Recognizing & Rectifying Discriminatory Education Practices

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OCR Instructions to the Field

Re Scope of Complaints

Regional Directors:

These instructions set forth new internal guidance regarding the scope of the investigation of all OCR cases. This guidance is effective immediately and applies to all complaints currently in evaluation or investigation, as well as newly-filed complaints. These Instructions shall be applied consistently with OCR’s Case Processing Manual (CPM), and if any questions arise about how to apply these instructions consistently with the CPM, please contact your designated Enforcement Director for clarification.

Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters. There is no longer a “sensitive case” or “call home” list; rather, Headquarters and the Regional Offices (Regional Director) will consult regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction. Cases are retroactive and can/will be returned to the respective Regional Office if the RD feels a case can be adjudicated at the regional level.

In particular, OCR will no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient’s compliance, which rule had been stated in OCR’s Approach to Title IX PSE Sexual Violence Complaints (January 2014) (for internal discussion), OCR’s Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints (February 12, 2014) (Draft for internal discussion), and other related internal policy documents. For example, if a discipline complaint requires analysis of whether a facially-neutral suspension policy was applied differently against a particular student based on a prohibited classification such as race, the investigative team (supervised by their Team Leader and Regional Director) is empowered to determine what comparative data (CRDC or otherwise) are necessary to, e.g., determine if other similarly-situated students of a different race were, in fact, treated differently from one whose behalf the complaint was filed.

The scope of the investigation of all complaints, including ESE discipline and PSE sexual violence complaints, is determined by the statutes and regulations, OCR’s published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant. There is no longer a “one size fits all” approach to the investigation of any category of complaints. Based on the investigative requirements set forth in the statutes and regulations, published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant, it is the investigative team’s responsibility (under appropriate supervision by Team Leaders and other Regional Office Supervisors) to determine on a case-by-case basis the type and scope of evidence that is necessary to support a legally sound investigation and determination, with the understanding that all OCR investigations are to be framed in their scope by the allegations of each particular complaint.

For the sake of clarity, these instructions mean that OCR will only apply a “systemic” or “class-action” approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.

Please apply the instructions in this document with the understanding that OCR’s goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible.

I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible. These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time-frame, thus providing effective resolution and justice to complainants and recipients.

Thank you for your continued dedication to OCR’s core mission to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools. If you have any questions about these instructions, please contact your Enforcement Director. You may also contact me if further clarification is needed.

Candice Jackson
OCR Acting Assistant Secretary for Civil Rights
Race, Color and National Origin Discrimination

• Discrimination against students based on race, color or national origin is prohibited by Title VI of the Civil Rights Act of 1964.

1. Title VI prohibits discrimination based on race, color, or national origin for programs receiving federal assistance;

2. The Equal Educational Opportunities Act of 1974 (EEOA);

3. The equal protection clause of the Fourteenth Amendment.
Race, Color and National Origin Discrimination (continued)

• Most litigation under the equal protection clause has been related to racial desegregation of public schools.

• *In Parents Involved in Cmty. School v. Seattle School Dist. No. 1*, the United States Supreme Court struck down a student assignment plan that used race as the determinative factor in a school district that was not subject to a desegregation order.
Sex Discrimination

Certain types of sex discrimination against students are prohibited by:

• Title IX of the Education Amendments of 1972.
  – For school districts receiving federal assistance.

• The EEOA.

• The equal protection and due process clauses of the Fourteenth Amendment.
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance…
Discrimination Based on Disability

- Section 504 of the Rehabilitation Act of 1973 prohibits any school district receiving federal financial assistance from discriminating against disabled children.

- Title II of the Americans with Disabilities Act of 1990 expands these protections, and prohibits all school districts, whether they receive federal funding or not, from discriminating against disabled children.
Non-Discriminatory Enrollment and Registration Practices
Residency Requirements

- School District may establish bona fide residency requirements.
  - Rules vary among states and districts on what forms of documentation can be used to prove residency within a district.
  - Typical documents: utility bill or rent, mortgage or lease invoices.
  - Parent must be permitted to establish residency using any of the alternative methods provided for by state or local law.
Checklist Item

• Review the documentation that your school, school district, or state deems sufficient to meet their proof of residency requirement.

• Does the required documentation exclude, tend to exclude, or discourage an undocumented student or undocumented parent from enrolling in or attending school?

• For purposes of this review, the term “parent” should include a guardian or other responsible person under state or local law.

• Same rules and standards for all students.
Avoiding the Chilling Effect of Enrollment Policies & Practices
Educating Parents

• Schools should look for ways to proactively educate parents about their children’s rights.
  – Reassure them that their children are welcome in district schools.
    ○ A foreign birth certificate, a baptismal record, and alternative documentation will be treated in the same manner that a U.S. birth certificate, baptismal record, or alternative document -- solely to establish the age of a child.
  – The same approach should be taken in communicating the district’s proof of residency requirements.
  – Districts must apply rules and standards for proof of age or proof of residency in the same way to everyone, regardless of race, color, national origin, citizenship, or immigration status.
Checklist Item

• Review your district’s communications and publications of its:
  1. Proof of age and
  2. Proof of residency requirements

• Ensure that they include a section designed to proactively educate parents about their:
  1. Children’s rights;
  2. And reassure parents that their children are welcome in the district.
Homeless Students

McKinney-Vento Homeless Assistance Act 42 U.S.C. §§11301
Homeless Students

McKinney-Vento Homeless Assistance Act 42 U.S.C. §§11301

• Can a homeless child ever be required to show residency in a district in order to enroll in a district school? **No.**

• A state or district may establish bona fide residency requirements and thus might require that all prospective students furnish proof of residency within the district.
  – Every state or district that does require proof of residency as a requirement for enrollment must exempt “homeless” students, as defined by federal law, from those proof of residency requirements.
Homeless Students (continued)

- McKinney-Vento defines “homeless children and youth” to include, in part, children who are:
  1. Sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason;
  2. Living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations;
  3. Living in emergency or transitional shelters; are abandoned in hospitals;
  4. Awaiting foster care placement, and
  5. Children of migratory agricultural workers.
Checklist Item

• Review your district’s proof of residency requirements to ensure that every publication explaining the policy clarifies that your proof of residency requirements do not apply to homeless students and defines who qualifies as a “homeless” student under federal law.
Immigration or Citizenship Status
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• More than 30 years ago, the U.S. Supreme Court held in *Plyler v. Doe* that it is unconstitutional to deny a child present in the United States a public education based on his or her immigration status.
  – Rule is implicated any time that a public school adopts a policy or practice that has a chilling effect on an immigrant’s enrollment or registration in public schools.
Immigration or Citizenship Status

- 55 of 83 schools in New Orleans adopted discriminatory enrollment and registration practices in violation of the principle established in *Plyler*.
  - Discouraged enrollment and registration by requiring a Social Security number or conditioning enrollment on a parent’s ability to provide a driver’s license or identification card. Discriminatory practices were in plain view in the schools’ enrollment forms.
  - Federal law requires that schools requesting a Social Security number must indicate that disclosing the number is voluntary and not required for enrollment.
    - Provide the statutory or other basis upon which it is seeking the number; and explain how the number will be used.
Racial Disparity in AP Courses, Gifted & Talented Programs, etc.
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• Is a form of discrimination in violation of Title VI of the Civil Rights Act of 1964.

• Violations hinder education of students of color:
  – Stable workforces of effective teachers, leaders, and support staff;
  – Safe and appropriate school buildings and facilities;
  – Modern technology and high-quality instructional materials.
Racial Disparity in AP Courses, Gifted & Talented Programs, etc.

• The Legal Framework
  – Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin, in programs and activities receiving federal financial assistance.
  – School districts that receive federal funds must not intentionally discriminate on the basis of race, color, or national origin, and must not implement facially neutral policies that have the justified effect of discriminating against students on the basis of race, color, or national origin.
  – In assessing whether the allocation of educational resources is racially discriminatory, one must investigate and analyze the evidence relevant to both theories of discrimination intentional discrimination and disparate impact.
Intentional Discrimination

• Under Title VI, intentional discrimination in allocating educational resources on the basis of race, color, or national origin is unlawful.

• Such discrimination can include:
  – Acting on a racially discriminatory motive;
  – Providing educational resources only to members of select races;
  – Adopting facially neutral policies with an invidious intent to target students of certain races, or
  – Applying a facially neutral policy in a discriminatory manner.
Intentional Discrimination (continued)

• Evidence of Discriminatory Intent
  – Can be proven through direct evidence or circumstantial evidence.
  – Such evidence may include the existence of racial disparities that could not otherwise be explained;
  – A history of discriminatory conduct towards members of a certain race; or
  – The inconsistent application of resource allocation policies to schools with different racial demographics.
Intentional Discrimination (continued)

• To determine whether a school district intentionally discriminated in the allocation of resources, the Office of Civil Rights and many courts employ the following 3-part analysis:

  1. Did the school district treat a student, or group of students, differently with respect to providing access to educational resources as compared to another similarly situated student, or group of students, of a different race, color, or national origin (a prima facie case of discrimination)?

   If “yes,” then...
Intentional Discrimination (continued)

2. Can the school district articulate a legitimate, nondiscriminatory, educational reason for the different treatment? If not, OCR could find that the district has intentionally discriminated on the basis of race.

*If “yes,” then…*

3. Is the allegedly nondiscriminatory reason a pretext for discrimination?

*If “yes,”* OCR would find the district has intentionally discriminated on the basis of race.
Disparate Impact

- School districts also violate Title VI if they adopt **facially neutral policies** that are not intended to discriminate based on race, color, or national origin, but do have an unjustified, adverse disparate impact on students based on race, color, or national origin.
Disparate Impact (continued)

To determine whether a facially neutral policy or practice has an unjustified, adverse disparate impact in allocating educational resources that violates Title VI, courts and the Office of Civil Rights apply the following 3-part analysis:

1. Does the school district have a facially neutral policy or practice that produces an adverse impact on students of a particular race, color, or national origin when compared to other students?

   *If “yes,” then…*

2. Can the school district demonstrate that the policy or practice is necessary to meet an important educational goal?
Disparate Impact (continued)

3. Are there comparably effective alternative policies or practices that would meet the school district’s stated educational goal with less of a discriminatory effect on the disproportionately affected racial group; **OR**
   
is the identified justification a pretext for discrimination?

- If the answer to either question is **yes**, the school district has engaged in discrimination.
- If **no**, there is insufficient evidence to determine that the school district engaged in discrimination.
Disparate Impact (continued)

• Applying this disparate impact framework, unlawful discrimination would not be found based solely upon proof of a quantitative or qualitative racial disparity resulting from a facially neutral policy.

• Such proof will likely prompt an investigation into whether the additional proof required by the foregoing analysis exists.
Discipline Practices that Target Minorities, Special Education Students, etc.
Targeted Discipline Practices

• In 2014, the Department of Education’s Office of Civil Rights issued guidance to public schools and school districts explaining how to identify, avoid, and remedy discriminatory discipline in school.
The 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.

• Includes programs and activities administered to ensure & maintain school safety & student discipline.

• When schools respond to student misconduct, Titles IV and VI require that the school’s response be undertaken in a racially non-discriminatory manner.
The Legal Framework (continued)

• 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.
The Legal Framework (continued)

• 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.
The Legal Framework (continued)

– 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.

– 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.

– If a sanction from a discriminatory referral becomes part of the student’s school record, it could enhance the penalty for subsequent misconduct and follow the student throughout the student’s academic career.
The Legal Framework (continued)

• The administration of student discipline can result in unlawful discrimination based on race in 2 ways:

1. If a student is subjected to different treatment based on the student’s race; and

2. If a facially neutral policy - meaning that the policy itself does not mention race - is administered in an evenhanded manner, it can result in unlawful discrimination if it has a disparate impact.
   - i.e., a disproportionate and unjustified effect on students of a particular race.
The Legal Framework (continued)

• Under both theories, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is important evidence of potential violations.

• In all cases, investigations will focus on evidence of all relevant circumstances, such as the:
  – Student’s conduct.
  – Circumstances surrounding the conduct.
  – Discipline imposed.
Different Treatment in Punishment

- Both Title IV and Title VI prohibit schools from intentionally disciplining students differently based on race.

- 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.
Different Treatment in Punishment

• More commonly, 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 and discriminatory discipline of students in areas that its policy does not fully address.
Different Punishment, Same Offense

Intentional discrimination in administering 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.
Different Punishment, Same Offense

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.
Selective Enforcement

• Selective enforcement of a facially neutral policy against students of one race is also prohibited intentional discrimination.

• This can occur 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.
Selective Enforcement: Example

• Assume a teacher only refers students of a particular race for discipline outside of the classroom, even though students of other races in that classroom commit the same infractions.
  – This is a form of selective enforcement, even if an administrator issues the same consequence for all students referred for discipline outside of the classroom.
Facially Neutral Policy, Invidious Intent

- 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.
Facially Neutral Policy/Invidious Intent: Example

• Assume that school officials believed that students of a particular race were likely to wear a particular style of clothing.

• Then, as a means of penalizing students of that race (as opposed to advancing a legitimate school objective), the officials adopted a policy that made wearing that style of clothing a violation of the dress code.

• Adoption of this policy is a form of unlawful intentional discrimination.
Punishment with Discriminatory Motive

• May be proven even without proof of disparate treatment of a similarly situated student, if teachers or administrators imposed punishment based solely on racially discriminatory motives.
Punishment with Discriminatory Motive: Example

• Assume a school official uttered a racial slur when disciplining a student.
• The slur would be evidence of a racial animus, and might support a finding that the official’s punishment constituted intentional discrimination based on the student’s race.
Proving Different Treatment Theory of Discriminatory Punishment

• 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 would permit a reasonable person to infer discriminatory intent.

• Absent direct evidence of intentional discrimination based on race, investigators, courts, and regulators must examine the circumstantial evidence to determine whether discrimination has occurred.
Proving Different Treatment Theory of Discriminatory Punishment (continued)

• How to determine intentional discipline discrimination:
  – 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?

   *If “no,” then…*
   – There is insufficient evidence to determine that the school has engaged in intentional discrimination.
   – If the students are similarly situated and the school has treated them differently, *then…*
Proving Different Treatment Theory of Discriminatory Punishment (continued)

- Can the school articulate a legitimate, non-discriminatory 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...

- Is the reason articulated a pretext for discrimination?

- Some of the circumstances where a school’s stated reason may be deemed pretext - that is, not the reason for the school’s action – are then...
Proving Different Treatment Theory of Discriminatory Punishment (continued)

– Some of the circumstances where a school’s stated reason may be deemed pretext - that is...

...Not the reason for the school’s action are:

1. The asserted reason does not explain the school’s actions;
2. Witnesses contradict the school’s state reason for the disparity;
3. Students of other races have received different sanctions for similar instances of misbehavior; or
4. The sanctions imposed do not conform to the school’s permitted discipline sanctions in its written discipline policy.
Proving Different Treatment Theory of Discriminatory Punishment (continued)

- If the nondiscriminatory reason offered by the school is found to be pretext, the school had engaged in intentional discrimination.
Circumstantial Evidence of Discriminatory Intent

- Always, consideration may be given to other circumstantial evidence to determine if there was discriminatory intent underlying a school’s administration of discipline.

- Examples may include whether:
  - The impact of a disciplinary policy or practice weighs more heavily on students of a particular race;
  - There is a history of discriminatory conduct toward members of a student’s race; and
  - There had been inconsistent application of disciplinary policies and practices to students of different racial backgrounds.
Disparate Impact Theory

• Schools also engage in discriminatory punishment in violation of 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.

This discriminatory effect is commonly referred to as “disparate impact.”
Disparate Impact Theory (continued)

3-part inquiry to determine 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 justification a pretext for discrimination?
Examples of Disparate Impact Policies
Policies That Can Raise Disparate Impact Concerns

1. Policies that impose mandatory suspension, expulsion, or citation (ticketing or other fines or summonses) upon any student who commits a specified offense:
   - Being tardy to class, possessing a cell phone, being found insubordinate, acting out, or not wearing proper school uniform.

2. Corporal punishment policies that allow schools to paddle, spank, or otherwise physically punish students; and

3. Discipline policies that prevent youth returning from involvement in the justice system from re-enrolling in school.
Policies That Can Raise Disparate Impact Concerns (continued)

4. Policies that impose out-of-school suspensions or expulsions for truancy also raise concerns.

5. 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.
Practices that Lead to Retaliation and Harassment Claims
Retaliation

• One of the most frequently alleged basis of discrimination.
• One of the most common discrimination findings in OCR investigations.
• The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an investigation or proceeding to determine if discrimination has occurred.
Retaliation (continued)

3 main descriptive terms describe retaliation.

Occurs when a recipient of federal funds takes some adverse action against a protected individual because he or she engaged in a protected activity.

1. Adverse Action
2. Protected Individual
3. Protected Activity
Thank You.

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