

SCHOOL DISCIPLINE

- Legal Perspective -

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INTRODUCTION

Nearly five years in the making – on January 8, 2014 – the U.S. Department of Education (Office of Civil Rights – OCR) and the Department of Justice (Civil Rights Division) issued a joint “Dear Colleague Letter” that warns of increasing federal scrutiny of the administration of student discipline in local schools.ⁱ This came after the Departments had already resolved or settled several civil rights investigations involving student discipline issues in California, Minnesota, and elsewhere. The Letter purports to offer “guidance on how to identify, avoid and remedy discriminatory discipline [and] assist schools in providing all students with equal educational opportunities.” Yet, in the last year, the OCR has initiated more than 30 time-consuming, invasive, and somewhat offensive investigations of school districts across the country regarding their disciplinary policies and practices.ⁱⁱ

These materials are from the perspective of attorneys who represent boards of education, and the focus is on the legal issues surrounding discrimination in school discipline. While there are volumes of professional development materials that offer best practice tips on how to effectively and fairly discipline students, the primary focus here is understanding, avoiding, and preparing for the potentially incomprehensible and contradictory legal ramifications of ordinary disciplinary actions.

GUIDANCE FROM THE FEDS

Titles IV and VI of the Civil Rights Act of 1964 prohibit public school districts from intentionally discriminating in the administration of student discipline based on certain personal characteristics, such as race, color, and national origin.ⁱⁱⁱ By exercising their authority to enact federal regulations, the DOE and DOJ have further expanded the breadth of the statute to cover more than just intentional discrimination.

Although Title VI does not expressly preclude actions which might have the effect of unintentionally treating one group differently, the Departments have promulgated a regulation that prohibits the recipients of federal funds from “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 accomplishments of the objectives of the program as respect individuals of a particular race,

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color, or national origin.”^{iv} By accepting federal funds, school districts have agreed to be bound by these expanded requirements.

In their January 8th Letter, the Departments of Education and Justice flatly concluded that school districts throughout the country are discriminating against African American males in the referral to and administration of student discipline. This was likely a big surprise for most school administrators and teachers whose entire careers are spent for the betterment of all students regardless of race, gender, or disability. Nevertheless, as a result of their own conclusions, the Departments have decided to make discrimination complaints related to school discipline a priority. On an encouraging note, the Departments acknowledged that most of this alleged discrimination is not intentional, but rather is the product of innate or unconscious bias of teachers and administrators. This, again, was probably not the best way for the Departments to win the confidence of the educational community.

The Departments wanted to make it clear that most of their investigations would begin with an initial review of statistical disparities between the discipline of one racial group over another. They concluded that neutral, non-discriminatory disciplinary policies that are evenhandedly implemented will, nonetheless, be considered discriminatory if they happen to result in more minority students being disciplined than white. The Departments further explained that, even when there is no evidence that the district is acting in a discriminatory fashion, they will find discrimination if there are “comparably effective alternative policies or practices” that would meet the school’s stated goals with less of an impact on a racial group. In other words, the feds know more than state governments, local boards of education, administrators, and teachers about how school discipline should be handled.

Discrimination – Elements of Proof

The Departments have stated that the administration of student discipline can result in a finding of discrimination 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.

The courts and government will ask three questions when reviewing an allegation of intentional discrimination (disparate treatment):

- (1) Did the school treat students of one race differently from a similarly situated student or group of students of another race in the disciplinary process?
- (2) Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?
- (3) Is the reason articulated a pretext for discrimination?

An example of intentional discrimination might be an instance in which two students are involved in a fight. They both have a similar disciplinary history, but the black student is suspended

while the white student is not. In this circumstance, the answer to question (1) would be “yes.” However, in response to question (2), the school may respond that the black student was reported to have started the fight. This will be sufficient to meet the school’s burden. However, the OCR will conduct a comprehensive investigation into whether the evidence supporting this position is false.

The analysis for disparate impact claims is similar but much more likely to result in a finding against the school district. Keep in mind that there is no civil cause of action for disparate impact claims.^v A student can sue the school under Title VI if they have been intentionally discriminated against. They cannot sue if a neutral policy that is applied equally to all simply has a larger impact on one racial group over another. Therefore the analysis for disparate impact claims is exclusively defined by the Departments (DOE and DOJ), not the courts. While the Supreme Court has not expressly held so, it is likely that it would find that there is no such thing as disparate impact discrimination under Title VI.^{vi}

The Departments will use the following three-part inquiry to assess whether a facially neutral policy has an unlawful disparate impact:

- (1) Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?
- (2) Is the discipline policy necessary to meet an important educational goal?
- (3) 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?

In reality, the Departments normally get to third question pretty quickly. Most disciplinary policies have been shown to have some sort of statistical disparity in their application from one racial group to another. Yet, schools also have an important educational goal in enacting those policies. If there was no educational goal, why enact the policy? More recently, the Departments have begun to question more policies under the second step of the analysis. For instance, they point out that suspending a student for violating truancy policies does not seem to meet the important educational goal of getting the student to come to school.

Under the third step of the analysis, the question is whether there is a feasible alternative practice that would serve the school’s needs with less of an adverse impact on a racial group. This step most clearly demonstrates just how far the Departments have expanded their authority in investigating discrimination complaints. This third step was adopted by the Departments partially from the Title VII (employment discrimination) case law. However, in employment discrimination cases, it is the complainant who must show that the employer refused to adopt an available alternative employment practice that would have had less of a disparate impact. The courts have universally said that broad discretion will be given to employers to decide which is the better policy or practice.

Under the Departments’ scrutiny of school disciplinary policies, however, it appears the feds (not the local school district) will get to determine what the better disciplinary policy is. If the Departments conclude that it is school dress codes are discriminatory, for instance, they may be able

to mandate that the school change or abandon the code based upon their own preferences on what is appropriate.

Particular Policies

The Departments appear to be targeting policies that give teachers and administrators discretion in referrals and enforcement, even though the policies may not have any disparate impact in all school districts.

Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspension, expulsion, or citation (*e.g.*, ticketing or other 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 school uniform; [...].

The Departments offered no clear explanation for why these particular policies, on their face, raise disparate impact concerns. They subsequently provided examples of circumstances where such policies could provide concerns when they were discriminatorily applied to a particular group of students. However, why should a school abandon cellular phone policies simply because one racial group is more inclined to violate that policy? Should a school abandon an insubordination or tardiness policy simply because one group of students is more inclined to violate those policies? These are clearly legitimate and important policies. The Departments offer no rational explanation for its statement or even feasible alternatives to these most basic and essential policies.

Again, there is no private cause of action for disparate impact cases under Title VI. In other words, no student can sue the district claiming that more students of a particular race are disciplined under the school dress code than students of another race. While the Departments can file an action to remove federal funding from the school, no one has ever seen this occur. In fact, the Departments did not even mention this as one of their remedies in their January 8th “Dear Colleague Letter.” Rather, the list of remedies included things like compelling the school to: correct student records, provide compensatory academic services for students suspended, revise discipline policies, etc.

Dress Codes/Colorful Language

Dress codes and profanity policies are some of the key areas in which schools get in trouble under a disparate impact analysis. Such policies are usually based upon community standards, involve non-violent offenses, can be very subjective, and often have a disparate impact on certain racial groups. However, in recent years, schools across the country have experienced violence, gang activity, and thefts of clothing and accessories. This has given rise to policies prohibiting gang attire. These are very legitimate policies, but obviously impact African American males more than others. In addition, basic rules – like don’t show your underclothes – are routinely disregarded by very specific groups.

According to the Departments, even when important policies are applied evenhandedly to all students, the school may still be in violation of Title VI because of the known disparate impact on those groups. Is it the Departments’ position that schools should just allow all students to walk around with their underwear showing in order to avoid this disparate impact? They do not say. On

the other hand, general dress codes are likely to found discriminatory if they are enforced in a way that results in a disparate impact. For instance, if girls are normally cited under a general policy for wearing sleeveless shirts because it is distracting, but boys are not, it could constitute discrimination under Title IX. Therefore, it is advisable for the school to have more specific policies - such as the no-underwear-showing policy - than a more basic policy that states that students should dress respectfully and in a non-distracting manner.

Disparate Treatment versus Disparate Impact

The Department's position on whether a school district can be subject to an adverse finding simply based upon the fact that one group of students gets disciplined more than another group of students is controversial. The reason for this is simple. Any requirement that schools consider the statistical impact of disciplinary decisions on a particular racial group necessarily requires school districts to take race into consideration in making policy decisions. This type of consideration of race is the very thing that Titles IV and VI prohibit.

So, what happens when a school becomes so concerned with the disparate impact of a policy that they begin to take steps that discriminate in favor of the minority group? It is well-settled that discrimination laws such as Title VI do not protect just one racial group. Such laws protect white individuals as well as individuals of all races and national origins from discrimination. Therefore, if the school begins to take action that favors the minority group (increase suspensions of white students, cap the number of suspensions of black students, etc.), this could ultimately be legitimate grounds for a lawsuit by the white student against the district for intentional discrimination.^{vii} The Departments offered no guidance or thoughts for school districts on how to avoid intentional discrimination claims filed by members of the non-minority groups while schools are rectifying disparate impact concerns for minority groups.^{viii}

Given the status of the law on affirmative action and other actions used to rectify past discrimination, schools would be ill-advised to institute quotas on the discipline of particular racial groups or to take any action that could be thought to overtly discriminate in favor of one racial group over another regardless of what the DOE and DOJ say. The law simply does not favor the Departments on this issue.

Referrals to Law Enforcement

The federal guidance on school discipline was prompted in part by the various studies that show a positive correlation between school disciplinary policies, particularly exclusionary policies and their purported effect on the "school-to-prison pipeline." For that reason, the Departments have recommended that schools rely on law enforcement much less. The Departments propose that all routine discipline should be administered by school personnel, and that the only matters that should be referred to law enforcement are "major threats to school safety or serious school-based criminal conduct that cannot be safely and appropriately handled by the school's internal disciplinary procedures."

However, as discussed further below, such recommendations are inconsistent with the reality of modern schools. Schools cannot wait until a threat to school safety becomes "major" before getting law enforcement involved. Schools are not equipped to properly investigate bullying and harassment that may, ultimately, constitute civil rights violations. Schools should not be mandated

by the federal government to ignore their obligation to report minor issues, such as truancy, possession of marijuana, minor assaults or threats, or other matters than may ultimately prove to be a much larger concern.

Top Ten Lessons from the Federal Guidance^{ix}

1. The feds are less likely to be concerned about the severity of discipline for clearly defined infractions such as violence, drugs, or weapons charges.
2. The feds are most concerned with infractions that are open to subjective interpretation, such as defiance, disrespect, disruption, insubordination, or clothing violations. To the extent possible, subjective infractions should be given clearer definitions.
3. The feds are particularly focused on the discretion given to teachers in referring subjective violations for discipline.
4. However, zero-tolerance policies are strongly disfavored and may trigger a disparate impact investigation.
5. Teachers should be encouraged to resolve minor infractions in the classroom or find a way to resolve the situation without the referral for discipline (such as removing student briefly to another room for a timeout).
6. Suspensions and expulsions should be limited or non-existent for non-violent or non-threatening violations.
7. The school district should keep sufficient records of disciplinary actions to enable them to explain why one student was treated differently than another.

We have included some sample disciplinary referral forms for your use in the appendix.

8. The school district should keep track of potential racial disparities in administering student discipline, but be careful about instituting quotas or taking action that could subject them to claims by non-minority students.
9. School districts are potentially liable for the discriminatory conduct of School Resource Officers or other entities with which the school contracts, and the school should limit referrals to outside law enforcement agencies or the juvenile courts.
10. The school district should appoint a single person (“discipline supervisor”) or committee to review disciplinary referrals to ensure that discipline is applied consistently by each teacher and throughout the school.

OHIO LAW

The items that seemed to be of most concern for the Departments in their guidance letter were zero tolerance policies, exclusionary policies, and reporting students to law enforcement. Yet,

their preference for “positive reinforcement,” keeping students in class, and not referring matters to law enforcement could violate the rights of other students, Ohio law, and even the Departments’ own guidance on bullying and harassment.

Section 3313.534 of the Ohio Revised Code specifically requires zero-tolerance policies in certain circumstances, including excessive truancy and disruptive or inappropriate behavior:

No later than July 1, 1998, the board of education of each city, exempted village, and local school district shall adopt a policy of zero tolerance for violent, disruptive, or inappropriate behavior, including excessive truancy, and establish strategies to address such behavior that range from prevention to intervention.

Obviously, the federal government is going to have a federalism problem if it cites school districts for disciplinary policies that are actually mandated by the State of Ohio.^x For instance, R.C. § 3313.66 mandates suspension of students who bring guns on school property regardless of whether that results in a discriminatory impact on a particular racial group.

In addition, under R.C. § 3313.666, Ohio schools must expressly provide for the possibility of suspension of a student found responsible for harassment, intimidation or bullying by an electronic act. Even under the Departments’ own bullying/harassment guidance^{xi} (as well case law surrounding the U.S. Constitution and Titles IV, VI, and IX of the U.S. Code), if a school district fails to protect students from verbal or physical harassment by another student, it can be held liable to that student. The “positive interventions” and “supportive environment” for the offending student likely will not be considered sufficient to cover the Board of Education if such actions do not promptly end the harassment and/or bullying. Therefore, school districts are strongly advised to give priority to bullying/harassment policies.

R.C. § 3321.13 also mandates that schools involve law enforcement and outside entities for when a student is in non-compliance with the state’s compulsory attendance requirements (truancy). R.C. § 2921.22 requires schools to report criminally injurious conduct to law enforcement. Section 2151.421 requires the reporting of potential child abuse.

Special Education Students

While the IDEA/IDEIA also prevents discrimination against disabled students in the administration of discipline policies, the discipline of special education students is very complex and beyond the scope of these materials. If the Board does not have a very vibrant, strong, and advanced special education department in a particular school district, it will be important to involve legal counsel in any such disciplinary matters.

FINAL THOUGHTS

- In light of the increased scrutiny of student discipline, school districts should consider a comprehensive evaluation of current disciplinary policies and history to spot potential weaknesses as described by the DOE and DOJ.

- Revise policies to eliminate some of the subjectivity in making disciplinary decisions where possible. Where not, offer teachers/administrators guidance on why consistency is so important.
- Document all but the most minor disciplinary actions (verbal reprimands/corrections).
- Make sure disciplinary policies are well-known to the students. If there is a disciplinary policy in place that is well-known to the students, it will more difficult to find the school in violation should one particular racial group choose to flatly disregard those policies.
- Always give priority to state laws governing disciplinary policies, remembering that the “Dear Colleague Letter” is ostensibly meant to serve as guidance.
- Always give priority to student safety and educational quality concerns regardless of whether those concerns happen to have a statistical impact on a particular racial group. Yet, remain mindful of disparate impacts and be prepared to explain why the disciplinary action/policy was necessary.
- If the OCR contacts you about the beginning of an investigation – CALL THE BOARD’S ATTORNEY IMMEDIATELY. Most investigations are initiated by a parent complaint, and anyone can complain. The OCR has unfettered discretion to decide which complaints it will investigate.
- Be careful about entering into settlements with the OCR. Be aware that they will publish the results of the settlement on their website accompanied by report of the “facts” as they know them (usually framed poorly for the district). See example attached.

ⁱ The full “Dear Colleague Letter,” along with a complete guidance package, can be found at: <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html>

ⁱⁱ On June 17, 2014, the Palo Alto Unified School District (CA) passed a Board Resolution to move forward with a formal complaint about the invasive and inappropriate conduct of the Office for Civil Rights. The Resolution is attached to give school administrators and board members a better understanding of why they should always involve legal counsel in dealing with the OCR.

ⁱⁱⁱ 42 U.S.C. § 2000d.

^{iv} 34 C.F.R. § 100.3(b)(2).

^v *Alexander v. Sandoval*, 532 U.S. 275 (2001).

^{vi} See *Alexander*, *supra*.

^{vii} In *Ricci v. DeStefano*, 557 U.S. 557 (U.S. 2009), the U.S. Supreme Court found that a city of New Haven, Connecticut, violated the civil rights of white firefighters when it threw out objective tests used to determine individuals eligible for promotion. The test had resulted in white candidates outperforming black candidates. The city threw out the tests due to the racial disparity. The whites who had performed well on the test but who were denied a promotion filed a lawsuit alleging discrimination. The Supreme Court held that government actions to remedy past racial discrimination – actions that are themselves based on race – are constitutional only where there is

a “strong basis in evidence” that the remedial actions were necessary. The court noted that there was an obvious conflict between disparate treatment provisions and disparate impact provisions. The city was intentionally discriminating against white in taking the action they took but relying upon the defense that, otherwise, they were going to be held liable to the blacks for disparate impact. The Court found that there was an inadequate basis for such discrimination.

^{viii} In *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073(7th Cir. Ill.2001), Judge Posner wrote:

The reality is that until minority students achieve parity of educational achievement with the white students in the [] public schools, the plaintiffs will contend that the minority students are victims of the unlawful discrimination of an earlier period in [the school’s] history. Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' education and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture. Some of these factors may themselves be due to or exacerbated by discrimination, but not to discrimination by the [] school board. The board has no legal duty to remove those vestiges of societal discrimination for which it is not responsible. Insofar as the factors that we have mentioned, rather than unlawful conduct by the [] school board in years past, are responsible for lags in educational achievement by minority students, the board has no duty that a federal court can enforce to help those students catch up. It may have a moral duty; it has no federal constitutional duty.

In essence, the court flatly rejected the notion that school districts have a constitutional duty to ensure that there is absolutely no disparate impact on one racial group over another. We know there is no such express duty under Title VI. And, the only possible legal duty arises under federal regulations that the DOE arguably did not have authority to enact. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

^{ix} These lessons are summarized from the Departments’ “Dear Colleague Letter.” This does not mean the authors agree with the lessons or that a particular school is obligated to abide by them. In fact, the authors believe that local control of schools is of utmost important, as is the discretion of teachers and administrators to resolve disruptions and disciplinary matters within the school so that the largest number of students feel safe, secure, and willing to learn.

^x The U.S. Constitution grants the federal government with power over issues of national concern, while the state governments, generally, have jurisdiction over issues of domestic concern. While the federal government can enact laws governing the entire country, its powers are enumerated, or limited; it only has the specific powers allotted to it in the Constitution. How local schools administer discipline has historically been found to be a matter of domestic or local concern.

^{xi} Oct. 26, 2010, “Dear Colleague Letter – Harassment and Bullying.
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

BOARD OF EDUCATION

Attachment: Action

21

PALO ALTO UNIFIED SCHOOL DISTRICT

Date:

06.17.14

TO: The Board of Education

FROM: Barb Mitchell, President, Board of Education
Melissa Baten Caswell, Vice President, Board of Education
Kevin Skelly, Superintendent

SUBJECT: Resolution Regarding Office for Civil Rights Case Review/Appeal

STRATEGIC PLAN INITIATIVE

Governance and Communication

RECOMMENDATION

The attached draft Board Resolution 2014-15.16 is being proposed to advance the District's appeal for the review and remedy of substantial U.S. Department of Education Office for Civil Rights (OCR) errors in case no. 09-11-1337 and to call attention to significant concerns regarding OCR investigation practices. This Resolution was discussed at the June 3, 2014, regular Board meeting.

The District respects and values the purpose for OCR's work, and we have strived to work collaboratively with the agency to the betterment of our organization and the students we serve. It is the investigative processes that the OCR employs that appear to be purposefully confrontational and disruptive and without regard for classroom instruction (teacher time) and learning (student time). Our District seeks to address and resolve issues raised by OCR, but we have growing concerns their work is implemented to promote confusion and concern, rather than to build trust and strengthen school-based practices together.

We are not alone in our concerns regarding OCR investigation practices. The National School Boards Association's (NSBA) General Counsel presented in April on OCR overreach at the Council of School Attorneys Seminar and continues to monitor OCR investigation practices while being a resource to attorneys representing school districts. NSBA advocates legislation (H.R. 1386) to support local school board governance and flexibility and states: "The expansion of federal intrusion on public education in recent years has impacted local policy-making in ways that impose unnecessary rules, conditions, and restrictions, as well as significant costs, on local school governance." Tufts University recently voiced concerns regarding OCR's actions and OCR's issuance of unexpected findings after a voluntary resolution agreement. In response, Tufts revoked its signature to that resolution agreement. (see attachment A)

BACKGROUND

Our school district community is always striving to build on the ways in which we care for all students and to provide for student safety and respect at all times. The Board of Education recognizes the distinguished student safety outcomes that District staff, parents, and students have achieved together over many decades. This ongoing focus continues to be guided by specific annual focused goals and dedicated staff initiatives that reflect staff, parent, and student input.

The Board of Education recognizes its duty to maintain District policies that reflect current law, to provide staff training and community and student education consistent with those policies, and to equip staff with the resources needed to implement policies and procedures successfully. We believe District staff members have been very attentive, proactive, and successful in their well-documented efforts to uphold anti-discrimination and civil rights laws at all times. Although the District has implemented the voluntary resolution agreement in case no. 09-11-1337 by providing additional staff trainings and policy updates, the Board has appealed for review and remedy of substantial OCR factual errors in the letter of findings that contradict District evidence in the case.

Consistent with federal and state laws, and OCR protocols to protect confidentiality, the District's public discussions of OCR investigations and release of case documents have been very limited. OCR has now completed most of the recent compliance investigations, and the District is releasing the attached letters related to several cases. These documents reveal the substantial nature of OCR factual errors in case no. 09-11-1337, including OCR's conclusion that disciplinary action was not taken; the omission of contradictory witness accounts; the incomplete portrayal of staff actions; and the inaccuracy of quotes attributed to District staff. The letters also reveal numerous instances in which OCR has not followed guidelines in law and in OCR's Case Processing Manual while conducting investigations. These, and other OCR actions, have placed District staff at a substantial deficit during OCR investigations. OCR has opened investigations based solely on allegations made by complainants without giving the District an opportunity to review allegations or to provide factual information showing the District's responsive actions.

Although the District has received positive compliance determinations in all four recent investigations completed by OCR, the investigations have placed excessive and unfair burdens on District staff members and have been very costly to District resources and reputation.

Investigation errors in case no. 09-11-1337 and additional concerns were reported to OCR on May 15, 2013, more than a year ago, after which an OCR supervising attorney expressed willingness to review inconsistencies. The errors were again reported to OCR on January 14, 2014, after which the OCR Regional Director expressed willingness to review District concerns regarding the case. To date, OCR has not responded except to deny District access to the investigation records that would help to resolve the matter.

This is not a minor disagreement. OCR's published errors and investigations have caused significant damage to the District and our dedicated educators, which has been magnified by local media coverage that assumes OCR fidelity, unwittingly misrepresents facts, and portrays actions of District staff members unfairly and without complete information. OCR's current process is open to exploitation by complainants and critics of the District, while District staff must limit public disclosure of evidence in individual cases to protect privacy rights.

Our school district is a unique, dynamic, and diverse community. To be very clear, the District's expression of concerns regarding OCR practices in no way diminishes our commitment to providing schools and classrooms that are safe and respectful for all students at all times. We have consistently welcomed OCR's technical assistance and guidance in our efforts. The District does not tolerate harassment and bullying in our schools, and we will continue to strive to educate our students to be upstanders and respectful and understanding of differences. A sampling of District, school, classroom, and individual student activities promoting social-emotional health and

awareness, and preventing discrimination and harassment at our high schools illustrates some of the many ways our dedicated staff, students, and community undertake these efforts (see attachment B).

The District has two remaining open OCR compliance investigations at Gunn and Palo Alto High Schools. (While no actual complaint was filed at Palo Alto High School, OCR opened an investigation based on media attention following last April's *Verde* student publications.) During these busy last few weeks of school, the District complied with OCR's request of 40 staff interviews at Paly, Gunn, and the District Office. Over the course of this school year, our staff has spent hundreds of hours preparing extensive documentation to respond to OCR's data requests.

Review and Remedy of OCR Case No. 09-11-1337

December 26, 2012: Two weeks after a good faith voluntary agreement was reached to resolve a 14-month-old complaint, OCR issued an unexpected report concluding the District had violated anti-discrimination laws in failing to respond appropriately and effectively to notice that a student was harassed by peers based on his/her disability. The finding was a startling contradiction of extensive and well-documented staff actions in which civil rights laws were followed.

Document Timeline

District letters to OCR related to the review and remedy of OCR case no. 09-11-1337 and general concerns regarding OCR investigation procedures are indexed, attached, and summarized here:

May 20, 2013: This District letter outlined substantial concerns regarding the fairness of OCR fact-finding procedures, including the low threshold for initiating investigations; the lack of OCR review of expansive data requests before proposing resolution agreements; the inadequacy of protections for student privacy and parental permission; the absence of verifiable information from complaints and interviews; the refusal to present proposed resolutions with school board members present; a process that doesn't follow legal guidelines or OCR's Case Processing Manual; and the opaque nature of findings presented up to two years after alleged incidents occurred (see attachment C).

August 14, 2013: This is the District's appeal of its June 14, 2013, request for OCR investigation records on case no. 09-13-1224 that was partially denied by OCR. The letter outlines the District's basis for disagreeing with OCR's decision to deny information and requests complete records or justification for withholding them. In particular, the District requests a copy of the email correspondence shown to District staff members by OCR investigating attorneys on May 23, 2013, that did not match the District's stored copy. OCR was legally required to make a determination on the District's appeal by September 13, 2013, but the District has never received a determination despite follow-up communications (see Attachment D).

August 14, 2013: This is the District's appeal of the June 14, 2013, request for OCR investigation records on case no. 09-11-1337 that was denied by OCR. The letter outlines the District's basis for disagreeing with OCR's decision to deny information and requests complete records or justification for withholding them. As stated above, OCR was legally required to make a determination on the District's appeal by September 13, 2013, but has not made a determination (see Attachment E).

February 19, 2014: This is the District's response to the request by OCR's Regional Director to submit a letter documenting the January 14, 2014, meeting discussion with OCR requesting an OCR review and remedy of their substantial factual errors in case no. 09-11-1337 including false statements of the District's disciplinary actions, misquoted staff members, and the omission of well-documented evidence (see Attachment F).

April 23, 2014: This is the District's response to OCR's request for group interviews of high school students. The letter requests legal and procedural clarification and cooperation on procedures that will assure student confidentiality and parental permission while delivering relevant, factual, and verifiable information. The District outlines possible solutions and notes the continuing lack of response to the District's requests for the review of OCR errors in case no. 09-11-1337 which has significantly diminished the District's confidence in OCR procedures (see Attachment G).

**PALO ALTO UNIFIED SCHOOL DISTRICT
DRAFT: RESOLUTION 2014-15.16
FOR REVIEW OF THE OFFICE FOR CIVIL RIGHTS ERRORS IN CASE 09-11-1337
AND OF UNFAIR, COSTLY, AND UNREVIEWABLE INVESTIGATION PRACTICES**

WHEREAS, the Palo Alto Unified School District shares the U.S. Department of Education's vital mission to provide equitable access to high-quality education and to protect the civil rights of all students; and

WHEREAS, the District community has a distinguished record of exceptional outcomes corresponding to student safety, student learning, student conduct, inclusion, civil rights, and nondiscrimination; and

WHEREAS, the District has worked collaboratively with the Department's Office for Civil Rights (OCR), which is duly authorized to act as a neutral fact-finder and a provider of technical assistance; and

WHEREAS, the District has provided OCR attorneys with thousands of pages of evidence documenting legal compliance with anti-discrimination and civil rights laws in complaint investigations; and

WHEREAS, the District has arranged for dozens of requested staff interviews by OCR attorneys documenting legal compliance with anti-discrimination and civil rights laws in complaint investigations; and

WHEREAS, the District reported substantial factual errors in OCR's letter of findings on case no. 09-11-1337 to OCR attorneys on May 15, 2013; and

WHEREAS, OCR attorneys expressed willingness to review disputed evidence on May 15, 2013; and

WHEREAS, the District provided evidence of complainant document tampering on May 23, 2013; and

WHEREAS, OCR has not acted on its commitment and obligation to review disputed evidence; and

WHEREAS, OCR procedures provide little or no District review of complainant allegations or evidence; and

WHEREAS, the OCR has denied multiple formal District requests for records of evidence in the disputed case which has further restricted the District's opportunity for a fair review; and

WHEREAS, the OCR has not responded to the District's appeals of OCR's denial of requests for records despite OCR's legal obligation to make a determination on the appeals by September 13, 2013; and

WHEREAS, a faulty negative determination by OCR in the disputed case continues to generate public confusion and damage to the reputations of conscientious educators; and

WHEREAS, the District has nonetheless completed every item of its voluntary resolution agreement with OCR in the one disputed case, except for the third, and last, required year of student and staff training which will be completed in 2014-2015 ; and

WHEREAS, the District must limit disclosure of evidence in individual cases to protect privacy rights; and

WHEREAS, OCR's practice of opening investigations based only on a complainant's allegations – without an opportunity for District review of the allegations and without OCR review of District factual evidence – has created a process open to exploitation and placed District staff members at a substantial deficit during investigations; and

WHEREAS, media reporting on OCR investigations and on information received from complainants, to which the District may not respond because of confidentiality laws, has misled the public and burdened District staff with misrepresentations; and

WHEREAS, OCR's investigations have proceeded toward staff interviews and even student interviews with little or no review of documentary evidence; and

WHEREAS, OCR's investigations in the District have taken as long as fourteen months from filing of a complaint to a resolution, far exceeding OCR's stated time line of 180 days; and

WHEREAS, the District received positive compliance determinations in all four recent investigations completed by OCR, the investigations were still costly to District resources; and

WHEREAS, OCR has not followed guidelines in law and in its Case Processing Manual for conducting investigations; and

WHEREAS, the District will continue to seek to work collaboratively with OCR, the District is very concerned that OCR's current process impedes progress toward goals the District and OCR share, causes public confusion, and excessively burdens the District's staff and educational programs; and

WHEREAS, the District remains fully committed to building on effective strategies that promote the safety and inclusion of all students and to encouraging parents and students to bring any concerns regarding discrimination, harassment, or bullying to the attention of school officials for prompt resolution;

NOW, THEREFORE, BE IT RESOLVED that the Palo Alto Unified School District Board of Education will expand its pursuit of a just review and remedy of substantial OCR errors in case no. 09-11-1337 and of fair, prompt, and reviewable investigation practices through correspondence and meetings with elected representatives and education coalition affiliates.

PASSED AND ADOPTED on this _____ day of June 2014, by the following vote:

AYES:

ABSTAIN:

NOES:

ABSENT:

I, Kevin Skelly, Secretary to the Board of Education, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the said Board of Education at a general meeting thereof held at its regular place of meeting at the time and by the vote above stated, which resolution is on file in the office of said Board.

President
Board of Education

Secretary
Board of Education

Disciplinary Referral Form

Student Information

Student Name _____ Grade _____ Date _____ Time _____

Referred by _____ Homeroom Teacher _____

Previous Teacher Interventions

- | | | |
|---|--|---|
| <input type="checkbox"/> Student Warning | <input type="checkbox"/> Use of Time-Out | <input type="checkbox"/> Loss of Privilege |
| <input type="checkbox"/> Parent Note by Teacher | <input type="checkbox"/> Parent Contact by Teacher | <input type="checkbox"/> Parent Conference with Teacher |
| <input type="checkbox"/> Individual Behavior Plan | <input type="checkbox"/> Guidance Referral | <input type="checkbox"/> Previous Referral to Office |

Major Problem Behavior

- | | |
|---|---|
| <input type="checkbox"/> Abusive Language | Swearing or use of inappropriate words. |
| <input type="checkbox"/> Bullying/Harassment | Threats, intimidation, gestures, verbal attacks. |
| <input type="checkbox"/> Disrespect/Defiance | Refusal to follow directions and/or socially rude interactions. |
| <input type="checkbox"/> Disruption | Yelling, noise with materials, or horseplay. |
| <input type="checkbox"/> Fighting Resulting in Injury | Hitting, punching, hitting with an object, kicking, scratching. |
| <input type="checkbox"/> Theft | Removing someone's property. |
| <input type="checkbox"/> Vandalism/Property Damage | Substantial destruction of property. |
| <input type="checkbox"/> Weapons | Knives, guns (real or look alike), or objects capable of causing bodily harm. |

Specific Information Regarding Incident: _____

Action Taken By Administrator

- | | | | |
|--|--|--|---|
| <input type="checkbox"/> Conference with Student | <input type="checkbox"/> Loss of Privilege | <input type="checkbox"/> Time in Office | <input type="checkbox"/> In-School Suspension |
| <input type="checkbox"/> Parent Contact | <input type="checkbox"/> Detention | <input type="checkbox"/> Guidance Referral | <input type="checkbox"/> Out-of-School Suspension |

Signatures

Referred By _____ Date _____

Administrator _____ Date _____

Parent _____ Date _____

Office Use Only:

Infraction Code: _____ Response Code: _____

Notes: _____

Please sign, date, and return one copy to school.



Stage 2 and 3 OFFICE DISCIPLINE REFERRAL

Incident Reported by: _____ Date of Incident: _____ Time _____ am or pm

STUDENT:

LOCATION OF INCIDENT

- Bathroom/Restroom Classroom Hallway Office Special Event/Assembly/Field Trip
- Bus (on) Bus area Commons Library Parking Lot Stairs
- Cafeteria Gym Counseling Office Off Campus Playground Other

DESCRIPTION OF INCIDENT: WHAT HAPPENED? (Include quotes, facts & details; attach added information if necessary)

- Stage 2 (Significant or Intense) or Chronic Early-Stage Misbehavior (attach Stage 1 Behavior Report)
- Stage 3 (Extreme and/or Harmful to Others)

Prior Teacher/Staff Interventions: Re-taught Rule, Warnings, Teacher/Student Conference, Time Out, Parent/Guardian Contact, Detention, Loss of Privilege, Other

PARENT/GUARDIAN CONTACT email, fax, home visit, letter, parent conference, telephone, voice message

Date: _____ Contacted by: _____ Conference/hearing date & time: _____

For Administrative Use Only



Stage 2	<input type="checkbox"/> Abusive/Profane Language <input type="checkbox"/> Class Cutting/Leaving w/o Permission <input type="checkbox"/> Deliberate Misuse of Property <input type="checkbox"/> Display of Patently Offensive Material <input type="checkbox"/> Disruptive Conduct <input type="checkbox"/> Dress Code Violation <input type="checkbox"/> Forgery <input type="checkbox"/> Gambling <input type="checkbox"/> Indecent (Obscene) Gesture <input type="checkbox"/> Insubordination	<input type="checkbox"/> Interference w/ School Personnel <input type="checkbox"/> Intimidation <input type="checkbox"/> Loitering <input type="checkbox"/> Non-Compliance w/ Disciplinary Action <input type="checkbox"/> Off Limits <input type="checkbox"/> Open Defiance <input type="checkbox"/> Physical Contact, inappropriate <input type="checkbox"/> Plagiarism/Cheating <input type="checkbox"/> Possession of Prohibited Item	<input type="checkbox"/> Possession/Use of Stolen Property <input type="checkbox"/> Reckless Vehicle Use <input type="checkbox"/> Tardiness <input type="checkbox"/> Technology, Use Violation <input type="checkbox"/> Theft: Minor <input type="checkbox"/> Trespassing <input type="checkbox"/> Truancy <input type="checkbox"/> Vandalism Mino <input type="checkbox"/> Willful Disobedience
Stage 3	<input type="checkbox"/> Alcohol/Drug <input type="checkbox"/> Arson or Attempted Arson <input type="checkbox"/> Assault/Menacing <input type="checkbox"/> Battery <input type="checkbox"/> Bomb Threat <input type="checkbox"/> Burglary <input type="checkbox"/> Extortion <input type="checkbox"/> False Fire Alarm	<input type="checkbox"/> Fighting <input type="checkbox"/> Firecrackers/Explosives <input type="checkbox"/> Gang Identifier <input type="checkbox"/> Harassment or Bullying Based on: <input type="checkbox"/> Disability <input type="checkbox"/> Sex <input type="checkbox"/> Other <input type="checkbox"/> Race, Color, or National Origin <input type="checkbox"/> Hazing <input type="checkbox"/> Indecent Exposure	<input type="checkbox"/> Robbery <input type="checkbox"/> Theft: Major <input type="checkbox"/> Threat of Violence <input type="checkbox"/> Tobacco, Use and/or Possession <input type="checkbox"/> Vandalism Major <input type="checkbox"/> Weapon: Call Student Services 503.916.5460 immediately to consult about next steps.

Violation of School Rules-Other: _____

Note: This document does NOT replace nor is it a substitute for suspension/expulsion notification letters.

ACTIONS/DISPOSITIONS	ACTIONS/DISPOSITIONS	Notes
<input type="checkbox"/> Conference <input type="checkbox"/> Letter of Apology <input type="checkbox"/> Student Contract <input type="checkbox"/> Detention <input type="checkbox"/> Community Service <input type="checkbox"/> Restitution	<input type="checkbox"/> Loss of Privilege: <input type="checkbox"/> Computer, <input type="checkbox"/> Gym, <input type="checkbox"/> Library, <input type="checkbox"/> Other <input type="checkbox"/> Suspension: <input type="checkbox"/> Bus, <input type="checkbox"/> In School, <input type="checkbox"/> Out of School, <input type="checkbox"/> Pending Expulsion <input type="checkbox"/> Notified Authorities <input type="checkbox"/> Other: _____	Action First Day _____ Last Day _____

REFERRAL TO OTHER RESOURCES:

Date: _____

PARENT/GUARDIAN CONTACT email, fax, home visit, letter, parent conference, telephone, voice message

Date: _____ Contacted by: _____ Conference/hearing date & time: _____

Principal/Designee

Date

Parent/Guardian

Date



U.S. Department of Education

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ARCHIVED INFORMATION

Departments of Education and Justice Reach Agreement with Owatonna, Minn., Public Schools to Resolve Harassment Allegations

APRIL 12, 2011

Contact: Education Department, (202) 401-1576, press@ed.gov (<mailto:press@ed.gov>)
Justice Department, (202) 514-2007 or TDD (202) 514-1888

WASHINGTON – Today, the Justice Department's Civil Rights Division and the Department of Education's Office for Civil Rights, reached a settlement agreement with Independent School District #761 in Owatonna, Minn., to resolve an investigation into race and national origin harassment and disproportionate discipline of Somali-American students at Owatonna High School.

The complaint alleged severe and persistent harassment of Somali-American students, culminating in an incident in November 2009, when approximately 11 white and Somali-American students engaged in a fight. Title IV of the Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibit harassment and discrimination based on race, color, sex, national origin or religion.

In collaboration with the district, community advocacy groups, students and parents, the Departments of Justice and Education conducted an extensive investigation of the school district's policies and practices with regard to student-on-student harassment and discipline. The departments gathered evidence indicating that the district meted out disproportionate discipline for the students involved in the November 2009 incident and that the district's policies, procedures and trainings were not adequately addressing harassment against Somali-American students. The district and its superintendent took affirmative steps to address the harassment and disproportionate discipline of Somali-American students, and voluntarily entered into the settlement agreement.

"All students have a right to go to school without fearing harassment from their peers, and schools have a responsibility to ensure students can exercise that right. We will continue to use all of the tools in our law enforcement arsenal to ensure that all students can go to school in a safe learning environment," said Thomas E. Perez, assistant attorney general for the Civil Rights Division. "I applaud the school district for working with us to address this matter, and we hope this agreement reminds school officials elsewhere of their obligations under federal law."

"If children aren't safe, then children can't learn. That's why the Obama administration is committed to ensuring all students in this country can attend school in an environment free from physical threats and discrimination," said Russlynn Ali, assistant secretary for the Office for Civil Rights at the Department of Education. "As a country, we must make clear that harassment in our schools, in any form, will not be tolerated. Local officials are in the best position to stop harassment in its tracks and the Obama Administration will use every resource we have to help them."

According to the agreement, the district will take all reasonable steps to ensure that all students enrolled in the district are not subject to harassment or discrimination on the basis of race, color or national origin, and to respond promptly and appropriately to all reports of harassment. To that end, the district has agreed to improve its policies and procedures concerning harassment and discipline as necessary to make them effectively protect students from racial or national origin-based harassment to specifically include, among other things: (1) issue an anti-harassment statement to all district students, parents and staff; (2) conduct training of all district faculty, staff and students on discrimination and harassment; (3) meet with high school Somali students to discuss their concerns about harassment; (4) establish a working group of district personnel, students and parents to make recommendations to the district regarding the effectiveness of the district's anti-harassment program; (5) develop a district-wide monitoring program to assess the effectiveness of the district's anti-harassment efforts; and (6) provide annual compliance reports to the departments for the next three years.

The enforcement of Title IV and Title VI are top priorities of the Justice Department's Civil Rights Division. Additional information about the Civil Rights Division of the Justice Department is available on its website at www.justice.gov/crt (<http://www.justice.gov/crt>). Enforcement of Title VI is also a top priority of Department of Education's Office for Civil Rights. Additional information about the Department of Education's Office for Civil Rights is available on its website at <http://www2.ed.gov/about/offices/list/ocr/index.html> (<http://www2.ed.gov/about/offices/list/ocr/index.html>).

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