

**OCR's Approach to the Evaluation, Investigation and Resolution of
Title VI Discipline Complaints
February 12, 2014**

I. STATEMENT OF POLICY AND LEGAL FRAMEWORK:

1. 2014 OCR/DOJ "DEAR COLLEAGUE LETTER" (DCL) ON DISCIPLINE

a. Policy

Districts must ensure that all students have an equal opportunity to learn in school. Fair and equitable discipline policies and their nondiscriminatory administration are important components of creating an environment where all students feel safe and welcome. Equipping school officials with an array of tools to support positive student behavior—thereby providing a range of options to prevent and address misconduct—will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate. (DCL, p. 5)

When districts respond to student misconduct, Title VI requires that the district's response be undertaken in a racially nondiscriminatory manner. Title VI protects students over the entire course of the disciplinary process, from behavior management in the classroom, to referral to an authority outside the classroom because of misconduct—a crucial step in the student discipline process—to resolution of the discipline incident. (DCL, p. 6)

Removing students from a classroom not only prevents them from accessing educational instruction, but may also send them on a school-to-prison pipeline. OCR's work in investigating these complaints and successfully implementing the agreements has the potential to be life-changing; this is an opportunity for OCR to make a truly significant difference in the lives of students.

b. Legal Framework

The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to *different treatment* based on the student's race, and second, if a policy is neutral on its face—meaning that the policy itself does not mention race—and is administered in an evenhanded manner but has a *disparate impact*, *i.e.*, a disproportionate and unjustified *effect* on students of a particular race.

Different Treatment

The Title VI regulation at 34 C.F.R. §100.3(b)(1) (i), (ii), and (v) prohibits recipients from, on the basis of race, color or national origin, denying students any service or benefit provided under the program; providing services or benefits that are different from or provided in a different manner from services or benefits provided to other students; and restricting students in the enjoyment of any privilege or advantage enjoyed by others. Districts violate Federal law where they intentionally discipline students differently based on race.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

Disparate Impact

The Title VI regulation at 34 C.F.R. §100.3(b)(2) states that a recipient, in determining the types of services, facilities or other benefits to be provided, or the situations in which such services or benefits will be provided, may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin. Districts violate Federal law where facially neutral disciplinary policies and practices, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race.

Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations. From the beginning, OCR's investigation should look for evidence of different treatment as well as evidence relevant to a disparate impact analysis. In all cases, however, OCR will investigate all relevant circumstances, such as the facts surrounding a student's actions and the discipline imposed. (DCL, p. 7)

II. EVALUATION OF THE COMPLAINT:

1. COMPLAINTS ALLEGING ONLY INDIVIDUAL DISCRIMINATION¹

In complaints alleging *only* individual discrimination in discipline, OCR will investigate both the individual allegation *and* will open a class-based investigation. To determine the scope of the investigation, see below:

- a. In all complaints alleging only individual discrimination, OCR will examine the district-wide CRDC data of exclusionary discipline to determine the *extent of the class-based investigation*:
 - i. If district-wide CRDC data of exclusionary discipline of students of a particular race are *at or above the current CRDC national average*, OCR will open a district-wide investigation;
 - ii. If district-wide CRDC data of exclusionary discipline of students of a particular race are *below the national average but still show a higher rate*

¹ OCR will dismiss *untimely* individual complaints and, depending on the disparities shown by the district's CRDC data of exclusionary discipline, will nominate the district for a compliance review.

OCR will dismiss individual complaints for which *no written consent to proceed is provided* and, depending on the disparities shown by the district's CRDC data of exclusionary discipline, will nominate the district for a compliance review.

For individual complaints that have been *withdrawn*, OCR will determine whether to go forward with the investigation, based on the status of the investigation at the time the complainant withdraws the complaint.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

- of exclusionary discipline for students of a particular race*, OCR will open an investigation *school-wide and possibly district-wide (district-wide, if more than one school in district show higher rates of exclusionary discipline for students of a particular race)*;
- iii. If district-wide CRDC data of exclusionary discipline of students of a particular race show that discipline rates for students of all races are *substantially proportionate*, OCR open an investigation *school-wide only*.

In complaints where immediate *relief for the individual student* is warranted, OCR may approach the district to provide such necessary immediate relief while OCR continues its investigation. OCR will not obtain a resolution agreement at this stage of the investigation, regardless of whether the relief provided fully addresses the individual complaint. Instead, in the agreement that resolves both the individual complaint and the class-wide investigation OCR will acknowledge any relief for the individual student that the district provided during the course of the investigation. ECR is never available to resolve discipline complaints.

2. ***COMPLAINTS ALLEGING ONLY STATISTICAL DISPARITIES BASED ON CRDC DATA AND NO OTHER INFORMATION***

OCR will dismiss complaints alleging *only statistical disparities* based on *CRDC data* and *no other information*.

3. ***COMPLAINTS ALLEGING ONLY STATISTICAL DISPARITIES BASED ON DATA OTHER THAN CRDC DATA AND NO OTHER INFORMATION***

OCR will dismiss complaints alleging only statistical disparities based on *data other than CRDC data* and *no other information*. OCR will consider this data along with the district's CRDC data and evaluate the data for a possible compliance review nomination.

4. ***COMPLAINTS ALLEGING STATISTICAL DISPARITIES AND ONLY ADDITIONAL INFORMATION REGARDING DISTRICT POLICIES***

OCR will open for district-wide investigation complaints alleging *statistical disparities* based on district-wide CRDC data of exclusionary discipline of students:

- a. if the district-wide CRDC data of exclusionary discipline of students of a particular race are *at or above the current national average*; OR
- b. if the district-wide CRDC data of exclusionary discipline of students of a particular race are *below the national average but still show a higher rate of exclusionary discipline for students of a particular race*; AND
- c. the allegation is that the district's disciplinary policy requires *mandatory* suspension or expulsion of students for low-level infractions (e.g., possession of a cell phone, tardiness) or truancy.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

NOTE: OCR will dismiss complaints alleging *statistical disparities* based on CRDC data when the allegation is that the district's disciplinary policy permits *discretionary* suspension or expulsion of students for low-level infractions (e.g., possession of a cell phone, tardiness) or truancy.

III. THE INVESTIGATION: SOME AREAS OF PARTICULAR FOCUS:

1. DISCIPLINE INVESTIGATIONS ARE BROAD-BASED:

- a. Investigation of discipline complaints involves an examination and analysis of *all* components of the disciplinary process; the investigations are broad-based and systemic.
- b. Generally, the investigation reviews disciplinary actions of a substantial nature, e. g., corporal punishment, suspension, expulsion, referral to an alternative school, law enforcement referral, bus suspensions, etc. Note, however, that other types of minor disciplinary responses (such as in-class time-out, or short-term loss of recess privileges) may be more likely to be used for non-minority students, so it is important to consider all types of disciplinary responses in the investigation. In addition, an accumulation of minor offenses may establish a disciplinary history that prejudices minority students in the course of a school year.

2. THE GENERAL APPROACH TO DISCIPLINE INVESTIGATIONS:

Data is reviewed to determine whether students of a particular race are disproportionately administered discipline district-wide, in which schools, and in which categories of sanctions. This analysis is necessary to properly focus the scope of the investigation, especially in larger schools districts where it is not logistically possible to review all of the schools. Priority should be placed on those schools having the largest number of sanctions administered and those exhibiting the greatest racial disproportionality as compared with the enrollment at the school. Additionally, the investigation should focus on the disciplinary sanctions and offenses in which the greatest disproportionality exists and those which result in the most severe punishment, e. g., suspensions, expulsion, referrals to law enforcement and arrest.

Data is analyzed to determine:

- i. whether there are a statistically disproportionate number of students of a particular race disciplined;
- ii. whether the district utilizes racially nondiscriminatory discipline policies and procedures; and

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

- iii. whether the district's discipline policies and procedures are applied in a nondiscriminatory manner. The data obtained should also be analyzed for any disparate impact issues.

The district's and individual school's disciplinary policies and procedures will be examined to determine if, on their face, or as applied, they discriminate against students of a particular race. Regarding the application of the disciplinary policies and procedures, data, including student records, will be obtained and reviewed and interviews conducted to determine if the policies are being applied in a nondiscriminatory manner and the procedures, including due process procedures, are implemented in the same manner for all students.

OCR should be alert to the fact that disciplinary policies and practices may differ between schools in the district. Often individual schools impose additional disciplinary sanctions and have procedures for the administration of discipline which are considered supplemental to the district-wide policies. It is extremely important to identify all of the policies and procedures applicable to the specific school reviewed.

In conducting this investigation, OCR should look at categories of offenses that experience indicates may be appropriate for disparate impact analysis. Data showing racial disproportionalities in particular offenses as compared with the student enrollment or as compared to other offenses may be helpful in identifying such provisions.

If, in the course of investigation, OCR determines that certain subjective disciplinary criteria are causing a disproportionate outcome, OCR should determine the statistical effect of the use of the subjective criteria, and whether the subjective criteria are causing the disproportionate impact.

Subjective criteria and discretion in the administration of discipline procedures are not per se illegal or violative of Title VI. Certain disciplinary infractions are subject to personal interpretation, e.g., disrespectful behavior, disruptive behavior, insubordination, etc. Additionally, there are instances where the circumstances of the disciplinary infraction, the student's personal and educational record, and/or other factors may warrant discretion in the administration of discipline. Subjectivity and discretion in the process should, however, "raise a red flag" and be carefully reviewed to ensure that such factors are not being used in a discriminatory manner. The degree of subjectivity and the frequency with which discretion and subjectivity are employed should be carefully evaluated to determine the effect of such factors on minority students. Subjective criteria may be considered as part of a disparate treatment or disparate impact analysis, where appropriate.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

3. INTERVIEWS ARE A CRITICAL COMPONENT OF DISCIPLINE INVESTIGATIONS:

In addition to the data that OCR must obtain in all discipline investigations (see Section IV below), interviews are an essential component of discipline investigations because much critical data is not routinely generated and maintained by the district. For example, investigators will probably not find data identifying the students who committed disciplinary infractions but were not referred for disciplinary action. Further, data is not always maintained when students are referred for disciplinary action and no sanctions are imposed. In addition, law enforcement referrals may not be recorded in discipline files or aggregate data maintained, so the only way to obtain this information may be through interviews with students and the district personnel responsible for the administration and imposition of discipline and those responsible for law enforcement referrals. This latter category includes district personnel who have the responsibility for referring students for conduct violations but do not have the authority to impose disciplinary sanctions (e.g., bus drivers, classroom teachers and aides, hall monitors, etc.).

4. OBTAINING INFORMATION ABOUT REFERRALS IS A KEY ELEMENT OF DISCIPLINE INVESTIGATIONS:

Referrals for discipline, whether or not they result in the imposition of sanctions, are an area of particular emphasis in the investigation. As the DCL states, “. . . the initial referral of a student . . . can raise concerns, to the extent that it entails the subjective exercise of unguided discretion in which racial biases or stereotypes may be manifested. If a school refers students for discipline because of their race, **the school has engaged in discriminatory conduct regardless of whether the student has engaged in misbehavior.**” (DCL, p.6) Further, in addition to reducing a student's class time, discriminatory referrals--even without sanction--stigmatize students by pulling them in to the district's disciplinary process and subject students to a chain of consequences and sanctions. If the student is not afforded due process after the referral, the administrator who imposes the sanction is relying solely on the referring teacher's perception, which only exacerbates the discrimination. And even if the referral does not ultimately lead to the imposition of a sanction, it could potentially enhance the penalty for subsequent misconduct. (DCL, p. 6)

5. UNDERSTANDING THE ROLE OF LAW ENFORCEMENT AUTHORITIES IN THE DISTRICT IS CRITICAL:

The role and duties of SROs, school district police officers, contract or private security companies, security guards or other contractors or law enforcement personnel are also an area of particular emphasis in the investigation. The DCL makes it clear that schools cannot divest themselves of responsibility for the nondiscriminatory administration of school safety measures and student discipline by rely on these personnel. (DCL, p. 6). Accordingly, OCR's investigation must carefully examine the district's involvement with SROs and other law enforcement authorities. OCR must have a complete understanding

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

of the role and duties of SROs and other law enforcement authorities and how students referred to and become involved with law enforcement.

6. MANDATORY EXCLUSIONARY POLICIES CAN RAISE CONCERNS:

The DCL also notes possible disparate impact concerns with “policies that impose mandatory suspension, expulsion, or citation (e.g., ticketing, fines or summonses) upon any student who commits a specified offense—such as being tardy to class, being in possession of a cellular phone, being found insubordinate, acting out, or not wearing the proper uniform; corporal punishment policies that allow schools to paddle, spank, or otherwise physically punish students; and discipline policies that prevent youth returning from involvement in the justice system from reenrolling in school . . . policies that impose out-of-school suspensions or expulsions for truancy also raise concerns because a school would likely have difficult demonstrating that excluding a student from attending school in response to the student’s efforts to avoid school was necessary to meet an important educational goal.” (DCL, p. 12) Districts should only utilize exclusionary sanctions “as a last resort.” (DCL Appendix, p. 2)

In light of this, OCR must ensure that “. . . the school’s written discipline policy *explicitly limits the use of out-of-school suspension, expulsions, and alternative placements* to the most severe disciplinary infractions that threaten school safety or to those *circumstances where mandated by Federal or State law.*” (DCL Appendix, p. 6)

Accordingly, OCR will require districts whose exclusionary sanctions are not limited to the most severe disciplinary infractions that threaten school safety or to those required by Federal or State law to revise them to conform to these standards.

IV. ESSENTIAL DATA/INFORMATION: CONTENT OF THE SOC

1. List of all schools (ES, MS, HS, alternative schools, school facilities for juvenile offenders, any other facilities operated by the district). Provide three years of district enrollment data by school level (ES, MS, HS) and for each alternative and/or juvenile offender program, disaggregated by race; graduation rate data by race; dropout rate data by race; GATE and Advanced Course/AP/Honors/IB enrollment data by race.
2. Discipline data (by school and district-wide) for the past three years.
3. Description (including number) of disciplinary referrals recorded (by school and district-wide) including referrals that did not result in sanctions and referrals that resulted in sanctions, by race for the past three years.
4. Description (including number) of referrals to SROs or other law enforcement authorities recorded (by school and district-wide), including referrals that did not

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

result in sanctions and referrals that resulted in sanctions, by race for the past three years.

5. Description (including number) of students to whom disciplinary sanctions were administered (by school and district-wide), and the number of disciplinary sanctions (including in-school-suspensions, out-of-school suspension, alternative school placements, juvenile offender facility placements, law enforcement citations and arrests, expulsions) imposed (by school and district-wide) by race for the past three years.
6. Description (including number) of discipline files reviewed and the method by which they were chosen for review. Note how files were organized and how thoroughly they documented the disciplinary incident, from referral to sanction.
7. Description of how the district's disciplinary policies and practices work at each grade level, from referral to imposition of sanctions, based on a review of all relevant documents (e.g., code, procedures, infraction/sanction matrices (which sanctions are assigned to which infractions and the district's ranking of infractions and sanctions), all other forms used in disciplinary process) and any other information concerning the district's disciplinary practices, as well as relevant state law concerning the mandatory imposition of sanctions for certain offenses. Summarize interviews of administrators, teaching staff, students, parents/guardians, and any interview surveys conducted by OCR. Describe the criteria for referring students for disciplinary action and the procedures utilized by staff in doing so. Describe who has authority to make referrals and who has authority to impose sanctions. Describe whether the policies ensure the right of students to due process in connection with referrals and any disciplinary sanction imposed by the district. Describe whether offenses are clearly defined; describe policies and practices regarding the exercise of discretion in referrals and the imposition of sanctions; note whether policies require the mandatory imposition of sanctions and the offenses for which these mandatory sanctions are imposed. Note if policies and practices have been revised within the past three years; if so, describe revisions that were made and why the revisions were made. Note if any individual school's procedures differ from district-wide procedures, and describe any difference. Describe how and where policies are publicized and disseminated to staff members, students and parents/guardians.
8. Description of whether the district provides academic and counselling services to students who are sanctioned with in-school-suspension, out-of-school-suspension, placement in alternative schools/programs, and placement in juvenile offender facilities. Describe the nature and extent of the academic services and counselling services that are provided (e.g., full instructional curriculum that meets state standards v. behavior monitor/no academic services).

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

9. Description of the role and duties of SROs and/or other law enforcement authorities in the district, including whether the SRO's duties include intervention and enforcement of school conduct policies that are not criminal matters. Describe who has the authority to refer students to SROs/law enforcement authorities and the standards used in mandatory and non-mandatory referrals to SROs or law enforcement authorities. Identify the schools in which SROs and/or other law enforcement personnel are assigned; describe any corresponding contracts or memoranda of understanding established between the district and law enforcement authorities. Describe any training that SROs and/or other law enforcement authorities receive that is related to the district's discipline policies and procedures and the SROs'/law enforcement authorities' role and duties in the district and how frequently training is provided.
10. Description of the district's disciplinary recordkeeping system, including an explanation of how the records are stored, maintained and accessed.
11. Description of any programs to address student behavior and provide support for students that the district currently utilizes. Describe how long any such programs have been in place and whether the programs are available district-wide or are housed in selected schools.
12. Description of all staff/administrator training related to the district's disciplinary policies and procedures and how frequently training is provided. Description of all staff/administrator training/professional development related to classroom/behavior management.
13. Description of the manner in which and how frequently the district communicates behavior expectations and disciplinary policies and procedures to students and to their parents/guardians. Describe whether the district provides a way for students and their parents/guardians to file complaints about referrals for discipline and the imposition of sanctions.
14. Description of district climate information as it relates to discipline. Summarize interviews with students and teaching staff concerning policies and practices, general climate at school, and experience (from student, teacher and administrator perspectives) of the disciplinary process. If the district has administered surveys or has other information that assesses climate with regard to discipline, describe the survey results and/or the other information.
15. Description of any system that the district employs to self-monitor and evaluate its administration of discipline. Describe whether the district has any safeguards/systems in place to monitor the exercise of discretion in both referrals and imposition of sanctions in order to ensure that it is nondiscriminatory.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

16. Other relevant information.

V. SELECTED AREAS OF DATA ANALYSIS:

1. THEORIES:

a. Different Treatment

Factual Scenarios:

- i. **Policy discriminatory on its face:** "... explicit language requiring that students of one race be disciplined differently from students of another race.
Similarly situated comparator² not necessary. (DCL, p. 7)
- ii. **Facially neutral policy that is administered in a discriminatory manner:** "similarly situated students of different races are disciplined differently for the same offense." or "... the school permits the *ad hoc* and discriminatory discipline of students in *areas that its policy does not fully address.*" (DCL, p. 7)
Similarly situated comparator necessary.
- iii. **Selective enforcement of a facially neutral policy:** "... school official elects to overlook a violation of a policy committed by a student who is a member of one racial group, while strictly enforcing the policy against a student who is a member of another racial group." **Referrals and selective enforcement:** "... complaints that a teacher only refers student of a particular race outside of the classroom for discipline, even though student of other races in that classroom commit the same infractions." (DCL, pp. 7-8).
Similarly situated comparator necessary.
- iv. **Targeting:** "... when a school adopts a **facially neutral policy** with the **intent to target** students of a particular race for invidious reasons ... even if the school punishes student of other races under the policy. (DCL, p. 8)
Similarly situated comparator necessary.
- v. **Direct evidence of racially discriminatory motives:** "... teachers or administrators were acting based on racially discriminatory motives ...

²"Students are similarly situated when they are comparable, even if not identical, in relevant respects." (DCL, p. 7)

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

[such as] if a school official uttered a racial slur when disciplining a student . . . “ (DCL, p. 8)

Similarly situated comparator not necessary.

Analysis:

- i. “Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student of group of students of another race in the disciplinary process? : **If “no,” insufficient evidence; if “yes,” then**
- ii. “Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?” **If “no,” then finding of intentional discrimination; if “yes,” then**
- iii. “Is the reason articulated a pretext for discrimination?” (DCL, pp. 8-9)

Additional Circumstantial Evidence that May Support Discriminatory Intent

- i. Whether the policy or practice has an adverse impact on particular race;
- ii. History of discriminatory conduct;
- iii. Administrative history behind disciplinary policy or decision;
- iv. Inconsistent application of disciplinary policies and practices to students of different racial backgrounds. (DCL, p. 9)

b. Disparate Impact

“Schools also violate Federal law when they *evenhandedly implement facially neutral policies and practices* that, although not adopted with the intent to discriminate, nonetheless have an *unjustified effect* of discriminating against students on the basis of race.” (DCL, p. 11)

Analysis:

- i. “Has the discipline policy resulted in an *adverse impact* on students of a particular race as compared with student of other races?” **If “no,” insufficient evidence; if “yes,” then**

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

- ii. "Is the discipline policy necessary to meet an *important educational goal*?" "... consider both the *importance of the goal* . . . and the *tightness of the fit* between the stated goal and the means employed to achieve it." If "no," then finding of discrimination; if "yes," then
- iii. "Are there *comparably effective alternative policies or practices* that would meet the school's stated educational goal with *less of a burden or adverse impact* on the disproportionately affected racial group, or is the school's proffered justification a *pretext* for discrimination?" (DCL, pp. 11-12)

VI. SELECTED APPLICATIONS:

1. *DETERMINING SIMILARLY SITUATED STUDENT INFRACTIONS:*

Students are similarly situated when they are comparable, even if not identical, in all relevant respects. Similarly situated student infractions are interpreted to mean "same" infractions, that is, only students who have committed exactly the same infraction can be directly compared. In addition, because the students have to be otherwise also similarly situated, OCR's comparisons have been of first infractions. This focus on "same infraction" is appropriate.

However, it is also appropriate to define "similarly situated" to include offenses of the "same severity." Accordingly, OCR staff will use information obtained from the recipient and statistical tests to determine whether facially different infractions can be considered infractions of the same severity, for purposes of analysis, thereby increasing the number of students in OCR's analysis.

Comparison has also generally been made considering first infractions, because second infractions introduce student history variations. For example, with Student A committing first infraction X (fighting) and second infraction X (fighting) and Student B committing first infraction X (fighting) and second infraction Y (sex harassment), you can only compare first infractions, since the second infractions are different.

NOTE: Comparison should also be between offense categories that are of the same severity, even if not facially the same infraction. This is an appropriate comparator for "similarly situated" students. For example, if infraction X (fighting) is determined to be of equivalent severity with infraction Y (sex harassment), Student A committing infraction X and Student B committing infraction Y can be compared as similarly situated.

This also allows comparison of second, third infractions, etc. For example, with Student A committing first infraction X and second infraction X, and Student B committing first infraction X and second infraction Y, you can compare penalties given for second infractions as well.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

2. LAW ENFORCEMENT REFERRALS:

Analyzing law enforcement referral data presents some unique challenges. The district may assert it has no responsibility for arrests resulting from law enforcement referrals and may question our jurisdiction to investigate them. OCR has jurisdiction to investigate law enforcement referrals emanating from the district even though the police department, or other law enforcement agency, is responsible for the ultimate decision to arrest the student and pursue the matter. (DCL, p. 6)

a. Mandatory Referrals

Many states have statutes that require a law enforcement referral for certain offenses such as possession of narcotics and weapons. Disciplinary codes may add additional conduct which will result in automatic law enforcement referral, e.g., injuring a staff member.³ OCR should identify applicable state statutes and local ordinances, isolate the statutorily mandated referrals and ascertain whether the mandatory referrals are consistently applied. This can be done by review of the disciplinary policies and procedures, through staff and student interviews, and by reviewing the description of conduct in the discipline file for serious/similar offenses which were not referred to the police.

b. Law Enforcement Liaisons

Models for the involvement of law enforcement personnel vary from district to district. Some districts have in-house police departments overseen by the superintendent. Other districts have an arrangement with their local police department to have law enforcement officers assigned to work at the school. SROs or other law enforcement authorities may respond to requests for intervention or initiate an arrest/police referral based on their own observations of misconduct. OCR should fully explore the SRO's role in initiating discipline, responding to referrals and determining whether to elevate misconduct to a criminal matter/law enforcement referral. Although the SRO may or may not be a district employee (or a joint employee of the district and the police department), as the DCL makes clear, OCR may hold the district accountable for the discriminatory actions taken by SROs or other law enforcement authorities assigned to the district. OCR should obtain a copy of any agreement between the police department (or applicable law enforcement agency) and the district concerning the SRO's duties. OCR should ascertain whether the SRO's duties include intervention and enforcement of school conduct policies that are not criminal matters, e.g., no cell phones on campus. OCR should also obtain information as to who pays, provides benefits, supervises, evaluates and determines the SROs' work hours and leave.

Even if the police department ostensibly controls the SRO's performance, OCR should still obtain information as to the district's knowledge of the SRO's activities, e.g., does the SRO generate reports or verbally inform district administration when he has made a law enforcement referral based on conduct he has personally observed.

³ While states statutes often define a limited type of misconduct which must be reported to law enforcement, school districts or individual schools often require that additional incidents are reported to law enforcement.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

c. Standards for Non-Mandatory Law Enforcement Referrals

OCR should ascertain the standards used in non-mandatory law enforcement referrals or referrals to the SROs. These standards may be found in teacher manuals, training materials and by interviewing the individuals who make such referrals. OCR should determine if the standard (e.g., a situation has escalated to the point that the teacher can no longer control the situation) is consistently applied. OCR should also determine whether the SRO or a district staff member decides whether to refer the student for arrest in these situations.

d. Obtaining Law Enforcement Records

Districts may not have complete or accurate information concerning law enforcement referrals. If necessary, interview the individuals responsible for making the referrals, usually a disciplinary dean or assistant principal, regarding each severe incident as to whether a referral was made. These individuals may also maintain separate folders containing all law enforcement referrals. If these sources are inadequate, OCR should attempt to obtain data directly from the local police departments, or whatever law enforcement agency was involved.

3. **TEACHER/STAFF REFERRALS FOR DISCIPLINE:**

OCR should consider whether *individual* teachers are more likely to refer students of a particular race for behavior for which students of another race are referred. Disciplinary referral data should be reviewed and analyzed on district-wide and individual school bases to determine if and where disproportionality exists.

For example, compare the differences between the percentages of African American and white students referred for discipline by white teachers to the percentages of African American and white students referred for discipline by African American teachers in the district as a whole. Next, compare the percentage of African American students referred for discipline by white teachers to the percentage of African American students referred for discipline by African American teachers to determine if any difference is statistically significant. If there is evidence of district-wide disproportionate referral of African American students by white teachers, it may not necessarily be attributable to each and every school in the district. Alternatively, the district-wide analysis may reveal no overall disproportionality by race of the teachers, but disproportionality could still exist at the individual school level. The statistical methodology employed in the analysis of district-wide data could also be performed for each school within a district on a school-by-school basis. As numbers alone do not establish a violation, any disparities should be analyzed in the broader context how the district' disciplinary system operates as a whole.

If the investigation identifies particular schools in a district that exhibit the greatest disproportion of referrals of students or a particular race, it still does not mean that all of the teachers at these schools are contributing to the disproportion equally. In such cases, it could be worthwhile to the investigation to perform an analysis that would determine which teachers were the greatest contributors to the disproportion. In addition, the race of the greatest contributory teachers could also be seen as relevant.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

4. INTERVIEWS OF TEACHERS/STAFF:

After conducting the above statistical analyses, OCR should: Interview staff members involved in the largest number and the most racially disproportionate number of disciplinary referrals to ascertain how they interpret the criteria utilized in making the decision to refer, any explanation(s) for the disproportionate number of disciplinary referrals involving students of a particular race, and, if a significant number of referrals were for subjective offenses (as identified by the district, or in some cases OCR), obtain their definition/description of such offenses. Ask questions about students of another race who are not referred despite engaging in activities for which minority students are referred, e.g. tardies, lack of supplies, etc. (Note: in some school districts teachers are encouraged to refer students with disciplinary issues for objective offenses such as not bringing books or pencils to class or lateness, so referrals for minor objective offenses should also be considered. Teachers may also differ within a school or school district with respect to this approach.)

Identify teachers and staff without significant disproportionalities in referrals and compare their referral rates to the racial composition of the students served. Interview teachers who serve diverse students to determine the reasons why disproportionalities are not present.

Interview the teachers (or staff) with an unusually high number of referrals (particularly of students of a particular race in subjective offense categories) to establish whether the teacher's referral practices or disciplinary approach (e.g. teacher's own conduct causes incidents to escalate into insubordination) is a factor possibly contributing to disproportionate referrals at the school or in the district. Ask questions about students of another race who are not referred despite engaging in activities for which students a particular race are referred, e.g. tardies, lack of supplies, etc.

Interview teachers or staff with an unusually low number of referrals, particularly teachers who teach or serve large numbers of students of a particular race. Identify any referral practice that contributes to a low number of referrals, particularly of those students.

5. INTERVIEWS OF STUDENTS/FILE REVIEW:

Interview students and other school personnel to obtain their knowledge and/or perceptions of the district's/schools' administration of disciplinary referral and anecdotal evidence of any problems or inconsistencies in the imposition of disciplinary referrals.

Use the interview process to identify methods for finding instances of students who were not referred for similar behavior as students who are referred. For example, teachers may keep track of minor misbehavior in their grade books.

Examine student files to determine whether the recipient has consistently explained the criteria and policies regarding disciplinary referrals. In some cases involving very large districts a representative sample could be drawn from the categories of offenses for which the largest

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

number of students were referred and those in which there exists the greatest disproportionate representation of minority students. Consider the following in reviewing discipline files:

- Are the forms complete? Is all the information asked for provided?
- Are there substantial differences in the type of information that is required from school to school or within school level?
- To what extent are referring staff members allowed/required to identify the violation/offense and penalty/consequence?
- Is the description of the behavior at issue written in a way that attempts to sway/influence the disciplinary outcome? For example, "I was extremely hurt by...", or "The student promised not to do this again"? "Johnny is such a good boy, he shouldn't be punished."
- If policy requires that students be given an opportunity to provide their side or statement, is that reflected anywhere on the form or in the description of the incident?
- If the incident description references the involvement of other students or witnesses, are there corresponding statements from those students in the file?
- Does the form indicate contact with parent or guardian (date/time/any notes)?
- If the penalty/consequence is noted on the referral form, does the form identify the assignor of the penalty/consequence?
- Does any information on the form substantially deviate from the information that is reflected in the electronic record?
- Are there referrals in the paper file that are not reflected in the electronic database and vice-versa?
- Is there any photographic/video/audio information about an incident stored or recorded outside of the paper discipline file?
- Any other mandatory or required aspects as directed by District policy present/absent?

6. *SCHOOLS WITH HIGH ENROLLMENT OF STUDENTS OF A PARTICULAR RACE:*

School that have exclusive or very high enrollment of students of a particular race pose challenges in analyzing disciplinary referrals (and sanctions) because of the lack of similarly situated comparator students of another race. In these circumstances, the analysis should focus first on the race of the referring teacher/staff; if not the same as the race of the referred students, this should be noted. If the teachers/staff are the same race as the students in the school, the investigation should determine if there is another school in the district the enrollment of which is predominantly of another race or which has a diverse enrollment. Referral rates as between the two schools can be compared (assuming that both schools administer the same or similar district disciplinary policies and procedures). Any disproportionality noted in these comparisons should be analyzed in the broader context of how the district's disciplinary system operates as a whole.

In the event that the entire district has exclusive or very high enrollment of students of a particular race, the appropriate comparator for referrals and imposition of sanctions is another district with a diverse enrollment of students of another race that implements similar disciplinary policies and procedures.

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

7. ANALYZING SANCTIONS:

Disciplinary infraction data should be reviewed. Determine whether the data collected show any differences in the imposition of sanctions by race. Then conduct statistical tests (today's discussion does not address which statistical tests and the manner in which they are to be applied) and to determine whether those differences in treatment are due to chance or are truly statistically significant. First, OCR must review actual comparators. Second, look at the penalties in the same penalty category to see if the outcomes are different, such as one student receives a lesser degree of the penalty (one day in-school suspension) and another a harsher degree of the penalty (one week in-school suspension).

VII. RESOLUTION AGREEMENTS, RESOLUTION LETTERS AND MONITORING:

1. REMEDIAL PROVISIONS TO BE INCLUDED IN RESOLUTION AGREEMENTS AS APPROPRIATE BASED ON THE SPECIFIC INVESTIGATION:

- Collaborate with a consultant (this could be an employee with expertise)
 - to review and, as appropriate, revise policies and procedures
 - to develop strategies for teaching, encouraging and reinforcing positive student behavior that do not require engagement with the discipline system (e.g., classroom management and behavioral supports for staff, supports for struggling students);
- Designate an individual to ensure the implementation of the district's discipline policies is fair and equitable; to address complaints from parents/guardians and students about the implementation of the disciplinary policies;
- Develop and administer annually climate surveys for students, teachers/staff and parents;
- Conduct student forums to discuss any matters relating to discipline and provide for student input for improvement in the district's discipline policies;
- Develop training programs to be delivered annually to staff and students;
- Develop informational programs for parents/guardians to explain policies, behavior expectations, advise parents of the importance of due process in connection with disciplinary actions (including referrals), explain how to file complaints about the administration of discipline or request assistance in addressing student behavioral problems;
- Review and, as appropriate, revise procedures for SRO/law enforcement interventions and practices (including referrals to SROs/law enforcement);
- Develop training programs for SROs/law enforcement regarding what is expected under SRO/law enforcement interventions and practices and the district's discipline policies and procedures.
- Data collection and self-monitoring/evaluation:

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

- Establish uniform standards for the content of student discipline files to ensure accurate and complete records;
- Collect and evaluate data concerning all referrals for discipline, including those that did not result in the imposition of sanctions and those that did result in the imposition of sanctions, all referrals to law enforcement, and in-school and out-of-school suspensions, placement in alternative schools/programs, juvenile offender facilities (students returning to the regular schools in the district), and expulsion at all district schools; The data collected will include, but not be limited to, the following:
 - The name/identification number, race, ethnicity, sex, age, disability and/or English Language Learner (ELL) status, , and grade level of each student referred for discipline;
 - For each referral, the name/identification number, race, ethnicity, sex, age, grade level, disability and/or ELL status, as applicable, and grade level of all other students involved in the incident, whether or not they were referred for discipline themselves;
 - A detailed description of the misconduct;
 - A description of all approaches that were attempted in order to address the behavior at issue prior to referral for discipline;
 - The date of the referral;
 - The specific Code violation for which the referral was made;
 - The referring staff member (by staff identification/employee number);
 - The school and type of class from which the referral was made or other specific settings (e.g. bus referral, hallway referral);
 - Whether there were any student and/or adult witness(es) of the incident; names of witness(es); number of witnesses;
 - The prior disciplinary history of the student;
 - The specific Code violation for which the student was punished and the penalty/sanction imposed or, if no violation was charged or penalty/sanction imposed, the reason why;
 - The outcome of the manifestation hearing determination, if applicable;
 - The date the penalty/sanction was imposed;
 - The length of the penalty/sanction (in number of days);
 - The staff member who assigned the penalty/sanction (by staff identification/employee number);
 - Whether the student was transferred to the alternative school or to a different school site;
 - Whether school-based or local law enforcement were involved (e.g. law enforcement was notified of the offense);
 - Whether the referral to law enforcement was mandatory and, if so, the statute or ordinance governing the referral;
 - Whether the student was arrested as a result of school-based or law

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

- enforcement involvement;
- Any other non-punitive outcomes arising out of each referral incident, including, but not limited to, referral for homebound services, disability evaluation; and,
- Whether the student was given access to appropriate due process procedures in connection with the penalty/sanction, including but not limited to being given the opportunity to present his or her version of events and/or an explanation for their conduct prior to the imposition of sanctions, and whether, when, and how their parents were contacted in connection with each referral incident.
- Implement school-level discussions each semester to examine how referrals and sanctions at the school compare to those at other schools; identify race-based disproportions, and implement remedial measures, as appropriate;
- Establish a discipline review team to randomly review a percentage of disciplinary actions taken at each school to ensure that actions taken were nondiscriminatory and consistent with district policies;
- Redact/correct individual discipline records, as appropriate;
- Require that the district establish that any remaining racial disparities in the administration of discipline are not the result of unlawful discrimination.

a. Provisions that may receive push-back from recipients:

- i. The role of SROs: many recipients argue that SROs are not employees of the recipient and are not involved in administering student discipline. As noted earlier, the investigation must go forward on the issue of SROs/law enforcement authorities, notwithstanding a recipient's assertion that they are not employees of the district or that they are not involved in the district's disciplinary processes.
- ii. The specific information that the agreement requires the recipient to obtain and maintain for each discipline incident. Recipients have taken issue with the volume of information that the agreement requires them to record (e.g., information about the student who was disciplined, other students involved in the incident, student witnesses to the incident, etc.). Recipients have also expressed concern with maintaining disciplinary records that include personal identifiable information of more than one student.

2. *MUST OCR ALWAYS INVESTIGATE INTENTIONAL DISCRIMINATION/DIFFERENT TREATMENT?*

Yes. From the beginning, OCR's investigation must always look for evidence of different treatment as well as evidence relevant to a disparate impact analysis. However, if the district requests to enter into an agreement prior to the conclusion of

OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints

the investigation and OCR determines that it is appropriate to do so, OCR and the district will have a period of up to 30 (calendar) days from the date that the proposed terms of the resolution agreement are shared with the district within which to reach final agreement. During the negotiation period (which may be less than 30 calendar days, at the discretion of OCR) OCR will suspend its investigation. If final agreement is not reached within the 30-day period, the investigation (of both different treatment and disparate impact) will resume no later than on the 31st day after negotiations were initiated. Of course, negotiations can and should continue during the on-going investigation.

3. *HOW MUCH INVESTIGATION IS NECESSARY TO SUPPORT A 302 AGREEMENT?*

OCR cannot enter into a 302 agreement unless a request to do so is made by the district and OCR, in its sole discretion, determines that it is appropriate to resolve the matter with a 302 agreement. Further, OCR will not enter into a 302 agreement to remedy a district's disciplinary program until it has obtained and analyzed sufficient data to get a complete understanding of how the district's discipline program works and what remedies are appropriate for that district. Accordingly, OCR must have, at a minimum, the data and information listed in Sections IV and V above, including interviews.

4. *RESOLUTION LETTERS:*

Regardless of whether the investigation is resolved under 302 or 303(b), the LOF or Resolution letter must contain a comprehensive discussion of the investigation, including all data and information obtained and analyzed in the SOC. See Sections IV and V above.

5. *MONITORING:*

Ongoing Interactions with the Recipient: Given the breadth of the discipline agreements, it is essential for OCR to be proactive in establishing and maintaining a productive working relationship with the recipient and with its consultant. Monitoring of discipline resolution agreements is very detailed and long-term; it requires on-going communication not only with administrators, but also with teachers, other staff, students and parents/guardians in order to determine whether the remedies are effective in addressing discrimination.

Ensure that resolution agreements are clear that OCR will review any changes that a district proposes and that if OCR is not satisfied with them, we will require further correction.

DRAFT: Deliberative work product-10.27.2014



**All procedures except Complaint Evaluation and addressing the individual complainant's allegation(s) are applicable to compliance reviews.*

Scope of discipline investigations (for discussion on Tuesday's directors call)

Provided by: Randolph Wills

April 25, 2014

As you know, the ratios for African American students/white students, Hispanic students/white students and American Indian students/white students have been calculated for each district and are set forth in the Excel sheet (K:\2011-12 CRDC\Discipline LEA Summary Data) at columns AC, AD and AE respectively.

For those race or national origin groups whose ratios are not presented on the Excel sheet, you can calculate the ratios yourself by using the following formula:

First, divide the number of students (of the particular race/national origin targeted) who received ***out-of-school suspension at least once*** by the number of students of that race/national origin enrolled in the district. This calculation will give you the ***suspension rate*** of the ***targeted students***.

Then, divide the number of white (or other race/national origin, depending on the individual complaint allegation) students who received ***out-of-school suspension at least once*** by the number of white (or other race/national origin) students enrolled in the district. This calculation will give you the ***suspension rate*** of the white (or other race/national origin) ***comparator students***.

Next, divide the ***suspension rate*** of the ***targeted students*** by the ***suspension rate*** of the ***comparator students***. This calculation will give you the ***ratio*** (i.e., how many times more likely the targeted group is suspended than the comparator group).

Please note: Although we are using "OSS at least once" to calculate ratios for the purpose of determining the scope of the investigations, our investigations must address ALL sanction categories (including *ISS, OSS, alternative school placements, juvenile offender facility placements, law enforcement citations and arrests, expulsions*) as well as *disciplinary referrals* and *referrals to SRO or other law enforcement authorities*.

DETERMINING THE SCOPE OF OCR'S INVESTIGATION

For the purpose of evaluating complaints alleging discrimination (individual or class-based that is less than district-wide) (See Section I.1.a of the draft guidance, *OCR's Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints*), we will use **2.0** as the ratio that will determine the scope of the investigation. The 2.0 figure represents the ratio for students from all other races and national origins/white students (the exact ratio is 2.03, but 2.0 is more efficient to work with).

We will soon modify Section I.1.a of the discipline guidance to reflect this change, but in the interim, please use the following criteria to determine the appropriate scope of your investigation:

- i. If district-wide CRDC data of out-of-school suspension rate (calculate using "OSS at least once") of the injured party's race/national origin indicate an out-of-

- school suspension rate at least two (2) times greater than the out-of-school suspension rate of white^[1] students, OCR will open a ***district-wide investigation***;
- ii. If district-wide CRDC data of out-of-school suspension rate (calculate using "OSS at least once") of the injured party's race/national origin indicate an out-of-school suspension rate of less than two (2) times greater than the out-of-school suspension rate of white students but still indicate a higher out-of-school suspension rate than the out-of-school suspension rate of white students, OCR will open a on ***school-wide investigation***;
 - iii. If district-wide CRDC data of out-of-school suspension rate (calculate using "OSS at least once") of the injured party's race/national origin indicate an out-of-school suspension rate that is equal to or less than the out-of-school suspension rate of white students, OCR will open an ***investigation of the allegation only***.

All complaints that allege district-wide discrimination must be investigated district-wide, regardless of what CRDC data show.

^[1] The complaint may allege a different comparator group or groups. If so, calculate ratios based on the alleged comparator group(s) rather than white students.