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15.5 Combatting Discrimination in Campus Conduct Administration: January 14, 2014 DOJ/OCR "Dear Colleague" Letter

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Recent tragedies involving Michael Brown in Ferguson, Eric Garner on Staten Island, and Tamir Rice in Cleveland highlight the grievous and destructive manner in which race manifests itself in the criminal justice system. As the #BlackLivesMatter, #ICantBreathe, and #StolenLives protests spread, many associated with “academic justice systems” – including student conduct professionals and academic integrity officials – have contemplated how their institutions’ practices may adversely impact their own students and how they can improve their systems to better promote social justice.

After all, scholarly research is clear: Racial bias against people of color infects disciplinary and punitive systems throughout our country, including:

- **School Discipline:** From pre-kindergarten(!) through high school, students of color are punished more often and more severely than white students (Skiba et al., 2011; Skiba, Michael, Nardo, & Peterson, 2002; U.S. Department of Education, 2014).
- **Juvenile Justice:** Youth of color are detrimentally impacted at various points in the juvenile justice system, from apprehension to sentencing (Fader, Kurlychek, & Morgan, 2014; Fagan, Slaughter, & Hartstone, 1987).
- **Campus Police:** Campus police have been found to enforce traffic rules more harshly on people of color (Moon & Corley, 2007).
- **Criminal Justice System:** People of color face discriminatory treatment through all aspects of the criminal justice system, including arrests, prosecution, convictions, sentencing, and punishment (Mitchell, 2005; Spohn, 2014; Stolzenberg, D’Alessio, & Eitle, 2013).
- **Presidential Pardons:** Presidential pardons and clemency decisions have disproportionately benefited white individuals (Linzer & LaFleur, 2011).

Thus, at all levels – from juveniles to adults, from pre-schools to college campuses, and from the principal’s office to the Oval Office – disciplinary processes punish people of color more harshly. We should take no solace in the fact that college discipline systems are absent from the preceding list; this is simply because no published studies exist on racial bias in campus conduct processes. But given the findings from other contexts (outlined above), as well as emerging evidence, we should not assume our systems are free of bias. After all, recent furor over sexual violence on campus largely stems from allegations that institutions discriminated against women by failing to treat victims and survivors of sexual violence fairly. And research presented at a recent ASCA Conference suggested that common conduct practices may have a disproportionate, negative impact on first-generation college students. Specifically, students whose parents never attended college may lack access to certain types of social capital that allow privileged students to navigate conduct processes more fluidly (Casares, 2013).

The lesson from all of this is clear: as institutional agents charged with the ethical and moral duty to implement student conduct practices in a fair and socially just manner, we must take steps to ensure that our processes and systems are as free from bias and discrimination as possible.

Fortunately, about one year ago, the Office for Civil Rights of the U.S. Department of Education and the Civil Rights Division of the U.S. Department of Justice issued a joint [Dear Colleague Letter](#) (DCL) that provides guidance on the nondiscriminatory administration of conduct practices in education (Lhamon & Samuels, 2014). Although this DCL was specifically directed at elementary and secondary schools and does not explicitly apply to higher education, its contents provide excellent guidance to assist college conduct officials, as well.

What follows are excerpts from the January 8, 2014 Dear Colleague Letter, using Gary Pavela's familiar Question & Answer format. Most internal citations and footnotes have been omitted.

Links to the full text of the letter -- and other resources made available by the Department of Education -- are included below.

Subsequent issues of the *Law & Policy Report* will outline more specific examples of how college systems could be deemed discriminatory under the DCL and also provide specific lessons and recommendations from the DCL for policy and practice.

Topics below

- [1] What does the research show?
- [2] What is the educational impact of exclusionary discipline?
- [3] Why is this guidance needed?
- [4] What is the scope of laws that mandate nondiscrimination in disciplinary proceedings?
- [5] What are the two types of discrimination that are illegal in discipline systems?
- [6] What is "different treatment" discrimination and what are some examples?
- [7] What is "disparate impact" discrimination and what are some examples?
- [8] What information may be considered when deciding if a system is discriminatory?
- [9] What types of records should be kept relating to disciplinary processes?
- [10] What remedies may be imposed upon educational institutions if discrimination occurred?

[1] What does the research show?

The Civil Rights Data Collection (CRDC), conducted by OCR, has demonstrated that students of certain racial or ethnic groups tend to be disciplined more than their peers [in the Pre-K through 12 system]. 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 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.... In short, racial discrimination in school discipline is a real problem.

[2] What is the educational impact of exclusionary discipline?

The CRDC data also show that an increasing number of students are losing important instructional time due to exclusionary discipline. 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; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems.

[3] Why is this guidance needed?

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.

[4] What is the scope of laws that mandate nondiscrimination in disciplinary proceedings?

Titles IV and VI [of the Civil Rights Act of 1964] protect students from discrimination based on race [footnote] 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.

Footnote: Throughout this guidance, “race” or “racial” includes race, color, or national origin.... 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. Section 504 prohibits disability discrimination by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II) prohibits disability discrimination by public entities, including public school districts, in their services, programs, and activities. Section 504 and Title II and their implementing regulations provide certain protections when students with disabilities are disciplined.

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.

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.

[5] What are the two types of discrimination that are illegal in discipline systems?

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.

[6] What is “different treatment” discrimination and what are some examples?

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.

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 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. 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.

[7] What is “disparate impact” discrimination and what are some examples?

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.”

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.

(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? 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? If the answer is yes to either question, then the 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.

[8] What information may be considered when deciding if a system is discriminatory?

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.

[9] What types of records should be kept relating to disciplinary processes?

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.²² A non-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 or discipline (and following up with these teachers, as appropriate, to determine the underlying causes).

[10] What remedies may be imposed upon educational institutions if discrimination occurred?

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;
- 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;
- 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. 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.

Links and Resources

[References cited above](#)

[Dear Colleague Letter, January 8, 2014](#)

[OCR's School Climate and Discipline webpage](#)

Contains links to the DCL and other elements of the ED-DOJ "School Discipline Guidance Package," including statements from the Secretary of Education, directories of school climate and discipline resources (focused on K-12 institutions), compendium of laws relating to discipline, and information on the Supportive School Discipline Initiative.