



Charles Houston  
Bar Association

**By Electronic Mail**

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Re: ACLU Support for Fremont Unified School District School Resource Officer (SRO) Review Task Force October 29, 2020 Recommendations

Dear Board of Education and Superintendent Cammack,

The ACLU Foundation of Northern California (“ACLU”) has a longstanding commitment to advocate against the toxic harms perpetrated by school policing practices that disproportionately criminalize Black students, students of color, and students with disabilities. In concert with this work, we declare unwavering support for the leadership of Fremont BAsTA, GENup, and Engage Fremont in advocating for the civil, human, and educational rights of Fremont Unified School District (“District”) students, particularly Black and Latinx students, and students with disabilities, who have been disproportionately negatively impacted by the police presence in Fremont schools. We join those organizations in urging you in the strongest terms to adopt, **without delay**, the District School Resource Officer (“SRO”) Review Task Force October 29, 2020 Report (“Task Force Report”) recommendations to 1) remove the District’s SRO program; 2) replace the SRO program by expanding restorative practice programs and other mental and

behavioral health supports for District students; and 3) restructure all law enforcement interactions with District students.

The facts and analysis below are based on information presented in the Task Force Report. The findings in the Task Force Report raise serious concerns for us about the disproportionate negative impact of police interactions with District students on the basis of race, ethnicity and disability; and highlight the urgent need for enhanced fundamental health and safety supports for all District students.

1. Disproportionate Negative Impact of the SRO Program on Black and Latinx Students and Students with Disabilities

The Task Force Report refutes the assumption that police make schools safer and instead reveals an alarming pattern of disproportionate negative impact on Black and Latinx students and students with disabilities in District schools. For example, during the 2016-2017 school year, the Report notes that while students with disabilities made up less than 10% of the student population, they made up 42% of referrals to law enforcement. This disproportionality indicates a likely overreliance by school and District staff on police officers to handle student behavior that may arise from a disability, particularly in conjunction with the finding that “the most frequent use of an SRO is to respond to a mental health issue in the form of a 5150,” when a student is undergoing a mental health crisis. Task Force Report at 15. Indeed, “several students who were having mental health crises have reported...[t]hey were threatened and sometimes treated violently.” *Id.* at 23.

The reported racial disproportionalities in the Task Force Report are even more shocking. During the 2017-2018 school year, Latinx students were referred to law enforcement at over double their rate of enrollment in the District and Black students were referred at nearly 8 times their rate of enrollment. *Id.* at 36. From 2015-2018, although Black students represented only 2% of the District’s student population, they made up more than 21% of arrests by police, “leading to a disproportionality factor of 10x their population in the District.” *Id.* at 34 (emphasis added). Unsurprisingly, given this data, Black and Latinx students in the District were less likely to report that having police in their schools made them feel safe. *Id.* at 23.

As both a legal and policy matter, these statistics expose significant, harmful inequities suffered by Fremont USD students related to the SRO program. To the extent this needs to be said, research demonstrates that racial disparities in how Black and white students are disciplined in school are primarily driven by differential treatment and support of those students, as opposed to differences in student behaviors.<sup>1</sup> As a policy matter, these discriminatory practices have real-world, damaging impacts on students. Unjust targeting of students by police leads to a damaging school climate, significant student mental health needs arising from trauma from police contact, and decreased graduation rates for students of color and students with disabilities. An arrest

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<sup>1</sup> See Jayanti Owens & Sara S McLanahan, *Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion*, 98(4) SOC. FORCES 1548 (June 2020), <https://doi.org/10.1093/sf/soz095>.

doubles high school students' odds of dropping out, and subsequent court involvement doubles those odds again, even when controlling for key indicators of future academic achievement, including parental poverty, grade retention, and middle school grade point average.<sup>2</sup>

The facts uncovered in the Task Force Report also present an array of legal issues centered on potential violations of the nondiscrimination rights of students of color and students with disabilities. We refer you to the United States Commission on Civil Rights July 2019 Briefing Report, [Connections to the School-to-Prison Pipeline for Students of Color with Disabilities](#) (link embedded)<sup>3</sup> (“Commission on Civil Rights Briefing Report”) for a concise summary of the relevant federal civil rights laws and merely highlight some key points here. School policies that “have the effect of subjecting individuals to discrimination because of their race, color, or national origin” and are not necessary to advance a legitimate, nondiscriminatory educational goal may violate Title VI under the “disparate impact” doctrine. 34 C.F.R. § 100.3(b)(2). The U.S. Department of Education Office for Civil Rights (OCR) enforces students’ rights to nondiscrimination under the disparate impact doctrine on the basis of race or ethnicity under Title VI. In August 2016, for example, OCR concluded a three-year investigation into a complaint arising from disparate racial impact in school discipline policy in Lodi Unified School District and concluded that the “evidence obtained established a violation of Title VI during the school years of 2011-12 through 2014-15.”<sup>4</sup> Although OCR has been less likely to pursue disparate racial impact claims under the current presidential administration, the recent presidential election likely presages a return to pre-2017 OCR practice to investigate and pursue remedies in cases like the one in Lodi USD. Disparate impact claims based in student disability status are also actionable, as described in the Task Force Report and in the Commission on Civil Rights Briefing Report, and may be enforced either by OCR or by private plaintiffs under Title VI, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.<sup>5</sup> As noted in

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<sup>2</sup> Gary Sweeten, “Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement,” available at [https://www.masslegalservices.org/system/files/library/H.S.ed\\_and\\_arrest\\_-\\_ct\\_involvement\\_study\\_by\\_Sweeten.pdf](https://www.masslegalservices.org/system/files/library/H.S.ed_and_arrest_-_ct_involvement_study_by_Sweeten.pdf); David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 41 (2013) (finding that arrested students matched to their identical, non-arrested peers on a comprehensive set of personal and situational characteristics were about half as likely to graduate from high school)

<sup>3</sup> <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

<sup>4</sup> Letter from Laura Faer, Regional Director, U.S. Dep’t of Educ. Office for Civil Rights to Dr. Cathy Nichols-Washer, Superintendent, Lodi Unified School District (Aug. 24, 2016), available at <https://www.ed.gov/news/press-releases/us-education-department-reaches-settlement-lodi-unified-school-district-california>.

<sup>5</sup> Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.* (Title II) (1990); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (2010) (IDEA); Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2015); *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (holding that disparate impact claims are viable for disability discrimination).

the Task Force Report, the California Constitution and an array of state civil rights statutes also protect students from discrimination on the basis of race, ethnicity, and disability status.<sup>6</sup>

A complaint against Fremont USD could arise because of the District's policy and practice of operating an SRO program that permanently stations full-time Fremont Police Department officers on school campuses to enforce the law against students and to enforce student discipline through "counseling." Task Force Report at 8, 12-13. As described above and extensively in the Task Force Report, preliminary analysis of District data from 2015 through 2018 reflects that Black and Latinx students, and students with disabilities, are significantly more likely to be referred to law enforcement and thus are more negatively impacted by this District program. This could give rise to claims under the federal and state civil rights laws described above. Additionally, the above-noted apparent overreliance on school police to handle behavior by students with disabilities may also give rise to claims under the Individuals with Disabilities Education Act if the behavior is related to the student's disability.

#### More Effective Alternatives Exist to Safeguard Students

The Task Force Report details several more effective alternatives to the SRO program that enhance student safety and create a safer, more inclusive and nurturing environment for all students. Task Force Report at 16-17, 19-21, 26-32. The ready availability of these alternatives undercut purported justifications for the SRO program that it is "educationally necessary" in District schools, thereby increasing liability under the civil rights laws described above. Providing counselors, mental health professionals, and a more robust restorative practices program is the more successful approach to school safety in the District, for the reasons described in the Task Force Report.

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<sup>6</sup> CAL. CONST. art. I, § 7(a), art. IV, § 16(a); *Butt v. State*, 4 Cal. 4th 668, 681 (1992) (observing that under the state constitution, the State is required to take steps to correct disparities "even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents"); *Collins v. Torlakson*, 41 Cal. App. 5th 879, 896-897 (Ct. App. 2019) (affirming that "public officials in some circumstances bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results" and concluding that, "under California's equal protection clause, a claim is stated when a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools and appreciable impact to a district's educational quality, and no action is taken to correct that policy when its impacts are identified"); CAL. EDUC. CODE § 220 (declaring that "[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."); Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2015); CAL. GOV'T CODE § 11135 (2011) (prohibiting both intentional discrimination and policies or practices that have an adverse disparate impact on individuals on the basis of race, national origin, ethnic group identification, religion, age, gender, gender identity, sexual orientation, color, genetic information, or disability).

Moreover, particularly during a time when the District is anticipating budget cuts of approximately \$27 million over the next two years, the District is far better served using the \$838,000 in classroom dollars it currently spends on the SRO program to hire more counselors and other mental health professionals who are actually trained and qualified in counseling students. *Id.* at 19 (noting that due to the scarcity of counselors in District schools, 1:1 counseling services are only available to students “in cases of extreme crisis” and many elementary schools have access to a counselor only 1-3 days a week). From a fiscal perspective, the base salary for a Fremont Police Department Police Officer (not including overtime or benefits) was \$125,060 in 2019;<sup>7</sup> while the base salary for a school counselor at a secondary school in the District was \$93,571,<sup>8</sup> for a cost savings per position of \$31,489 per year for every police officer who is replaced by a school counselor. On top of the fiscal considerations, not only are police officers less trained and qualified than student counselors to provide counseling, but also a police officer’s first duty is to enforce the law rather than to consider what course of action will best support the student in a given situation. Counselors, psychologists, social workers, and behavioral specialists are far better equipped to consider and implement a wider array of options to keep the student in school and on track to succeed.

### Conclusion

We understand from the Task Force Report that, in response to the murder of George Floyd by police and the ensuing local, national and international calls to end anti-Black racism and over-policing practices, you courageously took action to re-evaluate the District SRO program and established the SRO Task Force to assist in your review. The SRO Task Force conducted a comprehensive investigation and has arrived at recommendations to prioritize both equitable educational opportunities for all District students and evidence-based programs to better support those students during our country’s current economic and health crises. For all of the reasons described in this letter and in the Task Force Report, we urge you to join the growing list of school districts—from Oakland to San Jose to Minneapolis to Portland—that have eliminated school police programs to achieve authentic student well-being, safety, and equity. School districts across the nation are recognizing that policing students in schools continues a legacy of white supremacy in our public school system, when educational success for every student should instead be paramount. Every student deserves an educational environment where they can thrive. Our schools should be a place of learning for youth where we prevent conflict through trained restorative justice practitioners and mental health professionals, not law enforcement. Rather than spending nearly a million dollars in educational funds to pay the salaries of police officers, Fremont USD must invest in resources for its students to access a quality education.

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<sup>7</sup> Transparent California: California’s Largest Public Pay and Pension Database, “2019 Salaries for Fremont,” available at <https://transparentcalifornia.com/salaries/2019/fremont/>.

<sup>8</sup> Fremont Unified School District 2019-20 Local Control Accountability Plan and Annual Update at 76, available at <https://drive.google.com/file/d/1BchUDgMp1lC1tArG0Mox5JaHvjcurneZ/view> (listing expenditure of \$1,216,430 for salaries of 13 secondary counselors during the 2018-2019 school year).

This is your opportunity to take action to end discriminatory school policing and turn the District away from a long history of disproportionate harmful treatment of Black and Latinx students and students with disabilities. ***For the reasons discussed, we urge you to vote, without delay, to adopt the recommendations of the SRO Task Force to 1) remove the District's SRO program; 2) replace the SRO program by expanding restorative practice programs and other mental and behavioral health supports for District students; and 3) restructure all law enforcement interactions with District students through policy reforms detailed in the Report.***

Sincerely,



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ACLU Foundation of Northern California



Nichelle Holmes, President  
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