



Legal Issues Related to Disparities in Student Discipline

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Presenters



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Agenda

- I. Background:
 - A. Title VI
 - B. OCR
- II. The Discipline Guidance Package from the Obama Administration
- III. The Current Administration
- IV. Recent OCR Cases and Investigations
- V. Practical Advice



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Background: Title VI and OCR



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Title VI of the Civil Rights Act of 1964

- Title VI states:

“No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”



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The Department of Education's Office for Civil Rights ("OCR")



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What is OCR?



U.S. Department of
Education



Office for Civil Rights
(OCR)

The Office for Civil Rights (OCR) is a sub-agency of the Department of Education that seeks to prevent, identify, end, and remedy discrimination.



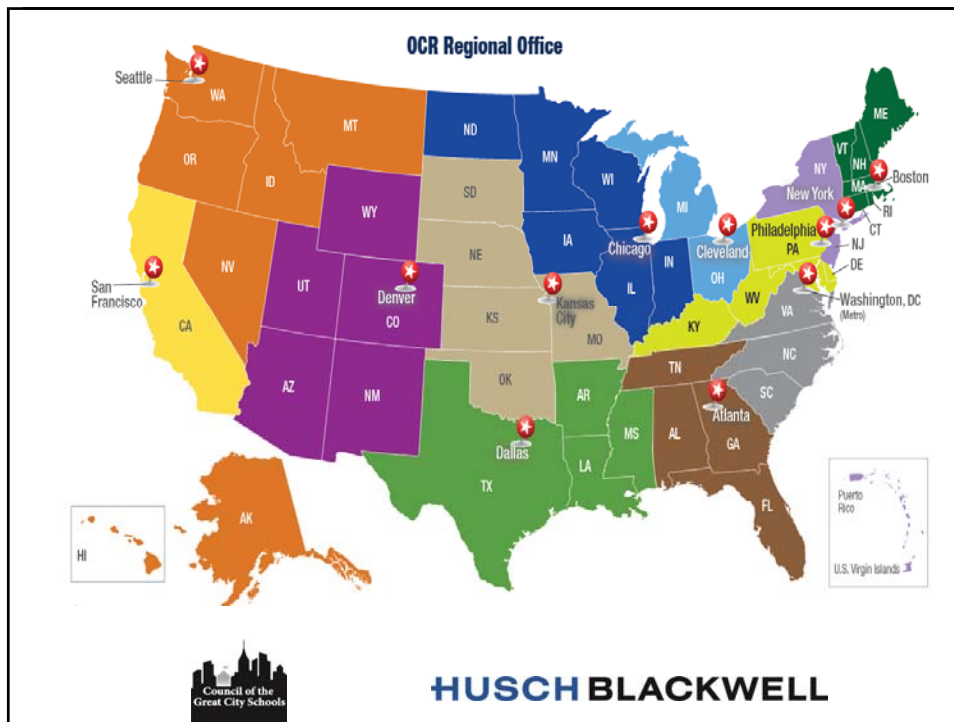
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Overview of the Agency

- Mission:
 - Ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.
- Headquarters located in Washington D.C. and 12 regional offices with management staff, attorneys and investigators



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Enforcement Activities

- Conducts investigations to resolve individual complaints
- Initiates compliance reviews
- Provides technical assistance
- Issues guidance



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Complaints

- Anyone may file a complaint, and generally complaints must be filed within 180 days after the alleged discrimination.
- OCR considers every complaint it receives and opens an investigation when jurisdictional requirements are met.
- Complaints tend to be focused on specific groups of students rather than discrimination that is acute, regional, or national in scope.
- OCR acts as “neutral fact-finder.”



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Compliance Reviews

- Proactive, broad-scale, system-wide investigations of strategic significance.
- School districts selected based on CRDC, media, tips from parents, and other sources of information.
- From 2009-12, OCR conducted 100 compliance reviews nationwide.
- In 2015 alone, OCR initiated 19 new compliance reviews.
- Designated to “affect significant change at the target institution” and to “provide widely applicable solutions.”





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**The Civil Rights Data Collection
("CRDC")**



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The Civil Rights Data Collection (“CRDC”)

- The CRDC is a mandatory, biennial survey through which OCR collects civil rights data directly from school districts.
- Historically, not all districts were required to participate; that changed in 2014, when OCR obtained approval to require **every** public school district in the country to respond to the 2013-2014 CRDC.



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For example, nationwide:

- Black students were nearly four times (3.6) as likely to be suspended as white students, and nearly twice as likely to be expelled.
- According to the CRDC, black students are 3.8 times more likely to receive one or more out-of-school suspensions compared to white children.



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Suspension Statistics in CRDC

- Students with disabilities and students of color are generally suspended and expelled at higher rates than their peers.



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The Civil Rights Data Collection (“CRDC”)

- The CRDC presents detailed civil rights data to the public for research and enforcement purposes.
- Latest data (2013-2014) released June 2016.
- OCR analyzes the data to identify concerns at the nationwide and local level.



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Disparate Discipline

After reviewing the CRDC data, the Obama administration made school discipline reform a top priority, seeking to find innovative alternatives to suspension, increase awareness about the detrimental impacts of exclusionary discipline, help states and districts strengthen behavioral supports for students, and clarify schools' obligation not to discriminate on the basis of race in discipline.



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Discriminatory Discipline = Unwelcome Environment = Unsafe School

- **Schools feel safer when all students feel comfortable and welcome, and are engaged in the school community**



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Exclusionary Discipline



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Discipline

- Correlation between exclusionary discipline policies and practices and serious educational, economic, and social problems:
 - School avoidance
 - Diminished educational engagement
 - Decreased academic achievement
 - Increased behavior problems
 - Increased likelihood of dropping out
 - Substance abuse
 - Involvement with juvenile justice systems



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Guidance Package



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Guidance Package to Enhance School Discipline Policies/Practices

- Released in January 2014 by the U.S. Departments of Education and Justice.
- Goal of the package was to assist states, districts and schools in developing practices and strategies to enhance school climate, and ensure discipline policies and practices comply with federal law.



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Guidance Package to Enhance School Discipline Policies/Practices

- Guidance on OCR's interpretations of Title VI
- Resources to support best practices
- Guidance package consisted of four components:
 - Dear Colleague Letter
 - Guiding Principles Document
 - Directory of Federal School Climate and Discipline Resources
 - The Compendium of School Discipline Laws and Regulations



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January 2014 Dear Colleague Letter



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January 2014 DCL: Nondiscriminatory Administration of School Discipline

- Provides information on how public elementary and secondary schools may meet their legal obligations to administer discipline without discriminating on the basis of race, color, or national origin.



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January 2014 DCL: Nondiscriminatory Administration of School Discipline

- Students of certain racial or ethnic groups tend to be disciplined more than their peers
- African-American students 3x more likely than white peers to be expelled or suspended
- Research suggests racial disparities are *not* explained by more frequent or serious misbehavior by students of color
- “In short, racial discrimination in school is a real problem.”



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Scenario

- Johnson County School District's discipline policy requires teachers to refer students to the office for instances of "disrespect". The District's policy has resulted in African-American students being suspended at a disproportionate rate to their white peers.



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January 2014 DCL: Nondiscriminatory Administration of School Discipline

- DCL also discusses the differences between different treatment and disparate impact cases and discusses the legal standards



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Different Treatment

- Intentionally disciplining students differently based on protected status
- Rarely: explicit policy language that requires students of one group disciplined differently than students of another group
- More common: neutral policy language, but intentionally administered differently for students of different groups
 - Examples:
 - Different races disciplined differently for the same offense
 - Selective enforcement of facially neutral policy
 - Ties in with referrals-even if same discipline is administered for all referrals; ***initial referral must not be selective***



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OCR's Evaluation of Different Treatment

- Absent direct evidence of discrimination, OCR will examine circumstantial evidence to evaluate whether discrimination occurred.
- Typically, OCR will ask the following questions to determine whether the school intentionally discriminated in the administration of discipline.



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Different Treatment?

- 1) Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular protected status by treating them differently from a similarly situated student or group of students in the disciplinary process?
 - If no, then OCR would not find sufficient evidence to determine that the school engaged in intentional discrimination.



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If the Students are Similarly Situated and Treated Differently, then:

- Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?
- If no, OCR could find that the school has intentionally discriminated.



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If the School Can Articulate a Legitimate, Nondiscrimination Reason, then:

- Is the reason merely pretext for discrimination?
 - OCR will assess whether the reason:
 - does not explain the school's actions;
 - witnesses contradict the school's stated reason for disparity;
 - exposing such reason was false; or
 - other students have received different sanctions for similar conduct.
- If found to be pretextual, OCR would find that the school engaged in intentional discrimination.



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Disparate Impact

- Evenhanded implementation of facially neutral policies that result in discrimination
- Unintentional effect
- Three-part inquiry for determining disparate impact policies:
 - Is there an adverse impact on students of a particular race?
 - Is the policy necessary to meet an important educational goal?
 - Are there comparable policies that are less burdensome that would meet the stated goal?



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OCR's Evaluation of Disparate Impact

- In determining whether a facially neutral policy has an unlawful disparate impact on the basis of race, OCR will engage in the following three-part inquiry:



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Adverse Impact

- 1) Has the discipline policy resulted in an adverse impact on students of a particular protected status?



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If there was an Adverse Impact, then:



- 2) Is the discipline policy necessary to meet an important educational goal?



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Comparably Effective Alternative Policies or Practices

- 3) Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less burden or adverse impact on the disproportionately affected racial group?
 - Is the school's proffered justification a pretext for discrimination?



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Comparably Effective Alternative Policies or Practices

- If the answer is YES, then OCR would find that the school has engaged in discrimination.
- If NO, then OCR would likely not find sufficient evidence to determine that the school engaged in discrimination.



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Strategy to Address Apparent Disparities in Preliminary Data

- **Step 1 :**
Gather Data and Identify Reasons for Notable Disparities



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Strategy to Address Apparent Disparities in Preliminary Data

- **Step 2:**
**Identify and Implement
Corrective Action Based
on OCR Guidance and
Resolution Agreements**



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Guiding Principals Document



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Guiding Principles Document

- Document does not set forth legal requirements or require States, districts, or schools to take action.
- Instead, document identifies three priorities:
 - Create positive climates and focus on prevention
 - Develop clear, appropriate consistent expectations and consequences to address disruptive behaviors
 - Ensure fairness, equity, and continuous improvement



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Climate and Prevention

- Schools that foster positive school climates can help to engage all students in learning by preventing problem behaviors.
 - Identify climate goals that complement the schools academic goals.



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Expectations and Consequences

- Schools that have discipline policies or codes of conduct with clear, appropriate, and consistently applied expectations and consequences will help students improve behavior, increase engagement, and boost achievement.



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Equity and Continuous Improvement

- Schools that build staff capacity and continuously evaluate the school's discipline policies and practices are more likely to ensure fairness and equity.



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Directory of Federal School Climate and Discipline Resources



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Directory of Federal School Climate and Discipline Resources

- The directory is designed to be used in conjunction with the Guiding Principals document.
- For each resource included in the directory, ED indicates the principals and actions steps for which the resource is likely to be useful.



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Compendium of School Discipline Laws and Regulations



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Compendium of School Discipline Laws and Regulations

- An online tool that catalogues the laws and regulations related to school discipline in each of the 50 States, Washington D.C., and Puerto Rico
- Also compares laws across states and jurisdictions



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Current Administration



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Title VI – Discipline Cases

- Trump administration has not changed enforcement position on these cases.
- Cases are still open and OCR has not issued closure letters.
- Administration has not removed Title VI discipline guidance from OCR webpage.



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New List of Active Cases

- Last week, ED published a list of active civil rights investigations
- List includes:
 - institution under investigation;
 - its state;
 - the institution type; and
 - The date the investigation was opened
- <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html>



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OCR Investigations



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Christina (DE) School District OCR Docket # 03-10-5001

- In March 2010, OCR initiated a compliance review to investigate whether a school district in Delaware subjected African American students to harsher and more frequent discipline than white students.
- OCR examined the District's written policies and procedures, made site visits to all of the District's schools, reviewed data from all of the District's schools and interviewed stakeholders.



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OCR found the District violated Title VI due to:

- Examples of harsher punishments for African American students when they engaged in the same misconduct as white students (with the same or worse disciplinary history).
- Analysis of first-time referrals found that African American students were 2X as likely as white students to receive in-school suspension and 3X as likely to receive out-of-school suspensions for violations of similar severity.
- District policy allowed decision-makers to use their discretion to exceed specified penalties for certain violations, which disproportionately penalized African American students.



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District and OCR entered into Resolution Agreement, which Required the District to, among other things:

- Hire/designate a discipline supervisor;
- Record 13 data items for every disciplinary action taken (including on students considered for, but who do not receive, discipline); and
- Use the above data to “implement an educational dashboard portal that provides . . . Discipline data disaggregated by race, ethnicity, sex, disability, ELL status to building administrators and parents.”



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Oklahoma City Public Schools OCR Docket # 07141149

- In April 2016, Oklahoma City Public Schools settled a 2-year long investigation with DOE based on a complaint that the District punished African-American and Hispanic students more frequently and for longer periods than white students.
- OCR found that the District referred African-American students for discipline more than three times as often as white students during the 2014-15 school year.



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Resolution Agreement

- The resolution agreement involved, among other things, the designation of a discipline supervisor, a revised student code of conduct, a requirement that the District retain experts to advise it on discrimination prevention strategies, revision of policies and procedures, and training for staff, administrators, and parents.



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Lodi Unified School District (CA) OCR Docket #09131314

- On May 13, 2013, OCR initiated a complaint investigation into whether a school district in California subjected African-American students to harsher and more frequent discipline than white students.
- OCR examined the District's written policies and procedures, reviewed data from 49 schools and interviewed stakeholders.



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Disparate Student Discipline

- OCR found the District violated Title VI due to:
 - Implementing a discipline policy that, while neutral on its face and not adopted with discriminatory intent, had a disproportionate impact on African-American students and was not necessary to meet educational goals.
 - Individual schools developing and imposing different consequences for discipline incidents than described in conduct codes.
 - Finding examples of harsher punishments for African-American students when they engaged in the same misconduct as white students (with the same or worse disciplinary history).



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Disparate Student Discipline – The Data

- OCR found that African-American students were over represented at almost every level of discipline
 - 5 times more likely than white students to receive OSS for “willful defiance or disruption”
 - 6.84 times more likely than white students to receive an ISS or OSS for tardiness or truancy
 - 3.13 times more likely to receive a discipline referral
 - 3.52 times more likely to receive ISS
 - 4.47 times more likely to receive OSS
 - 4.3 times more likely to be expelled



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Disparate Student Discipline

- District and OCR entered into resolution agreement, which required the District to, among other things:
 - Revise policies, procedures, training, and the MOU with the SROs;
 - Ensure the District consistently collects and reports discipline data on a number of discipline factors, review data regularly, and self monitor; and
 - Issue written guidance and provide training regarding racial harassment, and create a plan to prevent racial harassment for the particular school that was at issue in the case.



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Disparate Student Discipline

- District and OCR entered into a resolution agreement, which required the district to, among other things:
 - Employ a Positive School Climate coordinator to implement the agreement for the duration of the agreement;
 - Consult with experts to identify root causes for the disparities;
 - Revise disciplinary policies and submit them to OCR for review and comment;
 - Conduct school discipline climate surveys in all schools and incorporate results into an action plan





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Practical Advice and Best Practices



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Eliminate Discrimination in Initial Discipline Referrals

- Initial referral to the principal's office for misconduct may raise concerns
- Referrals alone result in reduced classroom time for the student
- If sanctioned from a discriminatory referral, it becomes part of the student's record, and can lead to enhanced penalties for subsequent misconduct



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Gather Data

- Do a self evaluation
 - Compare discipline rates to enrollment rates
 - Review the information on the CRDC
 - Review data from schools where you see disparities
 - Gather and analyze data about referral rates
 - Understand your own referral process and determine if/how referrals are documented



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Effective Discipline



- **Consistency**
 - Policies/procedures
 - Due process
 - ✓ Notice of charges
 - ✓ Chance to respond
 - Past history
 - Proportionality



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Information for Investigations

- Written policies
- Unwritten disciplinary practices
- Data on number of referrals to administrator
- Discipline incident reports
- Student discipline records and referral forms
- Interviews with students, parents, teachers, administrators, counselors, and other staff
- School's definitions of misconduct



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District-Wide Measures

- **Improvement of data collection**

- Responding to OCR document requests, if needed
- Allows District to review trends



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District-Wide Measures

- **Training Program**

- Teacher Training
 - Evidence-based classroom management
 - Conflict management
 - Conflict resolution
 - De-escalation approaches
 - Applying subjective criteria in making discipline decisions
 - Recognizing personal biases



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District-Wide Measures

- **Training Program**
 - Administrator Training
 - Inclusion v. Exclusionary Discipline
 - Correlation between exclusionary discipline and educational
 - Economic and social problems
 - Factors to consider when administering discipline
 - Clearly documenting reasons for different discipline
 - Discussing referrals with staff
 - Approaches to discipline



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District-Wide Measures

- Consider (if necessary) revision to student code of conduct
 - Improving clarity and specific objective criteria
 - Adding additional behavior modification consequences short of exclusionary discipline
- Consider adopting Positive Behavior Intervention Support at some or all schools



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Target-School Measures

- Conduct annual school climate surveys
- Use data to develop changes to policies and practices to improve equity and consistency
- Require staff to attempt a range of corrective measures before referring students for discipline
- Provide additional support for struggling students
- Designate an employee at each school for record-keeping regarding discipline, including referrals
- Designate a district employee to serve as “Discipline Supervisor”



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A Safe and Orderly Educational Environment

- Fair and equitable discipline policies are an important component of creating an environment where **all students feel safe and welcome**
- Need to support positive student behavior while preventing and addressing misconduct
- Schools are obligated to avoid and redress racial discrimination in the administration of student discipline



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Are there Effective Alternatives to Suspension?

- Evidence-based, multi-tiered behavioral frameworks, such as positive-behavioral intervention and supports (PBIS), can help improve overall school climate and safety.

– (Bradshaw, C., Koth, C.W., Thornton, L.A., & Leaf, P.J., 2009)



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Are there Effective Alternatives to Suspensions?

- Interventions, school-wide and individual, that use proactive preventative approaches, address the underlying cause or purpose of the behaviors, have been associated with increases in academic engagement, academic achievement, and reductions in suspensions and dropouts.

– <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html>



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Poll Question: School Resource Officers (SROs)

- Jackson County School District has an agreement with the local police department that places Officer Cass in its high school to serve as the resource officer. A parent complains that Officer Cass is targeting Hispanic students and writing office referrals for *insubordination*. The parent says that her daughter was suspended from school for the referrals for insubordination. The principal states that he has no control over the actions of the police officer.



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Incorporate School Resource Officers (SROs) Responsibly

- The role of law enforcement in school learning environments should be determined by District officials in consultation with local law enforcement agencies, school leaders, educators, families, students, and community and civil rights stakeholders.
 - Dear Colleague Letter on Role of School Resource Officers in PK-12 Schools.



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Incorporate School Resource Officers (SROs) Responsibly

- OCR has and will hold the district responsible for discriminatory actions of SROs.
- District should empower schools, educators, and staff with the skills and capacity to avoid relying on SROs in the first place, and also eliminate SRO-related school discipline policies and practices.



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Safe School-Based Enforcement through Collaboration, Understanding, and Respect (SECURE)

- ED and the DOJ designed a Local Implementation Rubric to assist Districts and law enforcement agencies with determining the type of school-police partnership that will be most effective in their community.

– <https://www2.ed.gov/policy/gen/guid/school-discipline/files/sro-local-implementation-rubric.pdf>



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Case Study: Broward County Public Schools

- During the 2010-11 school year, District data showed 1,000 school related arrests, the highest number in Florida. (Most involved nonviolent misdemeanors.)
- In November 2013, nearly a dozen agencies – including state attorney’s office, Broward County sheriff and the Fort Lauderdale Branch of the NAACP – signed a Collaborative Agreement on School Discipline



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Case Study: Broward County Public Schools

- Collaborative Agreement on School Discipline
 - Favors school-based interventions for non-violent misdemeanors
- District students involved in infractions that would also classify as certain nonviolent crimes can be assigned to the Preventing Recidivism Through Opportunities, Mentoring, Interventions, Support & Education (“PROMISE”) Program



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Case Study: Broward County Public Schools

- **PROMISE PROGRAM**
 - Students are removed from their home school for two to ten days to receive services from the District's Pine Ridge Education Center
 - At Pine Ridge, the students receive tutoring, family counseling and other interventions.
 - Community effort with participation from the city court and state Department of Juvenile Justice



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Case Study: Broward County Public Schools

- **Program's Success**
 - Only about 12 percent of students who successfully complete PROMISE in the 2015—16 school year reoffended.
 - Program also reduced arrests, behavior incidents and suspensions.
 - In the 2014-15 school year, less than 500 students were arrested, and the county had one of the lowest arrest rates in the state.



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Case Study: Broward County Public Schools

- Discipline Matrix
 - District also reviewed and made changes to its discipline policy
 - All behavior incidents and consequences were reviewed with consideration to student's development level, appropriate progression of discipline/consequences based on severity, and with the intention of addressing the behavior in an educational setting
 - Capped out-of-school suspension days



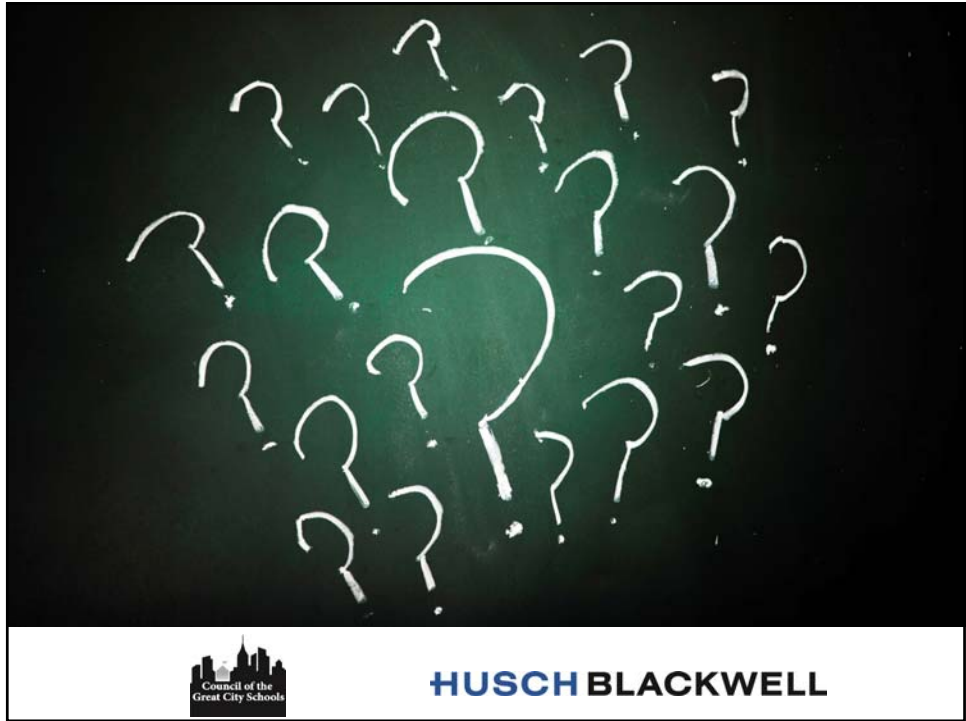
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Recommendations for Compliance

- Create a safe, inclusive, and positive school climate
- Provide training and professional development for all school personnel
- Ensure appropriate use of law enforcement
- Develop clear, appropriate, and consistent expectations and consequences
 - Nondiscriminatory, fair, and age-appropriate
 - Communicate with and engage school communities
 - Emphasize positive interventions over student removal
- Monitor and self-evaluate for continuous improvement
- Ensure complete data collection and responsive action
- Thoroughly document actions taken



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Husch Blackwell Blog

Providing legal insights about:

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- Special Education
- Title IX
- Discrimination
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