

CAHPERD (California Association for Health, Physical Education, Recreation and Dance)  
The City Project \* Latino Coalition for a Healthy California (LCHC)  
California Center for Public Health Advocacy \* Anahuak Youth Sports Association  
Prevention Institute



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**Re: Physical Education and Physical Fitness Title VI Compliance in California Public Schools**

Dear Assistant Secretary Lhamon:

Over 60 years ago, the United States Supreme Court held in *Brown v. Board of Education of Topeka* that public education “is a right which must be made available to all on equal terms.” 347 U.S. 483, 493 (1954). Today, disparities persist in access to resources for physical education and physical fitness in public school districts throughout California based on race, color, or national origin. We ask the US Department of Education (Department) Office of Civil Rights (OCR) to remedy this situation.

The undersigned members of a diverse and growing alliance request that you take action to ensure that the California Department of Education (CDE), public school districts, and public schools in California comply with the legal obligation to provide students with equal access to resources for physical education and fitness without regard to race, color, or national origin. We seek to ensure compliance on the basis of your October 1, 2014, Dear Colleague Letter regarding equal access to education resources, including Title VI of the Civil Rights Act of 1964 and its implementing regulations.

There is disturbing evidence of both unjustified discriminatory impacts, and intentional discrimination, in access to resources for physical education and fitness in California public schools. The disparate impact standard of discrimination plays an important role in uncovering discriminatory intent: it allows people to counteract disguised animus, unconscious prejudices, and implicit bias that escape easy classification as intentional discrimination. *See Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U. S. -- (2015) (upholding discriminatory impact standard under the Fair Housing Act of 1968); *accord, Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (test that was not valid for purpose used, and that disproportionately resulted in Black students being assigned to classes for special students in California schools violates unjustified discriminatory impact standard under Title VI).

CDE, districts, and schools do not conduct quality audits that are valid to monitor and ensure compliance with civil rights and physical education laws, as required under Title VI and California education law.

The California state education code requires schools to provide a minimum of 200 minutes of physical education every ten days in elementary schools, and 400 minutes in middle and high schools.<sup>1</sup> In *Doe v. Albany Unified School District*, 190 Cal.App.4th 668 (2010), the California Court of Appeal held that the law imposes a mandatory duty on schools to provide physical education, and that parents and students have standing to enforce the minutes requirements in court. Yet a series of empirical studies document that Black and Hispanic students are systematically denied quality physical education and are less physically fit than other students in California public schools. For example, a 2015 study of nearly 900 public school districts by the University of Southern California documents that physical fitness passing rates differ significantly based on race, color, and national origin. Black and Hispanic students have the poorest performance. Black students have a passing rate of only 10% or lower in nearly 400 school districts. A 2012 peer-reviewed study documents that students of color and low income students are disproportionately denied physical education in California public schools. Students in districts that complied with the physical education requirements were more likely to meet or exceed physical fitness standards than students in noncompliant districts.<sup>2</sup> The 2003 California Health Interview Survey<sup>3</sup> and the 2010 Shape of the Nation Report on Status of Physical Education in the United States<sup>4</sup> indicate that physical education quantity and quality are particularly deficient for students in racial and ethnic groups who are at high risk for being overweight and/or obese, and for less affluent students. Teachers often lack the credentials, experience, and professional development training to teach physical education. Half the districts audited by the state did not provide required physical education minutes from 2005 to 2009, and the actual numbers may be much worse.

California voters are in “nearly unanimous agreement” (97%) that it is important for schools to encourage more physical activity during the school day, according to a 2012 Field poll. In addition, three in four (74%) think that providing students with more physical activity during regular school hours will also have a positive effect on academic achievement.<sup>5</sup> Large majorities believe public investments aimed at keeping people healthy pay for themselves in the long run by preventing disease and reducing health care costs (73%) and think that a comprehensive program to prevent childhood obesity would be worth it even if it increased government spending by billions of dollars (68%).<sup>6</sup> More Californians favor physical education in schools than any other obesity prevention policy, across most party and socioeconomic lines, according to a 2011 Field poll. 89% support requiring physical education classes for four years in high school.<sup>7</sup>

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<sup>1</sup> See generally Mariah Lafleur, Seth Strongin, Brian L. Cole, Sally Lawrence Bullock, Rajni Banthia, Lisa Craypo, Ramya Sivasubramanian, Sarah Samuels, and Robert Garcia, *Physical Education and Student Activity: Evaluating Implementation of a New Policy in Los Angeles Public Schools*, 45(1) *Annals of Behavioral Medicine* 122-130 (2013), [goo.gl/Cpmey](http://goo.gl/Cpmey); Robert Garcia and Chad Fenwick, *Social Science, Equal Justice, and Public Health Policy: Lessons from Los Angeles*, 30 *Journal of Public Health* S26 (2009), [goo.gl/MIsWz](http://goo.gl/MIsWz); Robert Garcia, Sarah Samuels, Seth Strongin, Mariah Lafleur, Brian Cole and Kristina Harootun, *Physical Education Is a Right: The Los Angeles Unified School District Case Study Assessment, Implementation and Impact* (Policy Report Samuels & Associates & The City Project 2011), [goo.gl/q1q9K](http://goo.gl/q1q9K).

<sup>2</sup> Emma Sanchez et al., *Physical Education Policy Compliance and Children’s Physical Fitness*, 42(5) *Am. J. Prev. Med.* 452-59 (2012).

<sup>3</sup> S. Holtby, E. Zahnd, N. Lordi, C. McCain, Y.J. Chia, J.H. Kurata, *Health of California’s Adults, Adolescents and Children: Findings from CHIS 2003 and CHIS 2001*. Los Angeles, CA: UCLA Center for Health Policy Research, 2006.

<sup>4</sup> SHAPE America & American Heart Association, *2010 Shape of the nation report: Status of physical education in the USA* (2010).

<sup>5</sup> According to the Institute of Medicine, “Evidence suggests that increasing physical activity and physical fitness may improve academic performance and that time in the school day dedicated to recess, physical education class, and physical activity in the classroom may also facilitate academic performance.” Kohl III, H. W., & Cook, H. D. (Eds.), *Educating the student body: Taking physical activity and physical education to school*. Institute of Medicine / National Academies Press (2013) 161.

<sup>6</sup> Field Poll #2408: Unhealthy eating, lack of physical activity seen as greatest health risk facing California kids. Voters believe obesity prevention efforts should involve the community as well as kids and their families. 4/4/2012. Available at [www.field.com/fieldpollonline/subscribers/index.html](http://www.field.com/fieldpollonline/subscribers/index.html).

<sup>7</sup> Field Poll #2367: Increasing concern among California voters about childhood obesity. Support for policies aimed at encouraging greater physical activity and healthier eating among children. 2/8/2011. Available at [www.field.com/fieldpollonline/subscribers/index.html](http://www.field.com/fieldpollonline/subscribers/index.html).

The people have spoken. The legislature has spoken. The courts have spoken. Physical education is a right, good policy, and required by law. The attached Infographic on “Growing a Healthier California with Physical Education for All” summarizes these requirements.<sup>8</sup>

CDE, districts, and schools must take proactive efforts to conduct audits and self-assessments of physical education based on a review of relevant data, and their own programs and activities. The Los Angeles County Department of Public Health (DPH) publishes a physical education Tool Kit that includes a Checklist and model action plan (MAP) for audits, self-assessments, monitoring and compliance with civil rights and physical education requirements. The DPH and Tool Kit provide leadership and best practices for CDE, districts, and schools to ensure compliance with Title VI and physical education requirements.

We request that you take action as follows.

1. Ensure that CDE, districts, and schools comply with the legal obligation to provide students with equal access to resources for physical education and fitness without regard to race, color, or national origin.
2. Send a Dear Colleague Letter to CDE, all public school districts, and all public schools in California regarding their legal obligation to provide students with equal access to resources for physical education and fitness without regard to race, color, or national origin.
3. Highlight for CDE, districts, and schools the importance of protecting students from discrimination in the allocation of resources for physical education and fitness.
4. Clarify for CDE, districts, and schools their legal obligations to provide equal access to physical education under Title VI and its implementing regulations.
5. Identify the need for CDE, districts, and schools to take proactive efforts using the DPH Tool Kit to complete audits and self-assessments of physical education based on a review of relevant data, policies and practices within 90 days; for CDE, districts, and schools to provide assurances of compliance with Title VI and its regulation with 180 days; and for districts to provide accurate compliance reports annually to CDE.
6. Ensure that CDE, districts, and schools adequately inform teachers, parents, students, and the public of the right to physical education. Districts and schools should post the attached Infographic on physical education in the front office of every school, for example, as the Superintendent for the Los Angeles Unified School District has offered to do.
7. If there appears to be a failure or threatened failure to comply with Title VI and its regulations in physical education programs and activities, and if the noncompliance or threatened noncompliance cannot be corrected by other means, the US Department of Education can effect compliance by a reference to the US Department of Justice, by the suspension or termination of

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<sup>8</sup> The California Endowment tweeted about this Infographic by CAHPERD and The City Project: “Great infographic with everything you need to know to advocate for #physicaleducation in school spr.ly/6013hYfb.” (June 3, 2015.) The Infographic is available at [www.cityprojectca.org/blog/archives/37228](http://www.cityprojectca.org/blog/archives/37228).

or refusal to grant or to continue federal financial assistance, or by any other means authorized by law.<sup>9</sup>

Our goal is to ensure public school students receive the physical education to which they are entitled through effective monitoring, self-assessments, and compliance with civil rights and education requirements. We do not seek to threaten school funding. We believe that the US Department of Education can effect compliance without suspending or terminating federal financial assistance. *See* Dear Colleague Letter at page 5: “This letter . . . highlights the importance of protecting students from discrimination in the allocation of . . . educational resources. This letter also serves to support and inform education officials by clarifying their legal obligations, and by identifying resources that can guide proactive district and State efforts to assess relevant data and to examine policies and practices to ensure compliance with Title VI.”

The Department is to make a prompt investigation whenever a “report, complaint, or any other information” indicates a possible failure to comply with Title VI and its regulations.<sup>10</sup> The matter “will be resolved by informal means whenever possible.”<sup>11</sup> Through the present complaint, the USC report and others discussed below, and the information cited here, complainants seek to work with OCR, CDE, the California Superintendent of Public Instruction (Superintendent), and public school districts in California to secure voluntary compliance with civil rights and physical education requirements through informal means if possible.<sup>12</sup> We seek to work together for the good of the public school children of California.

## **I. Background on Equal Access to Resources for Physical Education and Fitness under Title VI and its Regulations**

As discussed in the Dear Colleague Letter, Title VI of the Civil Rights Act of 1964 and its implementing regulations protect equal access to resources for physical education and fitness.

Thus, for example, education resources include “benefits such as increasing physical fitness,” “athletic programs including physical education courses,” “athletic fields,” and “athletic facilities.” Dear Colleague Letter at pages 2, 4, 18. Physical education is “fundamentally part of a student’s school day.” *Id.* at page 3 n\*. The Department’s Title VI regulations cite discrimination in “recreational” programs and activities as one example of what is prohibited. 34 C.F.R. § 100.5.

The California Education Code requires schools to provide a minimum of 200 minutes of physical education every ten days in elementary schools, and 400 in middle and high schools.<sup>13</sup> Qualified teachers are required to have single subject physical education credentials in middle and high schools. Parents, students, and others have standing to enforce physical education requirements in court. The CDE is required to monitor public schools and districts to ensure compliance with physical education and civil rights requirements, but fail to do so adequately.

Equal access to resources for physical education and fitness are critical to the success of students. Challenging and creative physical education courses, programs, and activities; qualified and effective

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<sup>9</sup> *See* 34 C.F.R. Part 100.8(a).

<sup>10</sup> *See* 34 C.F.R. Part 100.7(c).

<sup>11</sup> *See* 34 C.F.R. Part 100.7(d)(1).

<sup>12</sup> *See* 34 C.F.R. Part 100.7(b) (complainants). Complaints are described on the last page.

Meetings between The City Project, CDE, and the state attorney general’s office regarding physical education and civil rights have not produced results to date.

<sup>13</sup> *See Doe v. Albany Unified School District*, 190 Cal.App.4th 668 (2010).

physical education leadership, teachers, and support staff; parity in class size for physical education and other classes; quality physical education materials; adequate physical education facilities; and sufficient funding to meet physical education requirements -- these resources are critical to the success of students. Yet, disparities in the access to these resources often reflect the racial demographics of school districts. Districts that disproportionately serve Black and Hispanic students have lower quality or fewer resources than districts that serve disproportionately white and Asian students. The Dear Colleague Letter highlights the importance of protecting students from discrimination in the allocation of any of these resources for physical education and fitness. Dear Colleague Letter at page 5.<sup>14</sup>

OCR generally considers that each of the educational resources discussed in the Dear Colleague Letter - including resources for physical education and fitness - provides a benefit, and that its inequitable allocation tends to be adverse to students who are under-resourced. These resources must be provided equitably without regard to students' race, color, or national origin. Indicia of the quality of physical education is relevant when determining discriminatory adverse impact. This includes student achievement outcomes and surveys (*id.* at pages 8-9), such as the results of the state-required physical performance fitness test (Fitnessgram).

Title VI of the Civil Rights Act of 1964 and its regulations prohibit discrimination on the basis of race, color, or national origin, in programs and activities by recipients of federal financial assistance. School districts that receive federal funds must not intentionally discriminate, and must not implement facially neutral policies that have the unjustified effect of discriminating against students on the basis of race, color, or national origin in access to resources for physical education and fitness.<sup>15</sup> See Dear Colleague Letter at pages 6-9; *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (unjustified discriminatory impact standard under Title VI).<sup>16</sup>

While sound educational and budgetary judgments by state and local education officials may lead school districts to prioritize certain resources, such decisions cannot reflect unlawful race discrimination in purpose or effect. "Lack of funds does not preclude the duty to act under Title VI." Dear Colleague Letter

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<sup>14</sup> The need for equal access to resources for physical activity in public schools is drawing attention beyond California. In May 2014, high school teacher David Garcia-Rosen submitted a complaint to US DOE on the grounds that the way sports funds are distributed in New York City public schools violates Title VI of the Civil Rights Act of 1964. According to Mr. Garcia-Rosen, "Schools that had more students of color had less sports opportunities, schools that had more poverty had less sports opportunity. Schools that had more English language learners had less sports opportunities." New York City schools with predominantly white student bodies have more than double the number of PSAL sports teams: eighteen on average compared to seven. The matter is pending. See Maura Ewing, *Is NYC Punishing Educators Who Advocate for Sports Equity in Schools?* The Nation, May 8, 2015, [www.thenation.com/article/nyc-punishing-educators-who-advocate-sports-equity-schools/](http://www.thenation.com/article/nyc-punishing-educators-who-advocate-sports-equity-schools/).

A joint report from the Poverty & Race Research Action Council and the National Women's Law Center regarding disparate sports opportunities for girls of color at segregated schools highlights the intersection between Title VI and Title IX. "Because educational resources include extracurricular programs such as sports, the guidance supports increasing the quantity and quality of sports programs for students in heavily minority schools. States and school districts must further focus on girls in . . . segregated and often under-resourced communities, analyzing their participation rates and adding opportunities as needed to comply with Title IX." Fatima G. Graves, Neena Chaudhry, Katharine G. Robbins, Anne Morrison, Lauren Frohlich, Adaku Onyeka-Crawford, Philip Tegeler, Silva Mathema, and Michael Hilton, *Finishing Last: Girls of Color and School Sports Opportunities*, National Women's Law Center and Poverty & Race Research Action Council 8 (2015).

<sup>15</sup> See 42 U.S.C. § 2000d *et seq.* See also 34 C.F.R. Part 100.3(a), (b) (implementing regulations). Under the regulations implementing Title VI, districts are prohibited from unjustifiably "utiliz[ing] 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." 34 C.F.R. § 100.3(b)(2). See also Memorandum from Ralph F. Boyd, Jr., Assistant Attorney General, to Heads of Departments and Agencies, General Counsels and Civil Rights Directors (Oct. 26, 2001)), at 2, available at [www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf](http://www.justice.gov/crt/about/cor/lep/Oct26memorandum.pdf). Although the Supreme Court in *Alexander v. Sandoval* held that private individuals have no right to sue to enforce the disparate-impact provision of the Title VI regulations, it did not undermine the validity of the regulations or otherwise limit the government's authority and responsibility to enforce Title VI regulations. See 532 U.S. 275 (2001).

<sup>16</sup> *Accord, Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U. S. -- (2015) (upholding unjustified discriminatory impact standard under Fair Housing Act).

at page 11. “[L]ack of funding is not a defense for noncompliance with Federal civil rights obligations.”  
*Id.* at page 24.<sup>17</sup>

## **II. The Problem: Black and Hispanic Students Do Not Receive Equal Access to Quality Physical Education and Do Worse on Physical Fitness Tests. CDE, Districts, and Schools Do Not Monitor Compliance with Title VI and Physical Education Requirements.**

A series of empirical studies document that Black and Hispanic students are systematically denied quality physical education and are less physically fit than other students in California public schools. CDE, districts, and schools must but do not monitor and ensure compliance with Title VI and physical education requirements.

A 2015 study by the University of Southern California (USC) Sol School of Public Policy found disturbing disparities in physical fitness for Black and Hispanic students in elementary, middle, and high schools based on a review of nearly 900 public school districts in California for the years 2010-15. The report documents the following disparities:

- Physical fitness passing rates for 5th, 7th, and 9th graders on the Fitnessgram differ significantly based on race and ethnicity.
- Non-Hispanic white students have the highest passing rate of 34%, with Asian students next at 31%, far outpacing Hispanic and Black students at 26% and 22%, respectively. Students identifying as Other have a passing rate of 29%.
- Black students have the poorest performance, with **a passing rate of 10% or lower in nearly 400 school districts.**
- School districts with more low income students (eligible for free or reduced price meals) tend to have lower Fitnessgram passing rates.
- Districts with higher API scores (academic performance index) tend to have higher Fitnessgram passing rates. In other words, physically fit students tend to do better academically.

Gabrielle Green, Jordan Henry, and Jenny Power, *Physical Fitness Disparities in California School Districts*, USC Sol Price School of Public Policy (2015) at pages 17-22, 27 (the USC Report).<sup>18</sup>

A 2012 peer reviewed study documented disparities in physical education based on race, color, national origin, and income in California public schools. Elementary school students in districts that did not comply with physical education minutes requirements were more likely to be Hispanic or Black and less likely to be white or Asian, while schools in compliant districts included fewer low income students. Students in districts that complied with the physical education requirements were more likely to meet or exceed physical fitness standards than students in noncompliant districts. See Emma V. Sanchez, Vaznaugh, Brisa N. Sánchez, Lisa G. Rosas, Jonggyu Baek, Susan Egerter, *Physical Education Policy*

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<sup>17</sup> Ten years after *Brown*, schools in the South had taken virtually no steps to desegregate. The federal government and civil rights attorneys then began using Title VI of the Civil Rights Act of 1964, combined with federal funding for schools, to ensure compliance with nondiscrimination requirements. The U.S. Office of Education developed objective, quantifiable measures to evaluate progress. Southern schools became the most racially diverse in the nation by 1972. Gavin Wright, *Sharing the Prize: The Economics of the Civil Rights Revolution in the American South* (2013), chapter 5, Figure 5-2 and accompanying text (Kindle edition locations 2389-2407).

<sup>18</sup> See also pages 32-48. The USC Report recommends investigation of nine “at-risk” districts that demonstrate low fitness, high at-risk populations, and non-compliance with physical education requirements. Pages 29-31. The complete USC Report, and the separate four page summary, are available on the web at [www.cityprojectca.org/blog/archives/37752](http://www.cityprojectca.org/blog/archives/37752). CDE records analyzed in the USC Report are on file with The City Project and are available to OCR in this investigation.

*Compliance and Children's Physical Fitness*, 42(5) *American Journal of Preventive Medicine* 452-459 (2012), available at [www.cityprojectca.org/blog/archives/14536](http://www.cityprojectca.org/blog/archives/14536).

In 2013-14, fully, 50% of California public school students in grade five, and over 43% and 38% in grades seven and nine respectively, did not meet five of six standards on the Fitnessgram, and there are large disparities by ethnicity, according to results from the CDE.<sup>19</sup>

The failure to comply with physical education minutes requirements is significantly worse than state audits indicate. According to a peer reviewed study of public schools in San Francisco published by the Centers for Disease Control, self-reporting on the minute requirements by elementary schools significantly overestimated actual compliance. While 83% of elementary schools reported that they met the minute requirements, an analysis of teachers' schedules showed that just 20% of schools were in compliance, and on site monitoring proved that just 5% were actually in compliance. Hannah Thompson, Jennifer Linchey, Kristine Madsen, *Are Physical Education Policies Working? A Snapshot From San Francisco*, *Prev. Chronic. Dis.* 2011 (10:130108), available at [www.cdc.gov/pcd/issues/2013/pdf/13\\_0108.pdf](http://www.cdc.gov/pcd/issues/2013/pdf/13_0108.pdf).

Dozens of California public school districts settled a lawsuit in 2015 for failure to meet physical education minute requirements in elementary schools. As part of the settlement agreement, 37 districts are to document physical education minutes in elementary students for three years. Teachers are to report minutes on a standard form to a site administrator and are subject to unannounced spot checks; the administrator is to report the results to the school board; the board is to report the results to the court. Districts paid \$1.1 million in attorneys' fees to plaintiffs' counsel in the matter, and more to counsel for the districts.<sup>20</sup>

Good faith and reasonable self-assessment, monitoring, and compliance through the DPH toolkit and Infographic may provide a defense to CDE, districts, and schools in such litigation. School districts that take proactive, concrete, and effective steps to address disparities and to ensure that students are equitably served are more likely to be in compliance with Title VI. The effectiveness of such efforts may reflect favorably on districts and may inform any remedies OCR requires so that the district can build upon its efforts. *See Dear Colleague Letter* at page 19.

CDE conducted 134 on-site reviews of school districts from 2005 to 2009. CDE determined that half – 67 – of the school districts were not providing the required amount of physical education instruction at the time of the audit. The failure rate of roughly 50% of school districts audited was consistent for each school year.<sup>21</sup>

Physical education matters. California school districts are failing fitness. Evidence-based studies published by The California Endowment document the importance of quality physical education programs and teachers to improve academic performance, student health, and the full development of the child, and document unfair disparities based on race, color, national origin, and income. According to the Endowment:

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<sup>19</sup> Los Angeles County Department of Public Health, *California Physical Education Self-Assessment Checklist (K-12)* (8/7/2015), citing Physical Fitness Testing from the CDE, <http://www.cde.ca.gov/ta/tg/pf/pftresults.asp>.

<sup>20</sup> *See* Supplemental Declaration of Donald Driscoll in Support of Motion to Amend Complaint and for Approval of Settlement, March 20, 2015, filed in *Cal200 v San Francisco Unified School District*, Case No. CGC 13-534975 (S.F. Superior Court 2013); Jane Adams, EdSource: Bill seeks to curb lawsuits over physical education minutes (Mar. 16, 2015), <http://edsources.org/2015/bill-seeks-to-curb-lawsuits-over-physical-education-minutes/76348>.

<sup>21</sup> The audit records for 2005-09 obtained from CDE are on file with The City Project and are available to OCR in this investigation.

- Both quantity and quality of physical education are deficient in grades K-12 in California public schools, and the problems are most severe in elementary schools.
- Physical education quantity and quality are particularly deficient for racial and ethnic groups at high risk for overweight and obesity, and for less affluent students.
- Personnel and material resources are clearly inadequate to support quality physical education in many schools, particularly those in less affluent communities.
- Improving the quantity and quality of physical education programs is likely to improve the academic performance and health of students. Time spent in moderate to vigorous activity is key.
- Research-based, activity focused physical education programs for schools at all levels have been shown to improve physical activity and provide other benefits, such as improved concentration and decreased disruptive behavior.<sup>22</sup>

The Institute of Medicine recommends addressing disparities, ensuring physical education minutes, improving teacher education, monitoring compliance, making physical education a core subject, and addressing physical activity in the whole school environment.<sup>23</sup>

### **III. CDE, Districts, and Schools Must Engage in Monitoring, Self-Assessment, and Reporting to Ensure Compliance with Title VI and its Regulations**

The Los Angeles County Department of Public Health (DPH), working with education and civil rights experts, has developed a physical education Tool Kit to ensure compliance with civil rights and physical education requirements in California public schools. This self-assessment tool is described below. We request that OCR require CDE, districts, and schools to engage in monitoring, self-assessment, and reporting to ensure compliance, as required under Title VI. CDE, districts, and schools must inform parents, students, teachers, and the public of the right to physical education under civil rights and physical education laws.<sup>24</sup>

#### **A. OCR Recommends Self-Assessment and Monitoring of Title VI Compliance**

OCR strongly recommends that school districts proactively assess their policies and practices to ensure that students are receiving educational resources without regard to race, color, or national origin, including resources for physical education and fitness, as Title VI requires. Periodic self-evaluation

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<sup>22</sup> See San Diego State University, *Physical Education Matters: A Full Report from the California Endowment* (California Endowment January 2008). See also San Diego State University, *Physical Education Matters* (California Endowment Policy Brief January 2007). Accord, UCLA Center to Eliminate Health Disparities and Samuels & Associates, *Failing Fitness: Physical Activity and Physical Education in Schools* (California Endowment Policy Brief 2007). The California Endowment's Policy Reports describing and explaining these findings are at [www.cityprojectca.org/blog/archives/601](http://www.cityprojectca.org/blog/archives/601).

<sup>23</sup> Kohl III, H. W., & Cook, H. D. (Eds.), *Educating the student body: Taking physical activity and physical education to school*. Institute of Medicine/National Academies Press (2013). The report is available at <http://iom.nationalacademies.org/Reports/2013/Educating-the-Student-Body-Taking-Physical-Activity-and-Physical-Education-to-School.aspx>.

Physical education is also aligned with federal requirements for district and school wellness. See Checklist page 26. The Healthy, Hunger-Free Kids Act of 2010, 42 U.S. Code § 1758b, requires each local educational agency participating in the National School Lunch Program or other federal child nutrition programs to establish a local school wellness policy for all schools under its jurisdiction. The intent of the Act is to strengthen wellness policies so they are useful tools in evaluating, establishing, and maintaining healthy school environments, and to make clear to the public (including parents, students, and others in the community) the content and implementation of the policies. See generally United States Department of Agriculture, *Team Nutrition, Local School Wellness Policy Requirements*, available at [www.fns.usda.gov/tn/local-school-wellness-policy-requirements](http://www.fns.usda.gov/tn/local-school-wellness-policy-requirements).

<sup>24</sup> See, e.g., 34 C.F.R. §§ 100.6(b) (Title VI compliance reports), 100.6(c) (informing beneficiaries and other interested persons to apprise them of the protections against discrimination under Title VI and its regulations). Accord, 28 C.F.R. § 42.406 (US Department of Justice regulations on racial and ethnic data collection); Executive Order 12898 on environmental justice and health, Sec. 3-3 (research, data collection, and analysis).



enables districts to identify barriers to equal educational opportunity and avoid unnecessary delay in taking corrective action. School districts that take proactive, concrete, and effective steps to address such disparities and to ensure that students are equitably served are more likely to be in compliance with Title VI. Furthermore, the effectiveness of such efforts may reflect favorably on districts and may inform any remedies OCR requires so that the district can build upon its efforts. An effective assessment should incorporate the principles that are outlined here. *See* Dear Colleague Letter at page 19.

Self-assessment should include notice to the school community of rights and responsibilities under Title VI and the procedure by which students, parents, and employees may report concerns. Ideally, the district should designate one or more employees to coordinate the district's compliance with Title VI and physical education requirements, including self-assessments. Designating one person responsible for overseeing compliance may aid in identifying and addressing any patterns or systemic problems that arise during the assessment. The self-evaluation and monitoring process provides a good opportunity to assess compliance with other aspects of Title VI as well as obligations under other laws. School districts that choose to conduct a comprehensive resource equity self-assessment should use reliable methods, *id.* at page 20, such as the DPH physical education Checklist and Model Action Plan.

If a district's self-assessment identifies significant inequities based on the race, color, or national origin of students, districts should take steps calculated to eliminate the inequities and remedy their effects in accordance with the remedial principles discussed in the Dear Colleague Letter, Title VI and its regulations, and physical education requirements under state law. Such proactive efforts may help a school district avoid a violation or give the district an opportunity to remedy a violation on its own. *Id.* at page 21. Such measures should be used to assess physical education and fitness.

### **B. CDE, Districts, and Schools Do Not Monitor Physical Education Adequately to Ensure Compliance with Title VI and Physical Education Laws**

Education Code section 51210.1(b)(2) requires the Superintendent to select not less than 10% of the school districts of the state each year to audit compliance with physical education requirements in elementary schools. CDE does not adequately comply with this requirement.

Education Code section 33352(b) and (c) require CDE to collect data on physical education minutes instruction in grades one to 12, to report to the governor and legislature, and to post a summary of the data on the web. CDE does not adequately comply with these requirements.

CDE, districts, and schools should use the audit process to ensure compliance with civil rights and physical education requirements. CDE does not use the process required by the sections cited above in order to present an accurate report to parents, students, teachers, and the public regarding compliance. The fact that CDE, districts, and schools do not conform to state physical education laws, policies, and standards is evidence of discrimination. *See* Dear Colleague Letter, pages 8, 32 n.40, and authorities cited.

School districts that conduct a self-assessment should use reliable methods. *Id.* at page 20. *Accord, Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (test not valid under Title VI). The audit instruments that CDE uses are not valid or reliable to determine whether schools in fact comply with physical education and civil rights requirements.<sup>25</sup> The audit instrument allows for misrepresentation and inaccuracy at both the school and district levels. As few as one school in an entire district might be audited. Furthermore,

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<sup>25</sup> *See* CDE, *Federal Program Monitoring of Physical Education*, [www.cde.ca.gov/ta/cr/documents/petrng1415.pdf](http://www.cde.ca.gov/ta/cr/documents/petrng1415.pdf).

schools and districts commonly self-report compliance with no effective checks and balances. The potential for, and reality of, misrepresentation is documented in the peer reviewed study in the San Francisco Unified School District discussed above. While 83% of elementary schools reported that they met the minute requirements, an analysis of teachers' schedules showed that just 20% of schools were actually in compliance, and on site monitoring proved that just 5% were in compliance.<sup>26</sup> CDE audits do not capture disparities in physical education and fitness for students of color.<sup>27</sup>

According to state physical education experts, the audit process is used at best for districts to find flaws. It is then left to the district's discretion to implement correct practices, without any further monitoring by CDE. The process is used to help districts just get through the audits to create the appearance of compliance, but there is no responsibility and accountability for actual compliance. Audit and compliance data is hard to obtain from CDE, districts, and schools. Other information about compliance with physical education is available, but it too can be difficult to obtain. This includes school records such as bell schedules, observational studies, and direct evidence from teachers, parents, and students who know the truth. Insiders whose jobs are on the line are often concerned about retaliation by the school if they report the truth about physical education compliance, however.<sup>28</sup>

### **C. The Los Angeles County Department of Public Health Physical Education Tool Kit for Self-Assessment Is a Best Practice for CDE, Districts, and Schools to Ensure Compliance with Title VI and Physical Education Requirements**

The Los Angeles County Department of Public Health (DPH), working with education and civil rights experts, has developed a physical education Tool Kit to ensure compliance with physical education and civil rights requirements by California public schools. The Tool Kit includes a physical education self-assessment Checklist and model action plan (MAP) for compliance with civil rights and education requirements.<sup>29</sup> We fully incorporate the Checklist by reference here. We request that OCR ensure compliance with Title VI through the use of the Checklist and Tool Kit by CDE, districts, and schools in the audit and self-assessment process.

The physical education Tool Kit is designed to enable school district staff – as well as parents, students, and others -- to conduct a comprehensive assessment of a school's physical education policies, programs, and activities, to establish a baseline, and to develop an action plan to address gaps and highlight strengths. Completing the Checklist can provide solid information about compliance by districts and schools with civil rights and physical education requirements. The Checklist also recommends best practices. The Checklist includes, for example, analyses of the California Education Code, California Code of Regulations, Title VI of the Civil Rights Act of 1964 and its implementing regulations, national best practice recommendations from leading physical education and health agencies (for example, the Society of Health And Physical Educators (SHAPE America), 2009 Commission on Teacher Credentialing, and the Centers for Disease Control and Prevention), and other resources.

Completing the Checklist can serve as a stand-alone assessment providing valuable information to districts, schools, and the public regarding physical education policies, programs, and activities. It can also be the first step of a four-step process to achieve compliance with civil rights and physical education

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<sup>26</sup> Hannah Thompson, Jennifer Linchey, Kristine Madsen, *Are Physical Education Policies Working? A Snapshot From San Francisco*, Prev. Chronic. Dis. 2011 (10:130108), available at [www.cdc.gov/pcd/issues/2013/pdf/13\\_0108.pdf](http://www.cdc.gov/pcd/issues/2013/pdf/13_0108.pdf).

<sup>27</sup> USC Report, pages 8-9, 29.

<sup>28</sup> Cf. Maura Ewing, *Is NYC Punishing Educators Who Advocate for Sports Equity in Schools?* The Nation, May 8, 2015, <http://www.thenation.com/article/nyc-punishing-educators-who-advocate-sports-equity-schools/>.

<sup>29</sup> Los Angeles County Department of Public Health, *California Physical Education Self-Assessment Checklist (K-12)* (3/3/2015), available at <http://publichealth.lacounty.gov/cardio/>.

requirements. The first step is the completion of the Checklist. Step two is the development of a district-wide physical education action plan. Step three is the preparation of a physical education policy. Step four is the adoption of a school board resolution to ensure implementation and compliance with civil rights and physical education requirements. This process can contribute to reducing disparities in physical education throughout the state.

In brief, districts can achieve compliance with legally required Checklist items by, at a minimum, providing at least 200 minutes of physical education in elementary schools every ten school days, and 400 minutes in middle and high schools; ensuring that all teachers who provide instruction in physical education are appropriately credentialed and receive professional development training; scheduling class sizes that are consistent with good instruction and safety; and maintaining safe and adequate teaching stations and equipment for physical education instruction.

The DPH physical education Tool Kit is based in part on the physical education policy and implementation plan that the Los Angeles Unified School District (LAUSD) adopted in response to an organizing campaign and administrative complaint in 2008.<sup>30</sup> Under the leadership of Superintendent Ramon Cortines, the district adopted a school board resolution, policy, and plan to ensure that all schools are compliant with civil rights and education laws, including Title VI and its regulations.<sup>31</sup> Dr. Cortines has asked district staff to present a report on compliance to the school board in October 2015.<sup>32</sup> Dr. Cortines's leadership at LAUSD is a best practice example of what CDE, districts, and schools should be doing to achieve compliance. "The physical education plan adopted by the Los Angeles Unified School District is a best practice example for districts across the state to provide a quality education for the children of California," according to Dr. Robert Ross, President of the California Endowment. "Research tells us physically active and fit kids get better grades and have better overall health."<sup>33</sup>

We request that OCR require school districts to engage in the process for self-assessment, monitoring, and compliance with physical education requirements, as Title VI requires. The systemic failure by CDE, districts, and schools to monitor, especially despite the clear evidence of disparities cited above, constitutes discrimination.

#### **IV. Physical Education, Qualified Physical Education Teachers, and Monitoring Are Required Under the California Education Code**

California state law requires physical education in public schools, as discussed below. Districts routinely fail to comply with physical education requirements. Failure to comply with physical education requirements is evidence of discrimination under the discriminatory impact standard, and under the intentional discrimination standard. The systemic failure to monitor effectively for compliance with Title VI and education requirements by CDE, districts, and schools, especially despite the clear evidence of disparities cited above, is evidence of discrimination.

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<sup>30</sup> See n.1 above; Checklist page 27.

<sup>31</sup> See the LAUSD school board resolution called "Physical Education Is a Priority" (July 8, 2008), first and third "resolved" clauses. The resolution is available at <http://www.cityprojectca.org/blog/wp-content/uploads/2008/07/Exhibit4resolution.pdf>.

See the LAUSD policy bulletin called "Physical Education Programs – Grades K-12," No. BUL-2528.1 (Dec, 21, 2009) at pages 5-6. The policy bulletin is available at <http://www.cityprojectca.org/blog/wp-content/uploads/2010/02/lausd-phys-ed-civil-rights-plan.pdf>.

<sup>32</sup> The School Quality Improvement Index (SQII) is being piloted by a coalition of 10 districts called the California Office to Reform Education (CORE) led by LAUSD and Dr. Cortines. SQII will replace the API (Academic Performance District) for those schools in 2016. SQII takes into account additional factors not included in the API, including the social and emotional health of students. SQII should include physical education, fitness, and fitnessgram, according to the USC Report (pages 3, 30). We agree.

<sup>33</sup> [www.preventioninstitute.org/action-center-sa/news-a-updates/780-leading-by-example.html](http://www.preventioninstitute.org/action-center-sa/news-a-updates/780-leading-by-example.html).

Under the discriminatory impact standard, it is necessary to assess discriminatory effects, whether the discrimination is justified by educational necessity, and whether there are less discriminatory alternatives. Conduct that has the necessary and foreseeable consequence of perpetuating discrimination can be as harmful as purposefully discriminatory conduct. The fact that physical education is required by state law demonstrates that there is no justification for failure to provide equal access to physical education. There are less discriminatory alternatives to promote physical fitness for all – by complying with physical education requirements.

Failure to provide physical education as required by law is evidence of intentional discrimination under the U.S. Supreme Court decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).<sup>34</sup> First, the impact of failure to comply bears more heavily on Black and Hispanic students, as demonstrated above. Second, failure to comply is by definition a departure from substantive standards requiring physical education.<sup>35</sup> Third, failure to comply violates procedural standards. CDE, districts, and schools do not seek to justify the failure to physical education requirements. They simply act with impunity in failing to do so. Fourth, education officials know and reasonably should know of the harms caused by failure to comply. As education professionals, they are charged with knowledge of the value of physical education as demonstrated by experience and the social science literature. The Education Code, state court of appeal decision, social science literature, media coverage, and poll results put education officials on actual and constructive notice of the need to comply with physical education requirements.

#### **A. Schools Must Comply with Physical Education Minutes Requirements**

The California State Legislature has found and declared that “the physical fitness and motor development of children in the public . . . schools is of equal importance to that of other elements of the curriculum.”<sup>36</sup>

For Grades 1 through 6, among other things, California Education Code Section 51210 requires that “The adopted course of study for grades 1 to 6, inclusive, shall include instruction, beginning in grade 1 and continuing through grade 6, in the following areas of study: . . . (g) Physical education, with emphasis upon the physical activities for the pupils that may be conducive to health and vigor of body and mind, for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.”

The physical education requirements are even more rigorous for grades 7 to 12. California Education Code Section 51220 provides: “The adopted course of study for grades 7 to 12, inclusive, shall offer courses in the following areas of study: . . . (d) Physical education, with emphasis given to physical activities that are conducive to health and to vigor of body and mind, as required by Section 51222.” And Section 51222 requires the following: “(a) All pupils, except pupils excused or exempted pursuant to Section 51241, shall be required to attend upon the courses of physical education for a total period of time of not less than 400 minutes each 10 schooldays.”

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<sup>34</sup> Intentional discrimination can be proven through direct and circumstantial evidence. Under the decision in *Arlington Heights*, circumstantial evidence includes, but is not limited to, the impact of the official action and whether it bears more heavily on one group than another; substantive departures, particularly if the substantive factors strongly favor a contrary action; procedural departures; a history of discrimination; and a pattern or practice of discrimination. 429 U.S. at 266-67.

<sup>35</sup> See Dear Colleague Letter page 8 (failure to conform to state and district policies is evidence of intentional discrimination). *Accord, id.* at 32 n. 40, citing *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (educational standards); *Abbott ex rel. Abbott v. Burke*, 748 A.2d 82, 88- 93 (N.J. 2000) (educational standards, qualified and certified teachers); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332-40 (N.Y. 2003) (education standards; teaching quality and training).

<sup>36</sup> Cal. Educ. Code § 51210.2(a).

In addition, in order to receive a high school diploma, students are required to take two year-long courses in physical education, unless they meet specific exemption requirements. Cal. Educ. Code § 51225.3(a)(1)(F).

These requirements are supported by the legislature's findings and declarations that: "Recent studies have shown that the vast majority of children and youth are not physically fit," and "According to a March 1997 report by the Centers for Disease Control, the percentage of children and adolescents who are overweight has more than doubled in the last 30 years. Most of this increase occurred within the last 10 years." Cal. Educ. Code § 51210.1. These findings support the legislature's intent in enacting the requirement that "It is, therefore, the intent of the legislature that all children shall have access to a high-quality, comprehensive, and developmentally appropriate physical education program on a regular basis." *Id.* at § 51210.1(a)(2).

These requirements are not optional or flexible. To the contrary, the California Court of Appeal has held that they are mandatory requirements that must be complied with to the letter by which they were enacted. In *Doe v. Albany Unified School District*, 190 Cal.App.4th 668 (2010), the Court declared that state law imposes a mandatory duty on school districts to provide minimum physical education minutes requirements, and that parents and students have standing to enforce the minutes requirements in court. There, a student's parent sued the district, the district's board of education, and CDE for the school's failure to provide the 200 minutes of physical education every 10 school days as required by section 51210. The Court of Appeal held that section 51210 imposes a **mandatory duty** on elementary schools to provide 200 minutes of physical education every 10 days, excluding lunch or recess, and that parents, students, and others have standing to seek enforcement of the statute in court. Based upon the use of similar statutory language to that establishing the mandatory minutes requirement, the teacher credentialing and training requirements are also mandatory.

Under state law, physical education classes in high school are required to evaluate each student's progress in each of the following content areas: effects of physical activity upon dynamic health, mechanics of body movement, aquatics, gymnastics and tumbling, individual and dual sports, rhythms and dance, team sports, and combatives (CCR Title 5, Section 10060(a).) If these state-mandated content areas are not covered in the classes, then the district may not legally provide physical education credit for those classes.

## **B. Schools Must Comply with Physical Education Teacher Requirements**

Strong teaching, leadership, and support are vital elements of a quality education.<sup>37</sup> Relevant inquiries regarding the characteristics and qualifications of teachers include teachers' licensure and certification status, whether teachers have completed appropriate training and professional development, whether teachers are inexperienced, whether they are teaching out of their field, and other indicators of access to strong teachers. See Dear Colleague Letter at pages 12-16. Teaching is clearly inadequate to support quality physical education in many schools, particularly those in less affluent communities. This is not the fault of the individual teachers but of education officials who do not provide the necessary leadership.

Under state law, teachers who teach physical education are required to be fully credentialed, either through a multiple subject teaching credential or a single subject teaching credential in physical education. These requirements are vital to the quality of the education provided. The elements of a credential and years of experience are the best predictors of a teacher's effectiveness in promoting high

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<sup>37</sup> We are not targeting public school teachers, who do the best they can with what they've got.

student achievement.<sup>38</sup> Without appropriate credentialing, students are deprived of the right to a qualified physical education teacher and a quality physical education.<sup>39</sup>

To be a fully credentialed teacher, one must obtain either a multiple subject teaching credential (typically obtained for teaching at the elementary school level), or a single subject teaching credential in the area of physical education (typically obtained for teaching at the middle or high school level).<sup>40</sup> The multiple subject credentialed teacher has less training in physical education than a single subject teacher.

The multiple subject credential and single subject credential can be either a “preliminary” credential or “professional clear” credential. A preliminary credential is for beginning teachers and is valid for 5 years. An individual who holds a preliminary credential may obtain a professional clear credential after completing several further requirements.

In order to obtain the five-year preliminary multiple subject teaching credential, or a single subject teaching credential in physical education, a potential teacher must successfully complete the following: (1) A B.A. or higher, (2) passage of the standardized teachers’ test, the CBEST, (3) a professional preparation subject program, (4) alternative methods of developing English language skills, (5) subject-matter knowledge requirement through exam or program, (6) knowledge of the U.S. Constitution, (7) computer competency, and (8) recommendation from an institution of higher education.<sup>41</sup>

After obtaining a *preliminary* multiple subject or single subject credential, an individual may apply for a professional clear credential. The requirements for the professional clear credential must be completed within five years of the issuance of the preliminary credential and include the following: (1) valid preliminary teaching credential, (2) completion of beginning teachers’ induction or fifth year of program, (3) health education, (4) special education, (5) advanced computer-based technology, and (6) advanced study in teaching English Learners.<sup>42</sup>

For all prospective teachers who wish to obtain a multiple subject credential, and for those who choose to demonstrate their subject matter competence in physical education through examination, the California Commission on Teacher Credentialing (CCTC) offers a series of subject matter examinations, the passage of which demonstrates an applicant’s subject matter knowledge. The examinations, the CSET, reflect the most current K–12 California Student Academic Content Standards.<sup>43</sup>

For the multiple subject teaching credential, the comprehensive subject matter requirements include three domains: Movement Skills and Movement Knowledge, Self Image and Personal Development, and Social Development.<sup>44</sup> Candidates for multiple subject credentials are required to understand the key factors in the development, analysis, and assessment of basic motor skills, how to structure lessons to promote maximum participation, inclusion, and engagement in a variety of traditional and nontraditional games, sports, dance, and other physical activities. It also ensures candidates can select lessons and activities based on factors such as the developmental levels of students and individual differences; design

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<sup>38</sup> See Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequality in California’s Public Schools* at 15-23, available at [www.decentschools.org/expert\\_reports/darling-hammond\\_report.pdf](http://www.decentschools.org/expert_reports/darling-hammond_report.pdf).

<sup>39</sup> See generally Public Advocates, *A Teacher is Key: Using the Williams Complaint Process to Monitor Teacher Quality* (2007).

<sup>40</sup> See Cal. Educ. Code § 44282(b), as amended by AB 3001 (2004).

<sup>41</sup> Cal. Educ. Code § 44257(a)(11).

<sup>42</sup> See Cal. Code Regs., tit. 5, § 80413(a).

<sup>43</sup> See Cal. Code Regs., tit. 5, § 80413(b).

<sup>44</sup> California Subject Examinations for Teachers, *About the CSET: Program Overview*, available at [http://www.cset.nesinc.com/CS13\\_overview.asp](http://www.cset.nesinc.com/CS13_overview.asp).

appropriate exercise programs and activities based on physical fitness concepts and applications that encourage physically active lifestyles; analyze the impact of factors such as exercise, relaxation, nutrition, stress, and substance abuse on physical health and well-being; and can design activities to provide opportunities for enjoyment, self-expression, and communication. Candidates must be able to create cooperative and competitive movement activities that require personal and social responsibility. The comprehensive physical education subject matter requirements include seven domains: Professional Foundations, Growth, Motor Development and Motor Learning, The Science of Human Movement, The Sociology and Psychology of Human Movement, Movement Concepts and Forms, Assessment and Evaluation Principles, and Integration of Concepts.

The legislature has sought to bolster the qualifications of physical education teachers in elementary schools where a multiple subject credential teacher may teach physical education. Because “the physical fitness and motor development of children in the public elementary schools is of equal importance to that of other elements of the curriculum,”<sup>45</sup> the legislature declared its intent “to encourage each school district maintaining an elementary school . . . to do one of the following:”

- (1) Employ a credentialed physical education teacher to provide instruction in physical education for each class of grades 1 to 6, inclusive, within any elementary school in the district for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period.
- (2) Provide each teacher providing instruction in physical education to any of grades 1 to 6, inclusive, within any elementary school in the district with yearly theoretical practical training in developmental physical education, as set forth in the Physical Education Framework adopted by the State Department of Education pursuant to Section 33350, except that any teacher who has successfully completed one college level course in elementary physical education shall not be subject to this paragraph.<sup>46</sup>

Thus the legislature intended that a single subject credentialed physical education teacher teach physical education classes in elementary schools, or that the multiple subject credentialed teacher at least have further physical education training.

CDE provides a professional development program for physical education teachers. *The California Physical Education-Health Project (A California Subject Matter Project)* provides focused professional development for teachers in physical education by offering three fully operating sites and an active recruitment of planning sites around California.<sup>47</sup>

Physical education teachers with the proper credentials, training, and experience, and subject matter competency are more likely to provide a quality physical education to students than other teachers.<sup>48</sup> For example, qualified teachers are more likely to provide 200/400 minutes of physical education every ten days as required under state law. Qualified teachers are more likely to provide active minutes rather than “sitting around doing nothing” minutes during physical education classes. Qualified teachers are more likely to implement physical education standards during physical education classes. Physical education teacher vacancies and misassignments and lack of subject matter competency deprive students of

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<sup>45</sup> *Physical Education Subject Matter Requirements*, available at [http://www.cset.nesinc.com/PDFs/CS\\_PE\\_SMR.pdf](http://www.cset.nesinc.com/PDFs/CS_PE_SMR.pdf).

<sup>46</sup> Cal. Educ. Code § 51210.2(a).

<sup>47</sup> Cal. Educ. Code § 51210.2(b).

<sup>48</sup> See <http://csmmp.ucop.edu/home/about>, and with respect to physical education, [http://csmmp.ucop.edu/home/program\\_list/?projids=24](http://csmmp.ucop.edu/home/program_list/?projids=24).

qualified physical education teachers and the physical education minutes to which students are entitled.<sup>49</sup> Minutes provided by non-qualified teachers do not meet the physical education minutes requirement.

## **V. Hispanic and African American Students Are Disproportionately Denied Equal Access to Physical Education**

The failure to comply with physical education requirements described in this complaint raise serious concerns about discriminatory impacts and discriminatory intent against Black and Hispanic students in access to resources for physical education and fitness.

### **A. Failure to Comply with Physical Education Requirements Has an Unjustified Discriminatory Impact on Black and Hispanic Students**

Under the discriminatory impact standard, it is necessary to assess discriminatory effects, whether the discrimination is justified, by educational necessity, and whether there are less discriminatory alternatives for the challenged practice. Conduct that has the necessary and foreseeable consequence of perpetuating discrimination can be as harmful as purposefully discriminatory conduct. There is evidence of unjustified discriminatory impacts here.

First, there are numeric disparities regarding physical education and fitness based on race, color, or national origin, as discussed above. Black and Hispanic students are disproportionately harmed. Black and Hispanic students are disproportionately denied physical education in public schools. Black and Hispanic students disproportionately perform worse on fitness tests. The systemic failure by CDE, districts, and schools to monitor, especially despite the clear evidence of disparities cited above, constitutes discrimination.

Second, there is no educational necessity to justify the failure to monitor effectively compliance with civil rights and physical education requirements, to provide physical education, and to provide qualified physical education teachers as required by law. Districts act with impunity when they disregard these legal requirements.

Third, there are less discriminatory alternatives to ensure all students receive the resources they are entitled to for physical education and fitness. CDE, districts, and schools must monitor and ensure compliance. Districts must engage in self-assessments and monitoring to ensure compliance. Districts and schools must comply with the legal requirements for physical education minutes and teachers.

### **B. Failure to Comply with Physical Education Requirements Reflects Evidence of Intentional Discrimination against Black and Hispanic Students**

The failure to comply with physical education requirements presents circumstantial evidence of intentional discrimination under the factors described by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). First, the failure to comply bears more heavily on Black and Hispanic students. Second, there are departures from substantive standards mandating monitoring, minutes, and qualified teachers in the Education Code.<sup>50</sup> Third, there are

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<sup>49</sup> See Cal. Educ. Code § 35186 (e)(2)(A) and (C) (uniform complaint procedure regarding teacher qualifications, misassignments, and vacancies); 5 CCR 4682(a) (1) and (3) (same).

<sup>50</sup> See Dear Colleague Letter page 8 (failure to conform to state and district policies is evidence of intentional discrimination). *Accord, id.* at 32 n. 40, citing *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (educational standards); *Abbott ex rel. Abbott v. Burke*, 748



procedural irregularities. CDE, districts, and schools do not seek to justify the failure to meet these requirements. Fourth, education officials know and reasonably should know of the harms caused by these practices. The Education Code, California court of appeal decision, social science literature, media coverage, and poll results, put them on actual and constructive notice. Fifth, there is a history of discrimination in public education in California against Black and Hispanic students, as discussed below. Sixth, there is a pattern and practice of discrimination. This is evidenced by each of the other five factors.

There is a history of discrimination in public education in California.<sup>51</sup> Thus, for example:

One of the first successful school desegregation cases in the U.S. was the Lemon Grove case on behalf of Mexican American students in the San Diego Superior Court in 1932.<sup>52</sup>

In the 1940s in *Mendez v. Westminster School District of Orange County*, the federal district court held that segregating students based on Mexican ancestry violated equal protection under the 14th Amendment. The *Mendez* case helped pave the way for *Brown v Board of Education* in the U.S. Supreme Court in 1954.<sup>53</sup>

The Pasadena School District in the 1960s was the defendant in one of the first school desegregation suits outside the Deep South following the historic ruling in *Brown v. Board of Education*. In *Jackson v. Pasadena City School District*, the California Supreme Court ruled that school boards were obligated to end school segregation.<sup>54</sup>

The Los Angeles school district apportioned school resources unequally, restricted the hiring of nonwhite teachers, readjusted zoning lines to keep black students in overcrowded black schools, and tracked black and Latino students into vocational rather than college programs. In 1963, 76 community and political groups formed the United Civil Rights Council, which called on the district to redraw district lines, transfer black students out of overcrowded schools, diversify the curriculum, and hire more nonwhite teachers.<sup>55</sup> *Crawford v. Board of Education of the City of Los Angeles* led to years of litigation.<sup>56</sup>

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A.2d 82, 88- 93 (N.J. 2000) (educational standards, qualified and certified teachers); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332-40 (N.Y. 2003) (education standards; teaching quality and training).

<sup>51</sup> See generally Robert García and Seth Strongin, *Healthy Parks Schools and Communities: Mapping Green Access and Equity for Southern California* at page 119 (The City Project Policy Report 2011). Available at [www.mapjustice.org/images/Southern\\_California\\_Report\\_Final\\_Medium\\_Res.2.pdf](http://www.mapjustice.org/images/Southern_California_Report_Final_Medium_Res.2.pdf). See also Jeannie Oakes and Martin Lipton, *Schools that Shock the Conscience: Williams v. California and the Struggle for Education on Equal Terms Fifty Years after Brown*, 6 Afr.-Am. L. & Pol'yRep. 152 (2004). Available at <http://scholarship.law.berkeley.edu/bjalp/vol6/iss2/3>.

<sup>52</sup> See Roberto R. Alvarez, Jr., *The Lemon Grove Incident: America's First Successful Desegregation Court Case*, 32 Journal of San Diego, (Spring 1986).

<sup>53</sup> See *Mendez, et al., v. Westminster School District of Orange County*, 161 F.2d 774 (9th Cir. 1947) (en banc); Jeanne M. Powers, *On Separate Paths: The Mexican American and African American Legal Campaigns against School Segregation*, 121 American Journal of Education 29 (2014); Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940's*, 8 La Raza L.J. 166, 173, 204 (1995).

<sup>54</sup> See *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 881 (1963).

<sup>55</sup> Jeanne Theoharis, *50 Years Later, We Still Haven't Learned from Watts*, N.Y. Times, Aug. 11, 2015, A23.

<sup>56</sup> See, e.g., *Crawford v. Board of Educ. of the City of Los Angeles*, 17 Cal. 3d 280 (1976); David S. Ettinger, *The Quest to Desegregate Los Angeles Schools*, Los Angeles Lawyer 55, 67 (March 2003).

Mexican-American, African-American, Asian, and white students filed a class action lawsuit against the San Diego Unified School District in 1967, resulting in a court order to alleviate racial segregation in city schools in 1977.<sup>57</sup>

The U.S. Department of Education found intentional discrimination in the Bakersfield school district. The U.S. Department of Justice in the 1980s settled the case through a consent decree under the Civil Rights Act of 1964.<sup>58</sup>

The Ninth Circuit Court of Appeal in 1984 held that the use of a test not valid for the purpose used to assign Black students to classes for special students in the Oakland school district violated the unjustified discriminatory impact standard under Title VI; the district court found a violation of both the discriminatory impact and intentional discrimination standards.<sup>59</sup>

Although the problem of access to resources for physical education and fitness is based on race, color, or national origin in California public schools, the fair and effective solutions requested here benefit all students and are race neutral. Even if at the margins any remedies were to employ race-conscious measures, such measures would be necessary and could be narrowly tailored to meet the compelling state interests in students who are physically active, healthy, and ready to learn.

## **VI. Conclusion**

We request that you take action that includes but is not limited to the following:

1. Ensure that CDE, school districts, and schools comply with the legal obligation to provide students with equal access to resources for physical education and fitness without regard to race, color, or national origin.
2. Send a Dear Colleague Letter to CDE, all public school districts, and all public schools in California regarding their legal obligation to provide students with equal access to resources for physical education and fitness without regard to race, color, or national origin.
3. Highlight for CDE, districts, and schools the importance of protecting students from discrimination in the allocation of resources for physical education and fitness.
4. Clarify for CDE, districts, and schools their legal obligations to provide equal access to physical education under Title VI and its implementing regulations.
5. Identify the need for CDE, districts, and schools to take proactive efforts using the DPH Tool Kit to complete audits and self-assessments of physical education based on a review of relevant data, policies and practices within 90 days; for CDE, districts, and schools to provide assurances of compliance with Title VI and its regulation with 180 days; and for districts to provide compliance reports annually to CDE.<sup>60</sup>

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<sup>57</sup> See San Diego State University Archives, *De Facto Segregation in San Diego Schools* (2008), <http://sdsuspollections.blogspot.com/2008/08/de-facto-segregation-in-san-diego.html>.

<sup>58</sup> See Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 *Yale Law Journal* 1811, 1812 (1986); Michael H. Sussman, *Reagan Administration Retreats on School Desegregation*, 91 *The Crisis* 38 (1984).

<sup>59</sup> *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

<sup>60</sup> See DPH Physical Education Checklist at pages 28-29.

6. Ensure that CDE, districts, and schools adequately inform teachers, parents, students, and the public of the right to physical education. Districts and schools should post the attached Infographic on physical education in the front office of every school, as LAUSD Superintendent Cortines has offered to do.

7. If there appears to be a failure or threatened failure to comply with Title VI and its regulations in physical education programs and activities, and if the noncompliance or threatened noncompliance cannot be corrected by other means, the US Department of Education can effect compliance by a reference to the US Department of Justice, by the suspension or termination of or refusal to grant or to continue federal financial assistance, or by any other means authorized by law.<sup>61</sup>

8. Specific actions education CDE, districts, and schools should take include but are not limited to the following:

- Enforce the physical education minutes and teacher requirements.
- Use valid audit, self-assessment, and reporting instruments to monitor and ensure compliance with Title VI and physical education requirements, including the DHP Checklist.
- Provide a list identifying the physical education classes offered in all district schools, the teachers assigned to teach those classes, the certifications held or special training received by those teachers that qualifies them to teach the classes identified, the dates of those certifications or trainings, and the renewal, good-through, or expiration dates of those certifications or trainings.
- Remedy misassignments (or vacancies) of physical education teachers, and assign teachers to teach physical education classes for which the teachers have subject matter competency.
- Ensure that the data collected through monitoring accurately discloses the extent to which each school within each district provides physical education teachers with appropriate credentials and subject matter competency.
- Ensure that the data collected through monitoring accurately discloses the extent to which each teacher vacancy, misassignment, or lack of subject matter competency within the district involves a physical education class or teacher.
- Ensure that the information each district publishes in the District Accountability Report Card, SARC, and SARC summaries accurately discloses the extent to which each teacher vacancy, misassignment, or lack of subject matter competency within the district involves a physical education class or teacher.
- Achieve and maintain parity in class size between physical education and academic classes, or limit physical education class size to a maximum of 55 students per teacher.
- Gather, analyze, and publish physical education and fitness data based on race, color, or national origin to evaluate and ensure compliance with civil rights laws.
- Engage in the shared use of schools, pools, and parks as appropriate to make optimal use of public resources.<sup>62</sup>
- Include physical education, fitness, and fitnessgram performance in the School Quality Improvement Index.

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<sup>61</sup> See 34 C.F.R. Part 100.8(a).

<sup>62</sup> Dear Colleague letter page 24 (remedies might include shared facilities such as athletic fields).

Catherine E. Lhamon, Assistant Secretary for Civil Rights  
Physical Education Title VI Compliance in California Public Schools  
August 13, 2015  
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We look forward to meeting or talking with you to resolve these matters. We request the opportunity to take part in any resolution of this matter, whether informal or formal.<sup>63</sup>  
Very truly yours,

Betty Hennesy  
CAHPERD (California Association for Health, Physical Education, Recreation and Dance)

Robert García  
Ariel Collins  
The City Project

Xavier Morales  
Latino Coalition for a Healthy California (LCHC)

Harold Goldstein  
California Center for Public Health Advocacy

Raul Macias  
Anahuak Youth Sports Association

Larry Cohen  
Manal Aboleta  
Prevention Institute

#### **Attachment**

CAHPERD and The City Project, Infographic, “Growing a Healthier California with Physical Education for All,” [www.cityprojectca.org/blog/archives/37228](http://www.cityprojectca.org/blog/archives/37228).

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<sup>63</sup> Cf. 34 C.F.R. Part 100.7(b), 100.9 (notice to complaint).

### **California Association for Health, Physical Education, Recreation and Dance**

The California Association for Health, Physical Education, Recreation and Dance (CAHPERD), founded in 1930, is a non-profit, voluntary membership corporation formed exclusively to promote the organizing and progress of school, community and statewide programs of health, physical education, recreation and dance which will embody such opportunities and which will insure the inclusion of such programs within the most appropriate philosophical and social context of life in California.

### **The City Project**

The City Project believes that all people should have access to healthy, livable communities. Our multicultural, Latino-led team of civil rights advocates works with diverse allies to ensure equal access to (1) healthy green land use through planning by and for the community; (2) climate justice; (3) physical education and schools of hope as centers of their communities; (4) health equity and wellness; and (5) economic vitality for all, including jobs and avoiding displacement as communities become greener and more desirable. The mission of The City Project is to achieve equal justice, democracy, and livability for all.

### **Latino Coalition for a Healthy California**

Latino Coalition for a Healthy California (LCHC)—the only statewide organization in California with a specific emphasis on Latino health—was founded in 1992 by health care providers, consumers and advocates to impact Latino health by focusing on policy development, providing enhanced information, and promoting community involvement. Three major functions provide focus to the organization's work: public policy and advocacy; community education; and health equity research. These functions complement LCHC's work in four key strategic areas: chronic disease prevention, safe communities, health care access, and just immigration reform.

### **California Center for Public Health Advocacy**

The California Center for Public Health Advocacy tackles the underlying factors that perpetuate childhood obesity and undermine parents' desire to keep their children healthy: multibillion-dollar marketing and overwhelming availability of unhealthy foods and beverages, limited access to fresh fruits and vegetables in far too many communities, schools failing to provide quality physical education, cities designed for cars rather than pedestrians and bicyclists, and lack of safe places for children to play.

### **Anahuak Youth Sports Association**

Anahuak Youth Sports Association (AYSA) was founded in 1994 in Northeast Los Angeles and was incorporated as a non-profit organization in 2000. Anahuak offers a structured soccer league for 2,000 girls and boys ages 5 to 17 at several parks and schools in Los Angeles. Parents, volunteers, and coaches oversee practices and games. Anahuak's mission is to inspire youth to continue their education through scholarship fundraisers and college visits. Anahuak was created to serve as an alternative to drugs, gangs, and crime, using soccer as a hook to keep children off of the streets, children whose families can't afford to pay for league fees and equipment. Anahuak serves as a leader in mobilizing its members, particularly around environmental and health issues that affect the community, including physical education in public schools.

### **Prevention Institute**

Prevention Institute was founded in 1997 to serve as a focal point for primary prevention practice—promoting policies, organizational practices, and collaborative efforts that improve health and quality of life. As a national non-profit organization, the Institute is committed to preventing illness and injury, to fostering health and social equity, and to building momentum for community prevention as an integral component of a quality health system. Prevention Institute synthesizes research and practice; develops prevention tools and frameworks; helps design and guide interdisciplinary partnerships; and conducts training and strategic consultation with government, foundations, and community-based organizations nationwide and internationally.



# GROWING A HEALTHIER CALIFORNIA

- WITH -

# PHYSICAL EDUCATION

FOR ALL!

The **PEOPLE** have spoken



**97%** of California voters agree students need more physical activity in school

The **LEGISLATURE** has spoken



An average of at least



of physical education is required by law

The **COURTS** have spoken



Physical education is a **right!**

## Science has spoken and the benefits are clear

### Studies show:

Physical education:

- Enhances academic performance, graduation rates, & attendance
- Increases skills, knowledge, & confidence to be healthy throughout life
- Lowers risk of obesity, diabetes, & heart disease
- Promotes emotional well-being

Obesity & physical inactivity cost CA \$41 billion per year, \$20 billion due to inactivity.



**NEVERTHELESS**

**Schools are not meeting physical education requirements, and civil rights disparities persist**

**50%** of school districts did not meet physical education requirements between 2005 and 2009, and the problem continues.



Elementary school students in districts that did not meet physical education requirements were more likely to be Hispanic or black, while districts that did included fewer low-income students.

**Physical education is good policy and required by law**



## TAKE ACTION



Write to your school board, share with your state legislators, and make sure your children receive the physical education they deserve. **Even one teacher or parent per district can make a difference!**



The L.A. County Department of Public Health has a physical education Checklist and MAP (Model Action Plan) for school and community leaders to make sure children receive quality physical education. Visit [goo.gl/qe8JUY](http://goo.gl/qe8JUY).

