



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

**Notice of Language Assistance
Dear Colleague Letter on the
Nondiscriminatory Administration of School Discipline**

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

給英語能力有限人士的通知: 如果您不懂英語, 或者使用英語有困難, 您可以要求獲得向大眾提供的語言協助服務, 幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊, 請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線: 1-800-877-8339), 或電郵: Ed.Language.Assistance@ed.gov。

Thông báo dành cho những người có khả năng Anh ngữ hạn chế: Nếu quý vị gặp khó khăn trong việc hiểu Anh ngữ thì quý vị có thể yêu cầu các dịch vụ hỗ trợ ngôn ngữ cho các tin tức của Bộ dành cho công chúng. Các dịch vụ hỗ trợ ngôn ngữ này đều miễn phí. Nếu quý vị muốn biết thêm chi tiết về các dịch vụ phiên dịch hay thông dịch, xin vui lòng gọi số 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), hoặc email: Ed.Language.Assistance@ed.gov.

영어 미숙자를 위한 공고: 영어를 이해하는 데 어려움이 있으신 경우, 교육부 정보 센터에 일반인 대상 언어 지원 서비스를 요청하실 수 있습니다. 이러한 언어 지원 서비스는 무료로 제공됩니다. 통역이나 번역 서비스에 대해 자세한 정보가 필요하신 경우, 전화번호 1-800-USA-LEARN (1-800-872-5327) 또는 청각 장애인용 전화번호 1-800-877-8339 또는 이메일주소 Ed.Language.Assistance@ed.gov 으로 연락하시기 바랍니다.

Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa impormasyon ng Kagawaran mula sa nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalín, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

January 8, 2014

Dear Colleague:

The U.S. Department of Education and the U.S. Department of Justice (Departments) are issuing this guidance to assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or national origin. The Departments recognize the commitment and effort of educators across the United States to provide their students with an excellent education. The Departments believe that guidance on how to identify, avoid, and remedy discriminatory discipline will assist schools in providing all students with equal educational opportunities.¹

The Departments strongly support schools in their efforts to create and maintain safe and orderly educational environments that allow our nation's students to learn and thrive. Many schools have adopted comprehensive, appropriate, and effective programs demonstrated to: (1) reduce disruption and misconduct; (2) support and reinforce positive behavior and character development; and (3) help students succeed. Successful programs may incorporate a wide range of strategies to reduce misbehavior and maintain a safe learning environment, including conflict resolution, restorative practices, counseling, and structured systems of positive interventions. The Departments recognize that schools may use disciplinary measures as part of a program to promote safe and orderly educational environments.

¹ The Departments have determined that this Dear Colleague Letter is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. This and other policy guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. The Departments’ legal authority is based on those laws. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202.

Regardless of the program adopted, Federal law prohibits public school districts from discriminating in the administration of student discipline based on certain personal characteristics. The Department of Justice’s Civil Rights Division (DOJ) is responsible for enforcing Title IV of the Civil Rights Act of 1964 (Title IV), 42 U.S.C. §§ 2000c *et seq.*, which prohibits discrimination in public elementary and secondary schools based on race, color, or national origin, among other bases. The Department of Education’s Office for Civil Rights (OCR) and the DOJ have responsibility for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulations, 34 C.F.R. Part 100, which prohibits discrimination based on race, color, or national origin by recipients of Federal financial assistance. Specifically, OCR enforces Title VI with respect to schools and other recipients of Federal financial assistance from the Department of Education.²

The Departments initiate investigations of student discipline policies and practices at particular schools based on complaints the Departments receive from students, parents, community members, and others about possible racial discrimination in student discipline.³ The Departments also may initiate investigations based on public reports of racial disparities in student discipline combined with other information, or as part of their regular compliance monitoring activities.

This guidance will help public elementary and secondary schools administer student discipline in a manner that does not discriminate on the basis of race. Federal law also prohibits discriminatory discipline based on other factors, including disability, religion, and sex.⁴ Those

² The Department of Justice enforces Title VI with respect to schools, law enforcement agencies, and other recipients of Federal financial assistance from DOJ; DOJ’s Office for Civil Rights at the Office of Justice Programs (OJP OCR) is the principal DOJ office that enforces Title VI through its administrative process. *See* http://www.ojp.usdoj.gov/about/ocr/pdfs/OCR_TitleVI.pdf. DOJ also enforces Title VI upon referral from another Federal funding agency, or through intervention in an existing lawsuit. DOJ also coordinates the enforcement of Title VI government-wide.

³ Throughout this guidance, “race” or “racial” includes race, color, or national origin; “policy” or “policies” includes policies and procedures; “school” or “schools” includes an elementary or secondary school, a school district, or a local educational agency (LEA) that is a recipient of Federal financial assistance, including a charter or “alternative” school that is a recipient of Federal financial assistance. The terms “program” and “programs” and “programs or activities” and “programs and activities” are used in a colloquial sense and are not meant to invoke the meaning of the terms “program” or “program or activity” as defined by the Civil Rights Restoration Act of 1987 (CRRA). Under the CRRA, which amended Title VI, Title IX of the Education Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act of 1973 (Section 504), the term “program or activity” and the term “program,” in the context of a school district, mean all of the operations of a school district. 42 U.S.C. § 2000d - 4a(2)(B); 20 U.S.C. § 1687(2)(B); 29 U.S.C. § 794(b)(2)(B).

⁴ While this guidance explicitly addresses only race discrimination, much of the analytical framework laid out in this document also applies to discrimination on other prohibited grounds. Title IV also prohibits discrimination on the basis of sex and religion by public elementary and secondary schools. Title IX prohibits discrimination on the basis of sex by recipients of Federal financial assistance in their education programs or activities. 20 U.S.C. §§ 1681 *et seq.* Section 504 prohibits disability discrimination by recipients of Federal financial assistance, and Title II of the

prohibitions are not specifically addressed in this guidance because they implicate separate statutes and sometimes different legal analyses (although this guidance applies to race discrimination against all students, including students of both sexes and students with disabilities). Schools are reminded, however, that they must ensure that their discipline policies and practices comply with all applicable constitutional requirements and Federal laws, including civil rights statutes and regulations.

OVERVIEW OF RACIAL DISPARITIES IN THE ADMINISTRATION OF SCHOOL DISCIPLINE

The Civil Rights Data Collection (CRDC),⁵ conducted by OCR, has demonstrated that students of certain racial or ethnic groups⁶ tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended. Although African-American students represent 15% of students in the CRDC, they make up 35% of students suspended once, 44% of those suspended more than once, and 36% of students expelled. Further, over 50% of students

Americans with Disabilities Act of 1990 (Title II) prohibits disability discrimination by public entities, including public school districts, in their services, programs, and activities. 29 U.S.C. § 794; 42 U.S.C. §§ 12131 *et seq.* Section 504 and Title II and their implementing regulations provide certain protections when students with disabilities are disciplined. Part B of the Individuals with Disabilities Education Act (IDEA) provides Federal funds to State educational agencies and through them to local educational agencies to assist in the provision of special education and related services to eligible children with disabilities. The IDEA contains specific provisions regarding the discipline of students with disabilities who are or may be IDEA-eligible and requires an analysis of discipline data disaggregated by race and ethnicity as well as possible review and revision of policies, practices, and procedures. *See, e.g.*, 20 U.S.C. §§ 1412(a)(22), 1415(k), 1418(d); 34 C.F.R. § 300.530(e)-(g). Additional information about Part B of the IDEA is available at <http://idea.ed.gov>.

⁵ The CRDC is a mandatory data collection authorized under Title VI, Title IX, and Section 504, the regulations implementing those statutes, and the Department of Education Organization Act, 20 U.S.C. § 3413. Since 1968, the CRDC (formerly the Elementary and Secondary School Survey) has collected data on key education and civil rights issues in our nation's public schools. Unless otherwise noted, statistics referenced in this letter are drawn from unpublished (as of January 8, 2014) data collected by the CRDC for the 2011-12 school year. Additional information and publicly available data from the CRDC can be found at <http://ocrdata.ed.gov>.

⁶ While this document addresses race discrimination against all students, including students with disabilities, evidence of significant disparities in the use of discipline and aversive techniques for students with disabilities raises particular concern for the Departments. For example, although students served by IDEA represent 12% of students in the country, they make up 19% of students suspended in school, 20% of students receiving out-of-school suspension once, 25% of students receiving multiple out-of-school suspensions, 19% of students expelled, 23% of students referred to law enforcement, and 23% of students receiving a school-related arrest. Additionally, students with disabilities (under the IDEA and Section 504 statutes) represent 14% of students, but nearly 76% of the students who are physically restrained by adults in their schools.

The Departments are developing resources to assist schools and support teachers in using appropriate discipline practices for students with disabilities.

who were involved in school-related arrests or referred to law enforcement are Hispanic or African-American.

The Departments recognize that disparities in student discipline rates in a school or district may be caused by a range of factors. However, research suggests that the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color.⁷ Although statistical and quantitative data would not end an inquiry under Title IV or Title VI, significant and unexplained racial disparities in student discipline give rise to concerns that schools may be engaging in racial discrimination that violates the Federal civil rights laws. For instance, statistical evidence may indicate that groups of students have been subjected to different treatment or that a school policy or practice may have an adverse discriminatory impact. Indeed, the Departments' investigations, which consider quantitative data as part of a wide array of evidence, have revealed racial discrimination in the administration of student discipline. For example, in our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.

The CRDC data also show that an increasing number of students are losing important instructional time due to exclusionary discipline.⁸ The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the "school to prison pipeline." Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement;⁹ decreased academic achievement;¹⁰ increased behavior problems;¹¹

⁷ See generally Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV 85 (2011); T. Fabelo, M.D. Thompson, M. Plotkin, D. Carmichael, M.P. Marchbanks & E.A. Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (Council of State Governments Justice Center, 2011); A. Gregory & A.R. Thompson, *African American High School Students and Variability in Behavior Across Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); R.J. Skiba, R.S. Michael, A.C. Nardo & R.L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?* 116 AM. J. EDUC. 557 (2010).

⁸ Compare the 1984 CRDC National Estimations to the 2009 CRDC National Estimations for the category of suspension-out of school.

⁹ Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*. 38 EDUC. & URB. SOC'Y 359 (2006).

¹⁰ *Id.*

increased likelihood of dropping out;¹² substance abuse;¹³ and involvement with juvenile justice systems.¹⁴

As a result, this guidance is critically needed to ensure that all students have an equal opportunity to learn and grow in school. Additionally, fair and equitable discipline policies are an important component of creating an environment where all students feel safe and welcome. Schools are safer when all students feel comfortable and are engaged in the school community, and when teachers and administrators have the tools and training to prevent and address conflicts and challenges as they arise. 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. The goals of equity and school safety are thus complementary, and together help ensure a safe school free of discrimination.

This guidance summarizes schools' obligations to avoid and redress racial discrimination in the administration of student discipline. It provides a detailed explanation of the Departments' investigative process under Title IV and Title VI, including the legal framework within which the Departments consider allegations of racially discriminatory student discipline practices, and examples of school disciplinary policies and practices that may violate civil rights laws. In the Appendix to this guidance, the Departments have provided a set of recommendations to assist schools in developing and implementing student discipline policies and practices equitably and in a manner consistent with their Federal civil rights obligations. These recommendations are intended to be illustrative, not exhaustive. The Departments are available to provide technical assistance to support school efforts to cultivate an environment in which all students are safe and have equal educational opportunities.¹⁵

¹¹ S.A. Hemphill, J.W. Toumbourou, T.I. Herrenkohl, B.J. McMorris & R.F. Catalano, *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*. 39 J. ADOLESCENT HEALTH 736 (2006); S.A. Hemphill, T.I. Herrenkohl, S.M. Plenty, J.W. Toumbourou, R.F. Catalano & B.J. McMorris, *Pathways from School Suspension to Adolescent Nonviolent Antisocial Behavior in Students in Victoria, Australia and Washington State, United States*, 40 J. COMMUNITY PSYCHOL. 301 (2012).

¹² Arcia, *supra*; Fabelo et al, *supra*; Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17 (2003).

¹³ S.A. Hemphill, J. A. Heerde, T.I. Herrenkohl, J.W. Toumbourou & R.F. Catalano, *The Impact of School Suspension on Student Tobacco Use: A Longitudinal Study in Victoria, Australia, and Washington State, United States*. 39 HEALTH EDUC. & BEHAV. 45 (2012).

¹⁴ V. Costenbader & S. Markson, *School Suspension: A Study with Secondary School Students*. 36 J. SCH. PSYCHOL. 59 (1998); Fabelo et al, *supra*.

¹⁵ Nothing in this guidance alters a school's obligation to respond to student misconduct that constitutes discriminatory harassment. More information about the applicable legal standards is included in OCR's Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), available at <http://www.ed.gov/ocr/letters/colleague-201010.pdf>. See also OCR's Dear Colleague Letter: Sexual Harassment and Sexual Violence (Apr. 4, 2011),

THE DEPARTMENTS' INVESTIGATIONS AND ENFORCEMENT ACTIONS UNDER TITLE IV AND TITLE VI

A. Legal Framework

Titles IV and VI protect students from discrimination based on race in connection with all academic, educational, extracurricular, athletic, and other programs and activities of a school, including programs and activities a school administers to ensure and maintain school safety and student discipline. When schools respond to student misconduct, Titles IV and VI require that the school's response be undertaken in a racially nondiscriminatory manner.

These statutes cover school officials and everyone school officials exercise some control over, whether through contract or other arrangement, including school resource officers. Schools cannot divest themselves of responsibility for the nondiscriminatory administration of school safety measures and student discipline by relying on school resource officers, school district police officers, contract or private security companies, security guards or other contractors, or law enforcement personnel. To the contrary, the Departments may hold schools accountable for discriminatory actions taken by such parties.¹⁶

Titles IV and VI protect 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. In their investigations of school discipline, the Departments have noted that the initial referral of a student to the principal's office for misconduct is a decision point that 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 referred has engaged in misbehavior. And even if the referrals do not ultimately lead to the imposition of disciplinary sanctions, the referrals alone result in reduced classroom time and academic instruction for the referred student. Furthermore, if a sanction from a discriminatory referral becomes part of the student's school record, it could potentially enhance the penalty for subsequent misconduct and follow the student throughout the student's academic career. Therefore, it is incumbent upon a school to take effective steps to eliminate all racial discrimination in initial discipline referrals.

available at <http://www.ed.gov/ocr/letters/colleague-201104.pdf>. When addressing such harassment, a school should consider incorporating wide-ranging strategies beyond exclusionary discipline, including, for example, conflict resolution, restorative practices, and counseling, to help meet its obligations under Federal civil rights laws.

¹⁶ The nondiscrimination requirements of Titles IV and VI extend to conduct undertaken by entities that carry out some or all of the schools' functions through "contractual or other arrangements." *See, e.g.*, 34 C.F.R. § 100.3(b)(1), (2).

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. 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. In all cases, however, the Departments will investigate all relevant circumstances, such as the facts surrounding a student's actions and the discipline imposed.

1. Different Treatment

Both Title IV and Title VI prohibit schools from intentionally disciplining students differently based on race.¹⁷ The clearest case of intentional discrimination would be a policy that was discriminatory on its face: one that included explicit language requiring that students of one race be disciplined differently from students of another race, or that only students of a particular race be subject to disciplinary action.

More commonly, however, intentional discrimination occurs when a school has a discipline policy that is neutral on its face (meaning the language of the policy does not explicitly differentiate between students based on their race), but the school administers the policy in a discriminatory manner or when a school permits the *ad hoc* and discriminatory discipline of students in areas that its policy does not fully address.

Such intentional discrimination in the administration of student discipline can take many forms. The typical example is when similarly situated students of different races are disciplined differently for the same offense. Students are similarly situated when they are comparable, even if not identical, in relevant respects. For example, assume a group of Asian-American and Native-American students, none of whom had ever engaged in or previously been disciplined for misconduct, got into a fight, and the school conducted an investigation. If the school could not determine how the fight began and had no information demonstrating that students behaved differently during the fight, *e.g.*, one group used weapons, then the school's decision to discipline the Asian-American students more harshly than the Native-American students would raise an inference of intentional discrimination.

Selective enforcement of a facially neutral policy against students of one race is also prohibited intentional discrimination. This can occur, for example, when a 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. It can occur at the classroom level as well. The Departments often receive complaints from parents

¹⁷ 42 U.S.C. §§ 2000c *et seq.*; 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(a), (b)(1).

that a teacher only refers students of a particular race outside of the classroom for discipline, even though students of other races in that classroom commit the same infractions. Where this is true, there has been selective enforcement, even if an administrator issues the same consequence for all students referred for discipline.

Intentional discrimination also occurs when a school adopts a facially neutral policy with the intent to target students of a particular race for invidious reasons. This is so even if the school punishes students of other races under the policy.¹⁸ For example, if school officials believed that students of a particular race were likely to wear a particular style of clothing, and then, as a means of penalizing students of that race (as opposed to as a means of advancing a legitimate school objective), adopted a policy that made wearing that style of clothing a violation of the dress code, the policy would constitute unlawful intentional discrimination.

Lastly, intentional discrimination could be proven even without the existence of a similarly situated student if the Departments found that teachers or administrators were acting based on racially discriminatory motives. For example, if a school official uttered a racial slur when disciplining a student, this could suggest racial animus, supporting a finding that the official intended to discriminate based on a particular student's race.

Whether the Departments find that a school has engaged in intentional discrimination will be based on the facts and circumstances surrounding the particular discipline incident. Evidence of racially discriminatory intent can be either direct or circumstantial. Direct evidence might include remarks, testimony, or admissions by school officials revealing racially discriminatory motives. Circumstantial evidence is evidence that allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances.

Absent direct evidence of intentional discrimination based on race, the Departments examine the circumstantial evidence to evaluate whether discrimination has occurred. The Departments typically ask the following questions to determine whether a school intentionally discriminated in the administration of student discipline (see also Illustration 1, page 10):

- (1) 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 or group of students of another race in the disciplinary process? (As noted above, students are similarly situated when they are comparable (even if not identical) in relevant respects, for example, with regard to the seriousness of the infraction committed and their respective disciplinary histories.) If no, then the Departments would not find sufficient evidence to determine that the school has

¹⁸ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227, 231-32 (1985).

engaged in intentional discrimination. If the students *are* similarly situated and the school has treated them differently, then:

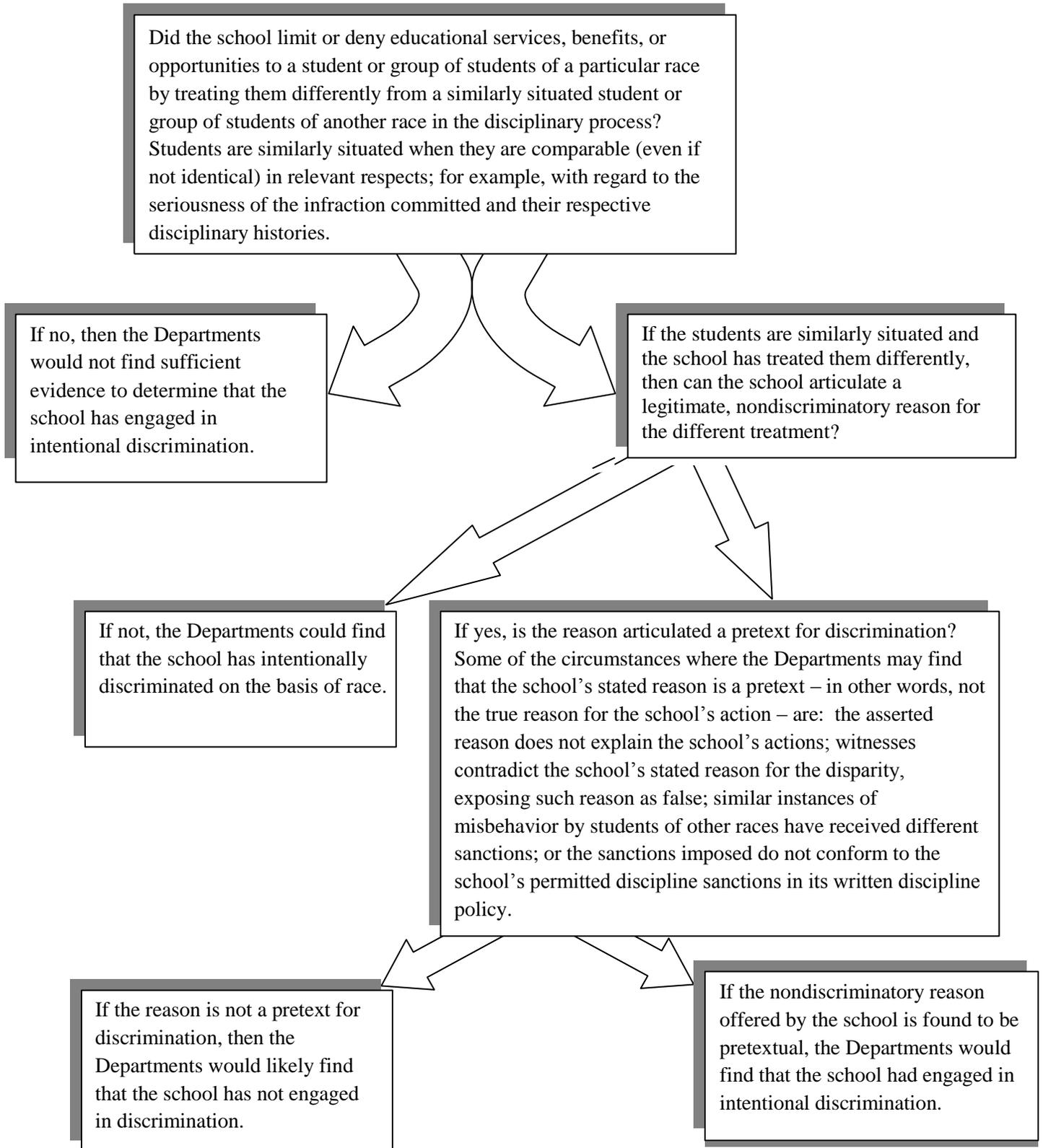
- (2) Can the school articulate a legitimate, nondiscriminatory reason for the different treatment? If not, the Departments could find that the school has intentionally discriminated on the basis of race. If yes, then:
- (3) Is the reason articulated a pretext for discrimination?¹⁹ Some of the circumstances where the Departments may find that the school's stated reason is a pretext – in other words, not the true reason for the school's action – are: the asserted reason does not explain the school's actions; witnesses contradict the school's stated reason for the disparity, exposing such reason as false; students of other races have received different sanctions for similar instances of misbehavior; or the sanctions imposed do not conform to the school's permitted discipline sanctions in its written discipline policy. If the nondiscriminatory reason offered by the school is found to be pretextual, the Departments would find that the school had engaged in intentional discrimination.

In evaluating claims under this analysis, the Departments may also consider other circumstantial evidence to determine whether there was discriminatory intent underlying a school's administration of discipline. Such circumstantial evidence may include, but is not limited to, whether the impact of a disciplinary policy or practice weighs more heavily on students of a particular race; whether there is a history of discriminatory conduct toward members of a student's race; the administrative history behind a disciplinary policy or decision; and whether there had been inconsistent application of disciplinary policies and practices to students of different racial backgrounds.²⁰

¹⁹ See generally *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); U.S. Department of Justice, *Title VI Legal Manual* 44-46 (Jan. 11, 2001) ("Title VI Manual"); U.S. Department of Education, Racial Incidents and Harassment against Students at Educational Institutions, 59 Fed. Reg. 11,448 (Mar. 10, 1994). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Title VII case that sets forth a three-part test that also applies in the Title VI and Title IV contexts. The *McDonnell Douglas* test applies in court and administrative litigation to determine whether an institution has engaged in prohibited discrimination.

²⁰ See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977) (identifying a non-exhaustive list of factors that may serve as indicia of discriminatory intent).

Illustration 1: Different Treatment Flowchart



2. 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. The resulting discriminatory effect is commonly referred to as “disparate impact.”²¹

In determining whether a facially neutral policy has an unlawful disparate impact on the basis of race, the Departments will engage in the following three-part inquiry (see also Illustration 2, page 13).

- (1) Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races? For example, depending on the facts of a particular case, an adverse impact may include, but is not limited to, instances where students of a particular race, as compared to students of other races, are disproportionately: sanctioned at higher rates; disciplined for specific offenses; subjected to longer sanctions or more severe penalties; removed from the regular school setting to an alternative school setting; or excluded from one or more educational programs or activities. If there were no adverse impact, then, under this inquiry, the Departments would not find sufficient evidence to determine that the school had engaged in discrimination. If there were an adverse impact, then:
- (2) Is the discipline policy necessary to meet an important educational goal?²² In conducting the second step of this inquiry, the Departments will consider both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it. If the policy is not necessary to meet an important educational goal, then the Departments would find that the school had engaged in discrimination. If the policy is necessary to meet an important educational goal, then the Departments would ask:
- (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?²³ If the answer is yes to either question, then the

²¹ Recipients of Federal financial assistance are prohibited 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 accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.” 34 C.F.R. § 100.3(b)(2); *see also* 28 C.F.R. § 42.104(b)(2).

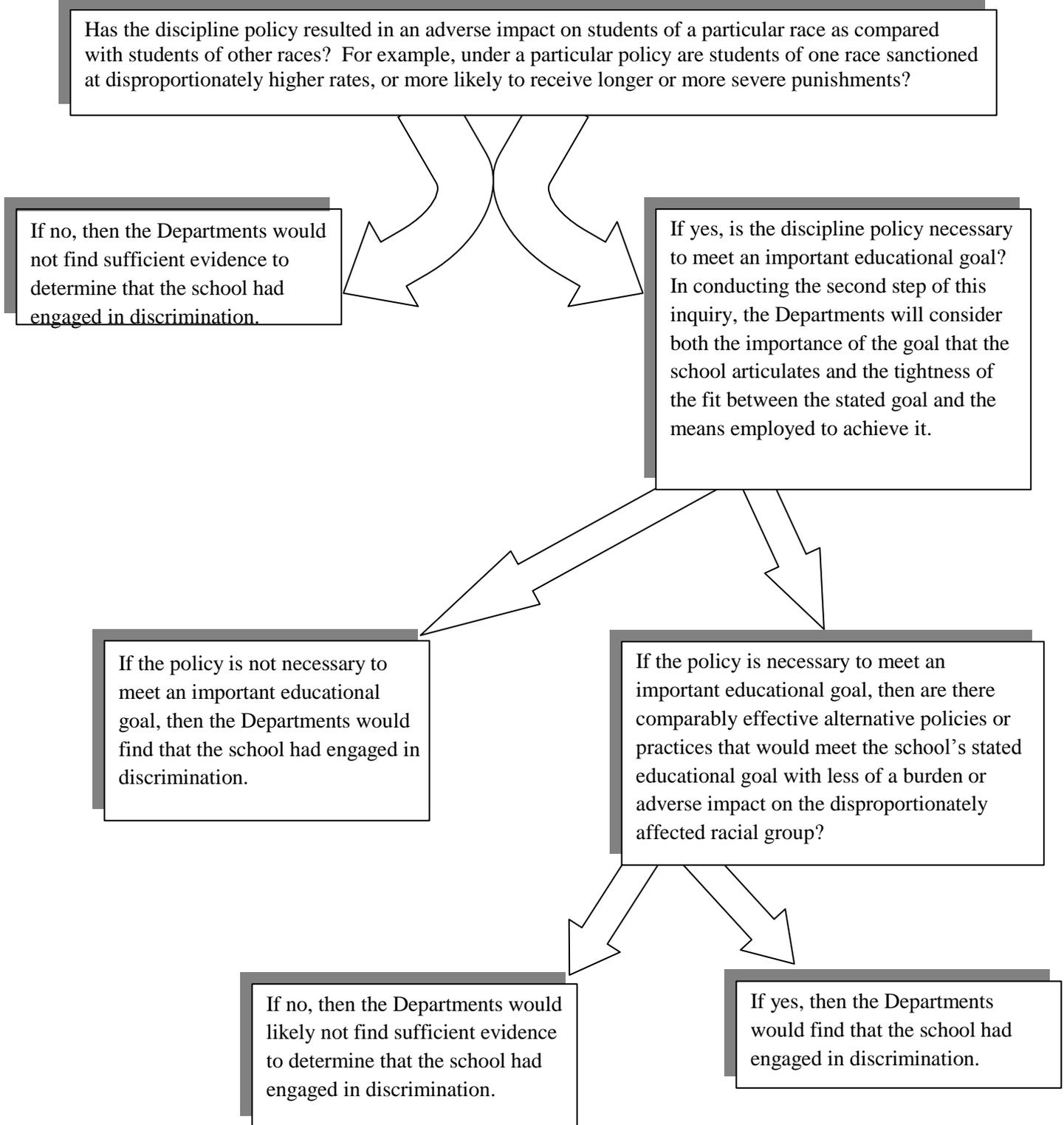
²² *See Elston*, 997 F.2d at 1411-12 (explaining that courts have required schools to demonstrate an “educational necessity” for the challenged program, practice, or procedure); Title VI Manual at 51.

²³ *See Elston*, 997 F.2d at 1413.

Departments would find that the school had engaged in discrimination. If no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.

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; 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. Additionally, policies that impose out-of-school suspensions or expulsions for truancy also raise concerns because a school would likely have difficulty 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.

Illustration 2: Disparate Impact Flowchart



3. Examples

This Section provides practical examples of situations in which the Departments might find, consistent with the principles set forth in the previous Sections, that violations of Title IV or Title VI have been established. These examples are intended to be illustrative, not exhaustive. We encourage school districts to contact us for technical assistance in applying this guidance to their particular situations.

Example 1

A complaint was filed alleging discrimination after a school imposed different disciplinary sanctions on two students in the sixth grade – a non-Hispanic student and a Hispanic student – who engaged in a fight. Both students had similar disciplinary histories, having each previously received after-school detention for minor infractions. The Hispanic student received a three-day out-of-school suspension for the student’s involvement in the fight, while the non-Hispanic student received a two-day out-of-school suspension for the same misconduct, raising a concern that the students were treated differently on the basis of race.

Based on these facts and circumstances, the Departments would make an initial determination that the students were similarly situated, as they were involved in the same incident and have similar discipline records. If the school provided evidence of facts and circumstances surrounding the incident that would constitute a legitimate, nondiscriminatory reason for the different treatment, such as evidence that it disciplined the Hispanic student more severely because the student instigated the fight and directly threatened school officials who tried to break up the fight, then these facts and circumstances might constitute a nondiscriminatory reason for the different treatment.²⁴ If a nondiscriminatory reason for imposing a different sanction on either student were not identified, the Departments could find that the school had violated Titles IV and VI.

If a legitimate, nondiscriminatory reason for the different sanction were identified, the Departments would probe further to determine whether the reason given for the enhanced sanction was a pretext for racial discrimination. In making this determination, the Departments would request and consider information such as witness statements, codes of conduct, and student disciplinary records. The Departments would then evaluate, among other things, whether the school conformed to its written policies; whether the Hispanic student did, in fact, instigate the fight; and whether the school had previously imposed a higher sanction on non-Hispanic students who had instigated fights.

If the Departments found a violation, among the individual remedies that might be required would be the revision of the Hispanic student’s school records to delete the record of additional

²⁴ For more information regarding evidence the Departments consider when conducting an investigation, please consult Section B.

punishment and the provision of compensatory educational services to remedy missed class time.²⁵ The Departments could also require systemic relief, such as training of decision makers and changing disciplinary procedures to prevent different treatment in the future.

Example 2

A district's code of conduct specifies three different categories of offenses, ranging from Level 1, or minor behavior offenses, to Level 3, which covers the most serious conduct.²⁶ The code of conduct gives school officials the discretion to select among a range of penalties identified for each category of offense. A complainant alleges that her eighth-grade son, who is African-American, was referred to the office at his school and received a one-day in-school suspension for "use of profane or vulgar language" – a Level 1 offense – during a class period. The disciplinary sanction imposed was within the permissible range for Level 1 offenses. The student has had no previous discipline incidents. A white student at the same school and with a similar disciplinary history also committed a Level 1 offense: "inappropriate display of affection" while on the school bus. While the parent of the white student was called, the student received no additional disciplinary sanction.

The fact that the school characterized both types of misconduct as Level 1 offenses indicates that the school itself believes that the misconduct warrants similar disciplinary responses. Based on these facts and circumstances, the Departments would make an initial determination that these students were similarly situated because they engaged in comparable conduct as defined by the school – misconduct classified as a Level 1 offense – and had similar disciplinary records.

The school would be asked whether it had a reason (such as the context or circumstances for these incidents) that would justify treating the students differently for Level 1 offenses. In this case, the school gave teachers and administrators a list of factors to consider when deciding whether to enhance or reduce disciplinary sanctions. Some of the factors relevant to Level 1 offenses were: whether the student's misconduct interrupted the learning process; whether the student had been previously disciplined for the same offense; whether the student accepted responsibility for the misconduct; and whether the student could demonstrate that he or she tried to avoid the situation that resulted in the misconduct. The school provided evidence that the parent of the African-American student previously received a telephone call about her son's prior use of profane or vulgar language in the classroom. The school also determined that the different

²⁵ For more information on remedies for violations of Titles IV or VI, please consult Section D.

²⁶ A district can create categories of offenses and penalties as part of its discipline policy or student code of conduct, as long as the categories themselves do not reflect racial biases or stereotypes and/or are not based on race. Misconduct that is categorized in a manner that does not align with the severity of the offense (*e.g.*, school-based arrest for a school uniform violation) may raise an inference of racial discrimination if students of a particular race are disproportionately disciplined for that offense.

locations of the offenses, *e.g.*, on the bus as compared to in the classroom, resulted in different levels of disruption to learning.

The school's reasons for treating the students differently would be sufficient under these facts and circumstances, unless the Departments found that the proffered reasons were a pretext for discrimination. In this instance, if school officials gave conflicting accounts of why the African-American student received a higher sanction, or if the school's records showed that it rarely distinguished misbehavior on the bus from misbehavior in the classroom in determining sanctions, the Departments could determine that the alleged nondiscriminatory explanation was pretextual.

If the school had not provided a nondiscriminatory reason for imposing a different sanction on the African-American student, or if the purported nondiscriminatory reason were found to be pretextual, the Departments would find that the school had violated Titles IV and VI. In that case, the Departments would seek individual and/or systemic relief.

Example 3

A complainant alleges that Native-American students are treated differently from their non-Native-American peers at a school that contracts with a school safety officer to secure the entrances and exits of the school building, patrol the halls, and maintain safety on the school grounds. The investigation reveals that the school safety officer, when he was posted for security at the main entrance, treated Native-American students differently from other students. The school's rules require that when a student arrives at the entrance less than five minutes late, the student should be allowed to go directly to class, whereas when a student arrives more than five minutes late, the student should be sent to the office before going to class. The school safety officer, however, had a practice of detaining for several minutes some Native-American students (but not any other students) who arrived less than five minutes late, and then sending them to the office. The school safety officer, who was not an employee of the school, offered no justification for the differential treatment and declined to speak with investigators or explain himself to the school.

Because a school is responsible for discrimination by parties with whom it contracts or to whom it otherwise delegates responsibility for aspects of the school's programs or functions, the conduct of the school safety officer would raise an inference of racial discrimination by the school. If the school could not provide a nondiscriminatory reason for the different treatment of Native American students by the school safety officer, or if the reason were found to be pretextual, the Departments would find that the school had violated Titles IV and VI.

Example 4

A school district established a district-wide alternative high school to which it assigns students with extensive disciplinary records. Although only 12 percent of the district's students are African-American, 90 percent of students assigned involuntarily to the alternative high school are African-American. The evidence shows that when white and African-American students commit similar offenses in their regular high schools, the offenses committed by the white students have not been reflected as often in school records. The evidence also shows that some white students are not assigned to the alternative high school, despite having disciplinary records as extensive (in terms of number of and severity of offenses) as some of the African-American students who have been involuntarily assigned there. Based on these facts and circumstances, if the school district could not provide a legitimate, nondiscriminatory reason for the different treatment or the reason provided were pretextual, the Departments would find that the school district had violated Titles IV and VI.

Example 5

A school district's discipline code allows for a one-day suspension of all students who commit the offense of "acting in a threatening manner." Statistical data demonstrate that under this provision of the code, a school in the district suspends African-American students disproportionately relative to their enrollment at the school. During the investigation, the Departments find that the discipline code provision lacks a clear definition of the prohibited conduct, and that the school has suspended African-American students under the provision for a broad range of actions, including congregating in groups in the hallways, talking too loudly, or talking back when admonished by the teacher. Further, the evidence indicates that white students engaging in comparable conduct are more likely to be charged with lower-level violations of the discipline code, such as "no hall pass" and "classroom disruption." These offenses do not lead to suspension and are more likely to result in after-school detention.

Based on this evidence, the Departments would probe further and ask the school whether it had a nondiscriminatory reason for the pattern of different treatment, such as additional circumstances or specific, objective factors that led decision makers to consider certain instances of misbehavior more threatening than other instances of similar misbehavior. If a nondiscriminatory reason were not identified (for instance, if the school provided only a statement from a teacher that the teacher felt more threatened by the conduct of the African-American students, without providing a reasonable basis to conclude that the behavior at issue actually was more threatening), or if the purported nondiscriminatory reason were found to be pretextual, the Departments would find the school in violation of Titles IV and VI, and seek individual and/or systemic relief.

Such remedies could consist of one or more of the following: (1) providing clear definitions and examples of threatening actions for which students may be suspended (including specifying the conduct that does not warrant a suspension); (2) requiring the administrator(s) to make specific

findings prior to imposing the sanction of suspension, *e.g.*, determining that the behavior in question falls within the scope of the prohibited conduct, and/or determining that other means of addressing student behavior are not feasible or repeatedly failed to bring about appropriate conduct; (3) providing teachers and administrators with training on how to administer the policy fairly and equitably; and/or (4) providing teachers with training in classroom management techniques and effective behavioral interventions that give them appropriate and culturally responsive tools to interpret and address the underlying behaviors.

Example 6

A school district adopted an elaborate set of rules governing the sanctions for various disciplinary offenses. For one particular offense, labeled “use of electronic devices,” the maximum sanction is a one-day in-school suspension where the student is separated from his regular classroom but still is provided some educational services. The investigation reveals that school officials, however, regularly impose a greater, unauthorized punishment – out-of-school suspension – for use of electronic devices. The investigation also shows that African-American students are engaging in the use of electronic devices at a higher rate than students of other races. Coupled with the school’s regular imposition of greater, unauthorized punishment for using electronic devices, therefore, African-American students are receiving excessive punishments more frequently than students of other races. In other words, African-American students are substantially more likely than students of other races to receive a punishment in excess of that authorized under the school’s own rules.

There is no evidence that the disproportionate discipline results from racial bias or reflects racial stereotypes. Rather, further investigation shows that this excessive punishment is the result of poor training of school officials on the school rules that apply to use of electronic devices.

Under these circumstances, the Departments could find a violation of Title VI. Although there is no finding of intentional discrimination, the misapplication of the discipline rules by school officials results in an adverse impact (disproportionate exclusion from education services) on African-American students as compared with other students. Because this practice has an adverse racial impact, the school must demonstrate that the practice is necessary to meet an important educational goal. The school cannot do so, however, because there is no justification for school officials to disregard their own rules and impose a punishment not authorized by those rules.

Additional training for school officials, clarification of the rules, and the immediate collection and review of incident data to prevent unauthorized punishments might be required to eliminate the disparate impact going forward. Among the individual remedies that might be required are revision of students’ school records and compensatory educational services to remedy missed class time.

Example 7

A middle school has a “zero tolerance” tardiness policy. Students who are more than five minutes tardy to class are always referred to the principal’s office at a particular school, where they are required to remain for the rest of the class period regardless of their reason for being tardy. The school also imposes an automatic one-day suspension when a student is recorded as being tardy five times in the same semester. Additional tardiness results in longer suspensions and a meeting with a truancy officer.

The evidence shows Asian-American students are disproportionately losing instruction time under the school’s “zero tolerance” tardiness policy, as a result of both office referrals and suspensions for repeated tardiness.

An investigation further reveals that white and Hispanic students are more likely to live within walking distance of the school, while Asian-American students are more likely to live farther away and in an area cut off by an interstate highway that prevents them from walking to school. The majority of Asian-American students are thus required to take public transportation. These students take the first public bus traveling in the direction of their school every morning. Even though they arrive at the bus stop in time to take the first bus available in the morning, they often are not dropped off at school until after school has begun.

As justification for the “zero tolerance” tardiness policy, the school articulates the goals of reducing disruption caused by tardiness, encouraging good attendance, and promoting a climate where school rules are respected, all of which the Departments accept as important educational goals. The Departments would then assess the fit between the stated goals and the means employed by the school – including whether the policy is reasonably likely to reduce tardiness for these students under these circumstances. Assuming there was such a fit, the Departments would then probe further to determine the availability of alternatives that would also achieve the important educational goals while reducing the adverse effect on Asian-American students (*e.g.*, aligning class schedules and bus schedules, or excusing students whose tardiness is the result of bus delays). If the Departments determine that a school’s articulated goal can be met through alternative policies that eliminate or have less of an adverse racial impact, the Departments would find the school in violation of Title VI and require that the school implement those alternatives.

B. Information the Departments Consider

During an investigation, the Departments will examine facts and information related to a school’s discipline approach. The following is a non-exhaustive list of the types of information the Departments have examined when investigating the possibility of discriminatory discipline: written policies (such as student codes of conduct, parent handbooks, and teacher manuals) and unwritten disciplinary practices (such as exercises of discretion by teachers and school administrators); data indicating the number of referrals to administrators charged with

implementing student discipline and/or to law enforcement authorities; discipline incident reports; copies of student discipline records and discipline referral forms; school discipline data disaggregated by subgroup, offense, other relevant factors (such as the time of incident, place of incident, whether more than one student was involved in an incident, the students' prior disciplinary infractions, the person(s) who referred a student for discipline); and interviews with students, parents, administrators, teachers, counselors, school resource officers and other law enforcement officers, relevant contractors, and support staff. The Departments also will review and analyze information provided by schools through the CRDC, if applicable, and other relevant data.

The Departments will look carefully at, among other things, a school's definitions of misconduct to ensure they are clear and nondiscriminatory, the extent to which disciplinary criteria and referrals are made for offenses that are subjectively defined (*e.g.*, disrespect or insubordination), and whether there are safeguards to ensure that discretion is exercised in a nondiscriminatory manner. In addition to establishing a system for monitoring all disciplinary referrals, the school should have a system in place to ensure that staff who have the authority to refer students for discipline are properly trained to administer student discipline in a nondiscriminatory manner. Schools should thus take steps to monitor and evaluate the impact of disciplinary practices to detect patterns that bear further investigation.

C. Importance of Appropriate Record Keeping

The Departments expect schools to cooperate with investigations and, upon request, to provide records that will enable the Departments to ascertain whether the administration of student discipline policies and practices complies with the requirements of Titles IV and VI. If the Departments determine that a school does not collect accurate and complete data to resolve an investigation, and/or the Departments are unable to obtain the necessary information through interviews or other means, the Departments may conclude that the school's record-keeping process presents concerns.

To address these concerns, the Departments may require, for example, that the school begin keeping the necessary information to determine if the school is meeting its Title VI obligations and not discriminating against students in the administration of its discipline policies.²⁷ A non-

²⁷ See 34 C.F.R. § 100.6(b), applying to the Department of Education ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying" with the Title VI regulations.); *id.* § 100.6(c) ("Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance" with the Title VI regulations). See also 28 C.F.R. § 42.106(b), applying to DOJ ("Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete, and accurate compliance reports at such times, and in such

exhaustive list of data-related remedies required of schools found to be in noncompliance with Title VI includes the following: developing and implementing uniform standards for the content of discipline files; developing and training all staff on uniform standards for entry, maintenance, updating and retrieval of data accurately documenting the school's discipline process and its implementation, including its racial impact; and keeping data on teacher referrals and discipline, to assess whether particular teachers may be referring large numbers of students by race for discipline (and following up with these teachers, as appropriate, to determine the underlying causes).

D. Remedies

If the Departments conclude that a school is in violation of Title IV or Title VI in the administration of student discipline, the Departments will attempt to secure the school's voluntary agreement to take specific steps to remedy the identified violation before seeking redress in court or through an administrative hearing. If appropriate under the circumstances, the Departments will involve the entire district, and not just an individual school, in the agreement. The remedy sought would be aligned with the Departments' findings and could include individual relief to students who were subjected to racial discrimination, and also prospective remedies that are necessary to ensure the school's (and district's) future adherence to the requirements of Titles IV and VI. Such remedies may include the following:

- correcting the records of students who were treated differently regarding the infraction and sanction imposed;
- providing compensatory, comparable academic services to students receiving in-school or out-of-school suspensions, expelled, placed in an alternative school, or otherwise removed from academic instruction;
- revising discipline policies to provide clear definitions of infractions to ensure that consequences are fair and consistent;
- developing and implementing strategies for teaching, including the use of appropriate supports and interventions, which encourage and reinforce positive student behaviors and utilize exclusionary discipline as a last resort;

form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying" with the Title VI regulations); *id.* § 106(c) ("each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance" with the Title VI regulations); *id.* § 106(d). If a school has been previously instructed by the Departments to collect and maintain particular data, the failure to provide such data would be regarded as a violation of these provisions and would cause the Departments to presume the missing data would have supported a finding of a substantive violation.

- providing training for school personnel on revised discipline policies and classroom management techniques;
- providing school-based supports for struggling students whose behavior repeatedly disrupts their education and/or the education of other students;²⁸
- designating a school official as a discipline supervisor to ensure that the school implements its discipline policies fairly and equitably;
- conducting and/or reviewing comprehensive needs assessments to ensure they are effective in measuring the perceptions of students and other members of the community in connection with the administration of school discipline, and using the results of these assessments to make responsive changes to policies and practices;
- at least annually, conducting a forum during the school day that provides students, teachers and administrators the opportunity to discuss matters relating to discipline and provide input on the school's discipline policies;
- developing a training and information program for students and community members that explains the school's discipline policies and what is expected of students in an age-appropriate, easily understood manner;
- creating a plan for improving teacher-student relationships and on-site mentoring programs; and
- conducting an annual comprehensive review of school resource officer interventions and practices to assess their effectiveness in helping the school meet its goals and objectives for student safety and discipline.

Remedies will necessarily vary with the facts of each case; in all instances, however, the remedies must fully and effectively address the school's discriminatory actions and ensure future compliance with Titles IV and VI.²⁹ If the Departments enter into a resolution agreement with a school, they will monitor the school's compliance with the agreement to ensure the school is meeting the requirements of Titles IV and VI when administering student discipline.

²⁸ As previously noted, for students with disabilities, other Federal requirements may apply.

²⁹ The Departments have entered into settlement agreements and consent decrees to address and prevent racial discrimination in student discipline. These documents provide additional examples of the kinds of remedies that the Departments seek to ensure compliance with Titles IV and VI, and may be found at <http://www.justice.gov/crt/about/edu/documents/classlist.php> and <http://www.ed.gov/ocr/docs/investigations/index.html>.

CONCLUSION

The Departments are committed to promoting effective and appropriate school discipline policies and practices that create a safe and inclusive environment where all students can learn and succeed. As part of this commitment, we will enforce Federal laws to eliminate unlawful racial discrimination in school discipline. In addition to investigating complaints that have been filed, both Departments are collaboratively and proactively initiating compliance reviews nationwide focused on student discipline. Finally, the Departments will continue to provide technical assistance to schools on the adoption and administration of discipline policies consistent with their obligations under Federal civil rights laws.

Thank you for your efforts to ensure that the nation's students are provided with equal educational opportunities. If you need technical assistance, please contact the OCR regional office serving your State or territory by visiting <http://www.ed.gov/about/offices/list/ocr/index.html> or call OCR's Customer Service Team at 1-800-421-3481. You may contact DOJ's Civil Rights Division, Educational Opportunities Section, at education@usdoj.gov, or 1-877-292-3804.

We look forward to continuing our work together to ensure equal access to education and to promote safe school environments for all of America's students.

Sincerely,

/S/

Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education

/S/

Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

APPENDIX

Recommendations for School Districts, Administrators, Teachers, and Staff

The U.S. Department of Education and the U.S. Department of Justice (Departments) are committed to working with schools, parents, students, stakeholder organizations, and other interested parties to ensure that students are not subjected to racially discriminatory discipline policies and practices. This appendix supplements the Dear Colleague Letter concerning discrimination on the basis of race, color, or national origin in school discipline issued by the Departments on January 8, 2014. We hope the following list of recommendations, which are based on a review of a broad spectrum of our cases, will assist schools to identify, avoid, and remedy discriminatory discipline based on race, color, or national origin.

These recommendations are intended to be illustrative. They are not intended to be exhaustive or exclusive; do not address recommendations specifically targeted at preventing discriminatory discipline that is based on prohibited grounds other than race, color, or national origin; and may not be applicable to every specific factual setting in a particular school.¹ Additionally, these recommendations do not constitute legal advice, and schools that choose to implement one or more of these recommendations might still be found to be in violation of Federal law(s). For additional information, research, and resources in these three areas relating more generally to improving school climate and discipline policies and practices, see the Guiding Principles Resource Guide released by the U.S. Department of Education on January 8, 2014.

¹ For specific resources designed to assist schools in developing and implementing effective prevention and intervention strategies that promote positive student behavior and in planning and executing dropout prevention strategies, readers may wish to consult the following practice guides published by the Department of Education: Epstein, M., Atkins, M., Cullinan, D., Kutash, K., and Weaver, R. (2008). *Reducing Behavior Problems in the Elementary School Classroom: A Practice Guide* (NCEE #2008-012). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at <http://ies.ed.gov/ncee/wwc/publications/practiceguides>; and Dynarski, M., Clarke, L., Cobb, B., Finn J., Rumberger, R., and Smink, J. (2008). *Dropout Prevention: A Practice Guide* (NCEE 2008-4025). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, available at <http://ies.ed.gov/ncee/wwc/publications/practiceguides>. You may also wish to consult with regional Equity Assistance Centers that can assist schools in developing and implementing policies and practices to promote equitable educational opportunity on the basis of race, color, national origin, or sex. Please visit <http://www.ed.gov/programs/equitycenters> for more information.

I. Climate and Prevention

(A) Safe, inclusive, and positive school climates that provide students with supports such as evidence-based tiered supports and social and emotional learning.

- ✓ Develop and implement a comprehensive, school- and/or district-wide approach to classroom management and student behavior grounded in evidence-based educational practices that seeks to create a safe, inclusive, and positive educational environment.
- ✓ Ensure that appropriate student behavior is positively reinforced. Such reinforcement could include school-wide tiered supports, including universal, targeted, and intensive supports, to align behavioral interventions to students' behavioral needs.
- ✓ Encourage students to accept responsibility for any misbehavior and acknowledge their responsibility to follow school rules.
- ✓ Assist students in developing social and emotional competencies (*e.g.*, self-management, resilience, self-awareness, responsible decision-making) that help them redirect their energy, avoid conflict, and refocus on learning.
- ✓ Refer students with complex social, emotional, or behavioral needs for psychological testing and services, health services, or other educational services, where needed.
- ✓ Ensure that there are sufficient school-based counselors, social workers, nurses, psychologists, and other mental health and supportive service providers to work with students and implement tiered supports. Involve these providers in addressing disciplinary incidents; preventing future disciplinary concerns; reintegrating students who are returning from suspensions, alternative disciplinary schools, or incarceration; and maintaining a safe, inclusive, and positive educational environment.
- ✓ Involve students and student advocates in maintaining a safe, inclusive, and positive educational environment through programs such as peer mediation and restorative justice, as appropriate.

(B) Training and professional development for all school personnel

- ✓ Provide all school personnel, including teachers, administrators, support personnel, and school resource officers, with ongoing, job-embedded professional development and training in evidence-based techniques on classroom management, conflict resolution, and de-escalation approaches that decrease classroom disruptions and utilize exclusionary disciplinary sanctions as a last resort.

- ✓ Train all school personnel on the school's written discipline policy and how to administer discipline fairly and equitably. Facilitate discussion for all school personnel of the school's discipline policies and the faculty's crucial role in creating a safe, inclusive, and positive educational environment.
- ✓ Provide training to all school personnel on how to apply subjective criteria in making disciplinary decisions.
- ✓ Provide cultural awareness training to all school personnel, including training on working with a racially and ethnically diverse student population and on the harms of employing or failing to counter racial and ethnic stereotypes.
- ✓ Establish procedures to assess the effectiveness of professional development approaches in improving school discipline practice and staff knowledge and skills.
- ✓ Establish procedures for school administrators to identify teachers who may be having difficulty managing classrooms effectively, preventing discipline problems from occurring, or making appropriate disciplinary referrals, and to provide those teachers with assistance and training.
- ✓ Ensure that appropriate instruction is provided to any volunteer on a school's campus regarding the school's approach to classroom management and student behavior.

(C) Appropriate use of law enforcement

- ✓ Clearly define and formalize roles and areas of responsibility to govern student and school interaction with school resource officers and other security or law enforcement personnel.
- ✓ Document the roles and responsibilities of school resource officers and security or law enforcement personnel in a written agreement or memorandum of understanding between the school and appropriate law enforcement and/or related agencies.
- ✓ Ensure that school resource officers and other security or law enforcement personnel effectively support school climate and discipline goals by promoting a safe, inclusive, and positive learning environment, and mentoring and otherwise supporting the education of students.
- ✓ Provide opportunities and approaches for school resource officers and other security or law enforcement personnel, school personnel, students, and parents to develop a trusting and positive relationship with one another.
- ✓ Ensure that school personnel understand that they, rather than school resource officers and other security or law enforcement personnel, are responsible for administering routine student discipline.

- ✓ Establish procedures and train school personnel and school volunteers on how to distinguish between disciplinary infractions appropriately handled by school officials versus 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, and how to contact law enforcement when warranted.
- ✓ Regularly meet with school resource officers and other security or law enforcement personnel who work in the school to ensure that they receive training to work effectively and appropriately with elementary and secondary students. Such training may include instruction in bias-free policing, including instruction on implicit bias and cultural competence; child and adolescent development and age appropriate responses; practices demonstrated to improve school climate; restorative justice techniques; mentoring; classroom presentation skills; conflict resolution; privacy issues; and working collaboratively with school administrators.
- ✓ Ensure compliance with the Family Educational Rights and Privacy Act (FERPA) if school resource officers or other security or law enforcement personnel are permitted access to personally identifiable information from students' education records, such as disciplinary records.²
- ✓ Collect data and monitor the actions that school resource officers and other security or law enforcement personnel take against students to ensure nondiscrimination.

II. Clear, Appropriate, and Consistent Expectations and Consequences

(A) Nondiscriminatory, fair, and age-appropriate discipline policies

- ✓ Ensure that school discipline policies specifically and positively state high expectations for student behavior, promote respect for others, and make clear that engaging in harassment and violence, among other problem behaviors, is unacceptable.
- ✓ Ensure that discipline policies include a range of measures that students may take to improve their behavior prior to disciplinary action.
- ✓ Develop or revise written discipline policies to clearly define offense categories and base disciplinary penalties on specific and objective criteria whenever possible. If certain offense categories have progressive sanctions, clearly set forth the range of sanctions for each infraction.

² These requirements are contained in 34 C.F.R. § 99.31(a)(1) and the criteria set forth in the school's annual notification of FERPA rights for how to identify school officials who have legitimate educational interests in accessing such records.

- ✓ Ensure that the sanctions outlined by the school’s discipline policies are proportionate to the misconduct.
- ✓ Review standards for disciplinary referrals and revise policies to include clear definitions of offenses and procedures for all school personnel to follow when making referrals.
- ✓ Clearly designate who has the authority to identify discipline violations and/or assign penalties for misconduct.
- ✓ Ensure that the school’s written discipline policy regarding referrals to disciplinary authorities or the imposition of sanctions distinguishes between those students who have violated the school’s discipline policy for the first time and those students who repeatedly commit a particular violation of the discipline policy.
- ✓ Ensure that appropriate due process procedures are in place and applied equally to all students and include a clearly explained opportunity for the student to appeal the school’s disciplinary action.

(B) Communicating with and engaging school communities

- ✓ Involve families, students, and school personnel in the development and implementation of discipline policies or codes of conduct and communicate those policies regularly and clearly.
- ✓ Provide the discipline policies and student code of conduct to students in an easily understandable, age-appropriate format that makes clear the sanctions imposed for specific offenses, and periodically advise students of what conduct is expected of them.
- ✓ Put protocols in place for when parents and guardians should be notified of incidents meriting disciplinary sanctions to ensure that they are appropriately informed.³
- ✓ Post all discipline-related materials on district and school websites.
- ✓ Provide parents and guardians with copies of all discipline policies, including the discipline code, student code of conduct, appeals process, process for re-enrollment, where appropriate, and other related notices; and ensure that these written materials accurately reflect the key

³ To the extent that information about these incidents is included in education records, parents have the right under FERPA and Individuals with Disabilities Education Act (IDEA) to inspect and review them. 20 U.S.C. § 1232g(1)(A); 34 C.F.R. § 99.10; 34 C.F.R. § 300.229; 34 C.F.R. § 300.613. If a student is 18 or over, or in the case of an IDEA-eligible student, if a student has reached the age of majority as determined by State law, then the rights accorded to parents under FERPA and the IDEA will transfer to the student. For students who hold their own educational rights, consideration should be given to whether it is appropriate to notify the parents or the student, or both, of the offense. *See generally* 20 U.S.C. § 1232g (d); 34 C.F.R. §§ 99.3, 99.5(a), 99.31; 20 U.S.C. § 1415(m); 34 C.F.R. § 300.520.

elements of the disciplinary approach, including appeals, alternative dispositions, time lines, and provisions for informal hearings.

- ✓ Translate all discipline policies, including the discipline code and all important documents related to individual disciplinary actions, to ensure effective communication with students, parents, and guardians who are limited English proficient. Provide interpreters or other language assistance as needed by students and parents for all discipline-related meetings, particularly for expulsion hearings.⁴
- ✓ Establish a method for soliciting student, family, and community input regarding the school's disciplinary approach and process, which may include establishing a committee(s) on general discipline policies made up of diverse participants, including, but not limited to students, administrators, teachers, parents, and guardians; and seek input from parents, guardians, and community leaders on discipline issues, including the written discipline policy and process.

(C) Emphasizing positive interventions over student removal

- ✓ Ensure that the school's written discipline policy emphasizes constructive interventions over tactics or disciplinary sanctions that remove students from regular academic instruction (e.g., office referral, suspension, expulsion, alternative placement, seclusion).
- ✓ Ensure that the school's written discipline policy explicitly limits the use of out-of-school suspensions, 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.
- ✓ Ensure that the school's written discipline policy provides for individual tailored intensive services and supports for students reentering the classroom following a disciplinary sanction.
- ✓ Ensure that the school's written discipline policies provide for alternatives to in-school and out-of-school suspensions and other exclusionary practices (*i.e.*, expulsions).

⁴ Such language assistance may be required by Title VI; schools have the responsibility to provide national origin-minority parents who have limited proficiency in English with meaningful access to information provided to other parents in a language they understand.

III. Equity and Continuous Improvement

(A) Monitoring and self-evaluation

- ✓ Develop a policy requiring the regular evaluation of each school's discipline policies and practices and other school-wide behavior management approaches to determine if they are affecting students of different racial and ethnic groups equally. Such a policy could include requiring the regular review of discipline reports containing information necessary to assess whether students with different personal characteristics (*e.g.*, race, sex, disability, and English learner status) are disproportionately disciplined, whether certain types of disciplinary offenses are more commonly referred for disciplinary sanctions(s), whether specific teachers or administrators are more likely to refer specific groups of students for disciplinary sanctions, and any other indicators that may reveal disproportionate disciplinary practices.
- ✓ Establish a means for monitoring that penalties imposed are consistent with those specified in the school's discipline code.
- ✓ Conduct a periodic review of a sample of discipline referrals and outcomes to ensure consistency in assignments.

(B) Data collection and responsive action

- ✓ Collect and use multiple forms of data, including school climate surveys, incident data, and other measures as needed, to track progress in creating and maintaining a safe, inclusive and positive educational environment.⁵
- ✓ Collect complete information surrounding all discipline incidents, including office referrals and discipline incidents that do not result in sanctions. Relevant data elements include information related to the date, time, and location of the discipline incident; the offense type; whether an incident was reported to law enforcement; demographic and other information related to the perpetrator, victim, witness, referrer, and disciplinarian; and the penalty

⁵ In administering a comprehensive needs assessment, school districts must comply with the Protection of Pupil Rights Amendment (PPRA), which requires, among other things, that in the event that a survey administered or distributed to students will contain questions about one or more of eight specified items, such as the student's mental or psychological problems, the school district must: (1) develop and adopt policies to protect student privacy with regard to the survey; (2) notify the parents, at least annually at the beginning of the school year, of the specific or approximate dates that the survey will be scheduled; and, (3) offer an opportunity for parents to opt students out of participation in the survey. *See* 20 U.S.C. § 1232h(c). The rights provided to parents under the PPRA transfer to the student when the student turns 18 years old, or is an emancipated minor (under an applicable State law) at any age. 20 U.S.C. § 1232h(c)(5)(B).

imposed. Ensure that there are administrative staff who understand how to analyze and interpret each school's discipline data to confirm that data are accurately collected, reported, and used.⁶

- ✓ Create and review discipline reports to detect patterns that bear further investigation, assist in prioritizing resources, and evaluate whether a school's discipline and behavior management goals are being reached.
- ✓ If disparities in the administration of student discipline are identified, commit the school to a plan of action to determine what modifications to the school's discipline approach would help it ameliorate the root cause(s) of these disparities.
- ✓ Develop a discipline incident database that provides useful, valid, reliable, and timely discipline incident data.⁷
- ✓ Provide the school board and community stakeholders, consistent with applicable privacy laws and after removing students' identifiable information, with disaggregated discipline information to ensure transparency and facilitate community discussion.
- ✓ Make statistics publicly available on the main discipline indices disaggregated by school and race.
- ✓ Maintain data for a sufficient period of time to yield timely, accurate, and complete statistical calculations.
- ✓ In addition to the Federal civil rights laws, ensure that the school's discipline policies and practices comply with applicable Federal, State, and local laws, such as IDEA and FERPA.

⁶ Any use and disclosure of personally identifiable information on students from school discipline data must be consistent with FERPA.

⁷ Assistance in developing such a database is available from the National Forum on Education Statistics' report entitled, "Forum Guide to Crime, Violence, and Discipline Incident Data" (Forum Guide) (May 2011), *available at* http://nces.ed.gov/forum/pub_2011806.asp.