecessarily pushing students out of school and into the criminal justice system.

This is not the first time this nation has reacted to a violent act with proposals for increasing law enforcement in schools, and we should not ignore the lessons of the past. Immediately following the 1999 Columbine High School massacre, President Clinton dramatically increased federal funding for school-based police officers, and the Department of Justice created the COPS in Schools (CIS) grant program the same year to help local communities pay for increasing police presence in schools.⁶ This was true despite the fact that there were already police at Columbine.

¹ White House, *Now is the Time: The President's plan to protect our children and our communities by reducing gun violence*, Jan. 16, 2013, available at http://www.whitehouse.gov/issues/preventing-gun-violence?utm_source=email193a&utm_medium=text1&utm_campaign=nowisthetime.

² *Id.* at 12.

³ New York Civil Liberties Union and American Civil Liberties Union, *Criminalizing the Classroom: the Over-Policing of New York City Schools*, 20 (2007), available at http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf

⁴ *Id.*

⁵ Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 *Justice Quarterly* 462, 473 (2006).

⁶ American Civil Liberties Union and ACLU of Connecticut, *Hard Lessons: School Resource Officers and School Based Arrests in Three Connecticut Towns*, 14 (2008), available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf.

Three school districts in the Hartford, Connecticut area, just an hour from Newtown, were among the many that took advantage of this funding, and the ACLU of Connecticut examined the results.⁷ In all three districts, the study found, very young students were being arrested at school, including numerous children in grade three and below.⁸ Among them, students of color were arrested at rates clearly disproportionate to their representation in the student population, and in some cases were even arrested for infractions when their white peers were not.⁹ Though statistics do not capture the full story, the numbers in Connecticut included the arrest of two Hispanic fourth graders for “insubordination,” the arrest of an African American first grader for “leaving school grounds,” and the arrest of a Hispanic kindergartner for battery.¹⁰ It is difficult to imagine any circumstances under which these arrests, rather than discipline meted out by an educator, were appropriate.

The disproportionate impact of over-policing and punitive school discipline policies on students of color, as well as students with disabilities, is a nationwide problem. According to national data released by the Department of Education, students of color are likely to be punished more harshly and more frequently in schools for the same infractions as white students.¹¹ Of all students arrested or referred to law enforcement nationally, 70% were Latino or African American.¹² African American students were also 3.5 times more likely than their white peers to be suspended—and while they represented just 18% of the students in the sample, they accounted for 39% of expulsions.¹³ Students with disabilities, similarly, are more than twice as likely as their peers to receive one or more out-of-school suspensions.¹⁴

Recently, the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights held a landmark hearing about the school to prison pipeline and the dangers of overly punitive school discipline policies. The Subcommittee heard testimony from Edward Ward, who attended a public high school on the west side of Chicago with a completely African American and Latino student body, where he saw these trends first hand.¹⁵ Though Ward graduated—one of just 27.7% of his classmates to do so—he described seeing many of his peers pushed out of school by the harsh policing practices. Specifically, he noted that each morning he was faced with metal detectors, x-ray machines, and uniformed security officers, making school feel like a hostile, prison-like environment.¹⁶

⁷ *See id.*

⁸ *Id.* at 26.

⁹ *Id.* at 36.

¹⁰ *Id.* at 44.

¹¹ Tamar Lewin, *Black Students Face More Harsh Discipline, Data Shows*, N.Y. TIMES, March 6, 2012, available at http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-datashows.html?_r=1&hp.

¹² DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION 2 (2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>

¹³ *Id.* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Ending the School to Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Edward Ward), available at <http://www.judiciary.senate.gov/pdf/12-12-12WardTestimony.pdf>.

¹⁶ *Id.* at 2.

He testified saying:

“[w]hen my classmates were suspended from Orr, they would disappear for days and when they were kicked out they would disappear sometimes for weeks. What was most shocking to me was discovering that they were being suspended for minor infractions, the kind of infractions that shouldn’t merit more than a stern warning or reminder”¹⁷

A New York Civil Liberties Union complaint details another outrageous incident in which a school officer handcuffed and arrested a girl who tried to enter the school early to catch up on schoolwork, and then arrested the principal for attempting to intervene.¹⁸

Unfortunately, these stories are all too common. Past experience demonstrates that increasing police presence in schools after a tragedy, while well-intentioned, is misguided. Any proposals that would bring more police, school resource officers (SROs), or even the National Guard, as some current legislative proposals suggest, must be rejected.¹⁹ Militarizing our schools is not the answer to improving school climate. The cost to the health and wellbeing of our children is just too great.

And in schools that already have a law enforcement presence, lawmakers and school administrators must put appropriate safeguards in place to ensure that officers do what they are intended to do—prevent serious crimes—not usurp the role of educators by engaging in routine school discipline. Some safeguards should include, but are not limited to:

- Specific, written agreement on the appropriate role of police involvement, limiting that involvement to serious criminal law matters to ensure that law enforcement intervention is only used as a last resort;
- High-quality specialized training for all police who work in schools in such areas as youth development, non-violent conflict resolution, cultural competency, implicit bias, and interacting with students with disabilities;
- Regular data collection and reporting to state and local governments about police activity in schools, so that data can be monitored and corrective action taken as necessary;
- Reduction or elimination of federal funds where there is overuse and/or racially disproportionate use of law enforcement to respond to student misbehavior;
- School reporting on the use of law enforcement and development of plans for reducing reliance on police, as well as any racial disparities in arrests, citations, or tickets; and
- Denial of renewal grants where the federal government identifies persistent police overreliance or racial disparities.

¹⁷ *Id.*

¹⁸ Amended Complaint, *B.H., et al. v. City of New York, et al.* (E.D.N.Y. June 11, 2010) (No. 10-cv-0210).

¹⁹ For example, Senator Barbara Boxer (D-CA) introduced two extremely troubling bills at the end of last Congress, immediately following the Newtown tragedy. The Save Our Schools Act (S. 3692) would facilitate the installation of National Guard troops in U.S. schools and the School Safety Enhancements Act of 2012 (S. 3693) would expand the U.S. Department of Justice’s COPS Secure Our Schools grants, create a national tip line to report students, and increase surveillance at schools. Both proposals would militarize schools to the detriment of students. S. 3692, 112th Cong. (2012); S. 3693, 112th Cong. (2012). We urge the Task Force to not include these proposals in any proposed legislation.

Improving Outcomes for Students

Instead of focusing on proposals that would direct even more funds towards increased school policing, we encourage you to pursue federal funding for efforts that proactively improve learning opportunities and school climate for all students, such as training for teachers, additional counselors and health professionals, and additional positive programs to support students.²⁰ Some specific examples of steps to take at the federal level include:

- The Positive Behavior for Safe and Effective Schools Act, which would provide schools with the tools they need to improve learning environments by allowing them to dedicate Title I federal funds to the development of school wide positive behavior supports.²¹ Positive behavior supports are evidence-based practices demonstrated to reduce disciplinary referrals, suspensions and expulsions, increase academic achievement, and improve school safety.²² The bill would help to reduce reliance on suspensions, expulsions, and referrals to law enforcement, all of which push students out of schools and put graduation out of reach.²³ It would also enable the Department of Education to provide more training and technical assistance on effective school discipline practices and support the development of alternatives to over policing.²⁴
- The Ending Corporal Punishment in Schools Act would prohibit the use of physical punishment at school²⁵—a practice still legal in 19 states.²⁶ The most recent national data available indicates that over 200,000 students are the victims of this practice every year.²⁷ The use of corporal punishment is not only ineffective when it comes to improving behavior and disciplining students, but it can also cause children to withdraw

²⁰ For a more detailed discussion of ACLU's federal recommendations for ending the school-to-prison pipeline and improving school climate, please see *Ending the School to Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of the Laura W. Murphy and Deborah J. Vagins, American Civil Liberties Union), available at http://www.aclu.org/files/assets/aclu_statement_for_sjc_subcomm_hearing_on_the_school_to_prison_pipeline_12_2012.pdf.

²¹ Positive Behavior for Safe and Effective Schools Act, H.R. 3165, 112th Cong. (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3165ih/pdf/BILLS-112hr3165ih.pdf>

²² Deborah J. Vagins, *Teach (and Treat) Our Children Well*, Huffington Post, Dec. 3, 2009, http://www.huffingtonpost.com/deborah-jvagins/teach-and-treat-our-child_b_378794.html.

²³ Letter from the Dignity in Schools Campaign to Members of Congress (Dec. 18, 2009), available at http://www.aclu.org/files/assets/PBSESA_-_Dignity_in_Schools_Campaign_HR_2597_Support_Letter_FINAL.pdf

²⁴ Positive Behavior for Safe and Effective Schools Act, H.R. 3165, 112th Cong. (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3165ih/pdf/BILLS-112hr3165ih.pdf>.

²⁵ <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3027ih/pdf/BILLS-112hr3027ih.pdf>

²⁶ Yunji DeNies, *Should Your Child Be Spanked at School? In 19 States, It's Legal*, ABC News, March 16, 2012, available at <http://abcnews.go.com/US/spanking-school-19-states-corporal-punishment-legal/story?id=15932135#.UL6PkFFAUTA>.

²⁷ See DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION 2006, available at http://ocrdata.ed.gov/Projections_2006.aspx (The 2006 CRDC data is the most recent available, as national data on corporal punishment from the most recent CRDC has not yet been released).

academically and socially, leading to fear, depression, and anger and impacting long term well-being.²⁸

Moreover, data shows that corporal punishment is applied at shockingly disproportionate rates against African American students and students with disabilities.²⁹ For example, while African Americans made up 21.7% of public school students in states that allowed corporal punishment during the 2006-2007 school year, they accounted for 35.6% of those who were paddled.³⁰ The discriminatory use of corporal punishment against these student subgroups seriously undermines their ability to learn and further contributes to school push-out.

Additional school officers with the power to administer school discipline in states where students can already be hit by school personnel and where such disparities exists, raises significant concerns about school climate and student safety.

- The Youth PROMISE Act, which seeks to curb youth violence and gang involvement by providing federal funding and support to local stakeholders to identify underlying causes of violence and implement evidence based prevention programs intended to keep youth from ever entering the criminal justice system. The legislation provides support for local youth organizations to create a PROMISE advisory panel, which would work with parents, teachers, law enforcement officers and other community members to evaluate needs of the community and identify and implement programs designed to address the drivers of crime in that community. This legislation is an important model for stopping more young people – overwhelmingly African American and Latino– from being funneled into the juvenile and adult criminal justice systems.
- Strengthening the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP), which over the past decade has suffered depletion of funding and support. Funding levels for OJJDP have declined more than 90% since 2002. The Juvenile Justice and Delinquency Prevention Act (JJDP) is more than five years overdue for reauthorization. In addition, the lack of a permanent OJJDP Administrator has halted progress in advancing reforms, and slowed the reauthorization of the JJDP, sending a message that federal leadership in juvenile justice is not a priority. We urge the Administration to act quickly to appointment a strong permanent OJJDP Administrator and provide the clear direction and resources needed to help states create and sustain

²⁸ *Corporal Punishment in Schools and Its Effect on Academic Success: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor*, 112th Cong. 1 (2010) (statement of the American Civil Liberties Union and Human Rights Watch), available at

http://www.hrw.org/sites/default/files/related_material/CorpPunishStatement_041510.pdf; ACLU blog: http://www.huffingtonpost.com/deborah-j-vagins/corporal-punishment-in-schools_b_983041.html; ACLU blog: http://www.huffingtonpost.com/deborah-j-vagins/an-arcane-destructive_b_631417.html

²⁹ *Corporal Punishment in Schools and Its Effect on Academic Success: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor*, 112th Cong. 1 (2010) (statement of the American Civil Liberties Union and Human Rights Watch), available at

http://www.hrw.org/sites/default/files/related_material/CorpPunishStatement_041510.pdf

³⁰ See DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION 2006, available at http://ocrdata.ed.gov/Projections_2006.aspx (The 2006 CRDC data is the most recent available, as national data on corporal punishment from the most recent CRDC has not yet been released).

juvenile justice systems that are less costly, enhance public safety, and offer appropriate interventions for court involved youth.

Upholding the First Amendment

In addition to our concerns about the collateral impact legislation could have on the school-to-prison pipeline, there are other civil liberties issues we hope would not be implicated by any gun control legislation. We urge Congress to resist the call for a study at the Centers for Disease Control and Prevention on the purported link between depictions of violence in the media and gun violence. Years of study and multiple courts, including the Supreme Court, have repeatedly found no evidence to link interactive media with real-world violence, and have applied the First Amendment full-force to such media.³¹ We also strongly oppose any proposed content regulation, including laws that would place the government in the shoes of parents in terms of deciding what children can see, read, play or hear. Finally, we would urge you to bear in mind the danger that Congressional scrutiny will result in self-censorship by media companies. Historically, calls for government regulation of disfavored media content have resulted in industry pressure on content producers to censor themselves. This also poses significant First Amendment considerations.

Protecting the Right to Privacy and Preserving Mental Health Protections

Federal legislation to address gun violence must protect the civil rights and liberties of all people, including people with psychiatric disabilities. Data shows that people with mental disabilities are no more likely to be violent than the general population, but are instead much more likely to be victims of violence.³² Yet, state legislation in New York, and much of the national dialogue assumes a link between gun violence and psychiatric illness. This creates a risk of further stigmatizing people who have mental health needs, and deterring them from seeking treatment.

President Obama's proposal to de-stigmatize mental health treatment through a national dialogue is a welcome policy decision. Further, since mental health services are chronically underfunded in many communities,³³ it would be beneficial for federal legislation to increase funds appropriated for mental health services and the training of additional mental health professionals. As an important step towards ensuring that all Americans can afford to access mental health care services, we are pleased to see President Obama's recent proposals to make sure that mental health services are funded at parity with medical and surgical benefits. As this Committee considers the issue of gun violence and future legislation, we would encourage the creation of a

³¹ See, e.g., *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (“[V]ideo games qualify for First Amendment protection The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577, 579-80 (7th Cir. 2001) (“All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002).

³² Grohol, J. M. “Dispelling the violence myth.” *Psych Central*. (June, 1998); Monahan, J. “Mental Disorder and Violent Behavior: Perceptions and Evidence.” *American Psychologist* vol. 47 iss.4 (1992): 511-521.

³³ Charles M. Blow, *Guns, Smoke and Mirrors*, THE NEW YORK TIMES, Dec. 21, 2012, at A25.

national dialogue between the Administration, Congress, and the public on the prevalence of psychiatric disabilities and the benefits of treatment.

We would also urge against the creation of a national database to “track” people who receive mental health care, as it will only further stigmatize and deter people from seeking treatment when necessary. Further, any legislation impacting the right to purchase or sell a firearm or ammunition, be employed in a gun store, or engage in any other related activity must include due process protections to ensure a fair adjudication. Whether these determinations are based on criminal background checks, whether an individual has been diagnosed with a psychiatric disability, or other factors, the information used to reach these decisions must be kept private. The use of any database should be securely maintained, not linked with other information databases, and kept for a limited period of time. Finally individuals must have the opportunity to seek a change in their legal status, when that status changes.

While increasing access to mental health resources is beneficial, any federal proposal under consideration should not include provisions to expand involuntary treatment. Not only would it be a significant infringement of an individual’s civil liberties, it is also a poor therapeutic approach, since forced treatment can create an understandable fear and suspicion of the mental health care community. Every state already has laws to detain and commit those who are viewed as a danger to themselves or others.

Creating a Fair Criminal Justice System

Finally, while the justice system has been tasked with the responsibility of keeping us safe, which requires many serious offenders to be held in our prisons and jails, it also has a responsibility to deliver fair and proportional sentences. The ACLU opposes mandatory minimum sentences because they eliminate a judge’s ability to evaluate the facts of each case and consider the character and history of the defendant in determining the most appropriate sentence. Chairman Leahy directly addressed this issue, stating in a recent address to Georgetown Law Students:

Our reliance at the state and federal level on mandatory minimums has been a great mistake. I’m not convinced it has lowered crime. I knew that we have imprisoned people who should not be there, and we have wasted money better spent on other things.³⁴

We are encouraged by the Chairman’s recognition of the problem with mandatory minimums and hope that legislative proposals considered by the Committee will not include new mandatory minimum sentences, and that Congress will work to eliminate those already in place.

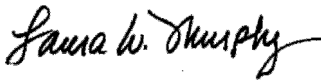
³⁴ *The Agenda for the Senate Judiciary Committee for the 113th Congress* (statement of Sen. Patrick Leahy), available at <http://www.cq.com/doc/newsmakertranscripts-4206024?wr=bzR2QWhQbmtjMG1yVVFhOHU1MDhRQQ>

Conclusion

Thank you for your leadership in seeking real reform on this crucial national dialogue about safety in our nation. We look forward to engaging in this process and working with you to implement smart reforms that will make us safer without sacrificing our civil rights and liberties.

If you have any other questions, please contact Senior Legislative Counsel Deborah Vagins at 202-675-2335 or dvagins@dcaclu.org.

Sincerely,



Laura W. Murphy
Director



Deborah J. Vagins
Senior Legislative Counsel



Jennifer Bellamy
Legislative Counsel



Chris Calabrese
Legislative Counsel