



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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February 21, 2018

Dr. Harry C. Bull, Jr., Ed.D., Superintendent
Cherry Creek School District
4700 South Yosemite Street
Greenwood Village, Colorado 80111

Via email only to XXXXX

Re: **Cherry Creek School District**
OCR Case Number: 08-17-1245

Dear Superintendent Bull:

We write to advise you of the resolution of the above-referenced complaint, filed with the Office for Civil Rights (OCR) of the U.S. Department of Education (“Department”), against Cherry Creek School District (“District”). The complaint alleged that: (a) the District, at XXXXX School (“School”), discriminated against the Complainants’ son (“Student”) on the basis of race when it disciplined him (“Individual Allegation”); and (b) the District’s discipline policies and practices discriminate against African American students (“Systemic Allegation”).

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (“Title VI”), and its implementing regulation, at 34 Code of Federal Regulations (C.F.R.) Part 100, which prohibit discrimination based on race, color, or national origin in programs or activities receiving Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the District is subject to this law and regulation.

With respect to the Individual Allegation, we completed a full investigation and found insufficient evidence to conclude that the District discriminated as alleged. The reasons for this finding are set forth below.

During the course of investigating the Systemic Allegation – and before we conducted interviews, requested additional information, and undertook further investigatory steps – the District indicated its desire to voluntarily enter into an agreement to resolve the Systemic Allegation pursuant to Section 302 of OCR’s *Case Processing Manual* (CPM). We reviewed this request and determined that entering into an agreement without completing a full investigation was appropriate. This letter details the applicable legal standards and the status of our investigation prior to receiving the District’s request to enter into an agreement.

I. LEGAL STANDARDS

The Title VI regulations, at 34 C.F.R. Section 100.3(a) and (b), provide that a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of the services, benefits, or opportunities it provides.

A. Different Treatment

To determine whether a district has discriminated against a student on the basis of race in the discipline process, OCR looks at: (1) whether there is evidence that the student was treated differently than students of other races under similar circumstances; and (2) whether the treatment has resulted in the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR next examines: (1) whether the district provided a nondiscriminatory reason for its actions; and (2) whether there is evidence that the stated reason is a pretext for discrimination. To find a violation, the preponderance of the evidence must establish that the district's actions were based on the student's race.

B. Disparate Impact

The Title VI regulations, at 34 C.F.R. Section 100.3(b)(2), provide that a school district may not use criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. To determine whether a district's disciplinary process has an unlawful disparate impact on the basis of race, OCR examines: (1) whether a discipline policy or practice that is neutral on its face has a disproportionate, adverse effect on students of a particular race; and (2) whether the policy or practice is educationally necessary (*i.e.*, whether there is a substantial, legitimate educational justification); and, if so, (3) whether there is an alternative policy or practice that would result in a lesser disparate impact and be comparably effective in meeting the district's educational objectives.

II. INVESTIGATION

Our investigation of the allegations consisted of requesting and reviewing: (1) copies of relevant communications, discipline records,¹ and policies and procedures; (2) disaggregated discipline data; (3) narrative responses and other information from the District; and (4) the Complainant's rebuttal to the information that the District provided to OCR.

III. INDIVIDUAL ALLEGATION – DIFFERENT TREATMENT

During the 2016-2017 school year, the Student was an eighth grade student at the School. According to the complaint, the Student is African American; whereas, his education records indicate that he is multi-racial.

¹ The discipline records included incident reports/witness statements and video footage.

A. Facts

On February 14, 2017, after school hours and off-school property, Student A (white), Student B (African American), Student C (African American), and Student D (Hispanic) smoked marijuana that Student A supplied. Student A gave the remaining marijuana to Student D.

On February 15, 2017, Student D brought the marijuana to the School and sold it to the Student at the Student's locker. The Student later removed the marijuana from his locker and buried it under a tree on school property. Then, the Student reburied the marijuana under a different tree after Student E (white) sprayed the marijuana with body spray to mask the scent. Student F (white) ended up with the marijuana, put it in his backpack, and rode the school bus home. The Complainant does not dispute these facts. However, how Student F came to possess the marijuana and whether the Student "distributed" the marijuana to Student F are in dispute.²

On February 16, 2017, a student reported to the School's Dean that students had marijuana at the School on the previous day. School staff conducted an investigation that involved searching lockers, reviewing video footage, and interviewing and obtaining statements from students.

All of the students involved were in eighth grade at the School during the 2016-2017 school year.

The District issued a five-day out-of-school suspension (OSS) to Student A because she sold the marijuana that ended up at the School.³ The District did not discipline Student B or Student C because their off-campus conduct was not directly connected to the School.⁴ The District initially expelled Student D and the Student for a full calendar year, but ultimately excluded both of them from the School from February 16, 2017 to April 2, 2017, and allowed them to return early with the following conditions:

² District Policy JICH-R defines "distributing" as "any means by which a prohibited substance or a counterfeit drug is transferred from one person to another." According to the District, the Student gave the marijuana to Student F. The Student wrote in an incident report that he "gave it to a friend." "Friend" is marked out, and a line from the marked out word to Student F's name appears. Student F's incident report reads, in part, "I couldn't find [the marijuana] and [the Student] comes outside and shows me so that I'll relocate it[.]" The Complainant argued to OCR that the Student did not receive money in exchange for marijuana, that Student F retrieved the marijuana on his own volition, and that the Student "had no way of knowing that [Student F] would then take it on the bus with him[.]" After the Student's appeal hearing, the District's hearing officer found that the Student engaged in distribution of marijuana. Ultimately, based on the available evidence, OCR cannot declare the District's conclusion that the Student engaged in distribution of marijuana to be unfounded or unreasonable. Absent such a finding, for purposes of the different treatment analysis, we must defer to the District's factual conclusions about whether the Student distributed marijuana. In other words, in a case such as this, OCR does not conduct a de novo review of the facts giving rise to the application of disciplinary sanctions.

³ The District explained its rationale for not punishing Student A more severely: "[T]he nexus was too uncertain, the evidence was too tenuous, and the string of actions were too attenuated and broken in time and location from school to warrant further discipline, including expulsion. ... [Student A] did not possess marijuana on school grounds nor distribute marijuana on school grounds."

⁴ The District explained its rationale for not disciplining Student B or Student C: "[Student B] and [Student C] smoked marijuana at Target but did not bring it to Target and were not involved in the incident at school."

- Parental support for addressing and correcting their behavior;
- Understanding and accepting responsibility for their actions;
- Participation in a District-approved drug and alcohol intervention program;
- Passage of random drug testing;
- Active participation with the School administration in the development of behavior contracts; and
- Continued academic work and progress in language and math.

The District issued an “in-school time out” to Student E because he sprayed the marijuana and was found in possession of a lighter and condom. Finally, the District initially issued a ten-day OSS to Student F, but then reduced the OSS to three school days after Student F agreed to participate in a drug intervention program.

B. Analysis

OCR reviewed the District’s student discipline policies and regulations and determined that they are nondiscriminatory on their face and do not raise any compliance concerns regarding the Individual Allegation.

The first question we must ask is whether there is evidence that the Student was treated differently than students of other races under similar circumstances. Among the seven students involved in the aforementioned series of events, three students – Student D, Student E, and Student F – could be considered having been disciplined under similar circumstances as the Student because, like the Student, they engaged in on-campus, drug-related activity. The Student, who is African American or multi-racial, and Student D, who is Hispanic, received the same consequences – *i.e.*, they were excluded from the School from February 16, 2017 to April 2, 2017, and then readmitted with the same specific conditions. In contrast, the School gave Student E, who is white, an in-school timeout, and Student F, who is also white, a three-day OSS upon voluntary agreement to participate in a drug treatment program. Thus, the Student was treated differently than students of other races – Student E and Student F – who were arguably under similar circumstances.

The second question we must ask is whether this different treatment resulted in the denial or limitation of education services, benefits, or opportunities for the Student. Here, the answer is clear. The Student was excluded from attending School from February 16, 2017 to April 3, 2017, and therefore, was denied education services, benefits, and opportunities.

Since the first two questions were answered in the affirmative, we must next ask if the District provided a nondiscriminatory reason for treating the Student differently than Student E and Student F. The District did articulate legitimate, nondiscriminatory reasons for the different treatment of the Student. With regard to Student E, the District wrote, “[Student E] did not possess the marijuana. Therefore, [Student E] was not suspended but was disciplined with an in-school time out for possession of inappropriate items on school ground. ... [Student E] did not possess marijuana nor distribute marijuana to other students on school grounds.” To distinguish Student F from the Student, the District wrote, “[Student F] did not distribute the marijuana to any student or students on school grounds.” The District added, “[D]iscipline was allocated

according to the misbehavior unique to each student. Only [Student D] and [the Student] both possessed and distributed marijuana on school grounds.”

Therefore, we must ask, lastly, whether there is evidence that the District’s stated reasons are a pretext for discrimination. The investigation uncovered no such evidence. In fact, the stated reasons for the different treatment explain the School’s actions; the disciplinary sanctions imposed on the students conform to the District’s written policies and regulations;⁵ the District’s stated reasons for the different treatment did not change over time or contexts; and the District treated the most similarly situated student, Student D, who is of a different race than the Student, the same in terms of disciplinary consequences.

C. Conclusion

Based on a preponderance of the evidence standard, we find insufficient evidence to support the Complainant’s allegation that the District disciplined the Student differently *based on his race*.

IV. SYSTEMIC ALLEGATION – DISPARATE IMPACT

Again, OCR reviewed the District’s student discipline policies and regulations and determined that they are nondiscriminatory on their face.

Data from OCR’s Civil Rights Data Collection (CRDC), the District, and the Colorado Department of Education (CDE) indicate that African American students in the District are disproportionately subjected to disciplinary sanctions. As is customary in OCR’s resolution letters, we provide below a summary of the evidence obtained thus far.⁶ However, as indicated above, prior to conducting the investigation necessary to determine whether such disparities were the result of discrimination,⁷ the District and OCR entered into a resolution agreement.

Table 1: CRDC data for the District for the 2013-2014 school year (unduplicated counts)

Race	% of Total Student Population	% of Students Out-of-School Suspended	% of Race Out-of-School Suspended
Black	11.6	29.2	10.1
White	55.4	34.6	2.5

Table 2: District data for the 2015-2016 school year (duplicated counts)

Race	% of Total Student Population	% of Time Outs	% of Lunch Detentions	% of After School Detentions
Black	11.3	18.5	25.2	26.0
White	54.3	50.5	40.2	42.7

⁵ *i.e.*, JICDA, JICH, JICH-R, and JKD-1-E.

⁶ Notably, the District had equity work underway prior to OCR opening an investigation in this case. For example, the District had been: (a) working with an expert in a multi-year partnership to address inclusive excellence and to close the opportunity gap; (b) requiring “Beyond Diversity” training for all administrators; (c) providing training to staff about “The Role of Inclusive Education and Disrupting Implicit Bias;” and (d) providing training to staff about “Culturally Responsive Discipline Practices.”

⁷ Disparities are not *per se* discriminatory.

Table 3: District data for the 2015-2016 school year (duplicated counts)

Race	% of Total Student Population	% of Saturday School Assignments	% of In-School Suspensions	% of Out-of-School Suspensions
Black	11.3	34.2	26.0	30.0
White	54.3	32.1	45.1	35.4

Table 4: CDE data for the District (2016-2017) (*duplicated counts; **unduplicated counts)

Race	% of Total Student Population*	% of In-School Suspensions*	% of Out-of-School Suspensions*	% of Students Disciplined ^{8**}	% of Race Disciplined**
Black	11.1	27.5	31.7	26.7	13.1
White	53.3	40.0	34.9	37.3	3.8

V. CONCLUSION

We thank the District for being willing to voluntarily address the Systemic Allegation raised by the Complainant.⁹ A copy of the signed Resolution Agreement is attached. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. We will inform the Complainant of the status of the Monitoring, including providing the Complainant with copies of our monitoring responses. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues listed previously and should not be interpreted as a determination of the District's compliance or noncompliance with Title VI or any other federal law in any other respect.

Additionally, this letter sets forth OCR's resolution of an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint investigation. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

⁸ Includes students who received at least one in-school suspension, out-of-school suspension, expulsion, referral to law enforcement, and/or school-related arrest.

⁹ OCR will take no further action with respect to the Individual Allegation.

Thank you for the courtesy and cooperation that your staff extended to us during the resolution of this case. If you have any questions regarding this letter or the monitoring of this case, please contact Jason Langberg, the assigned attorney, at XXX-XXX-XXXX or XXXX@ed.gov.

Sincerely,



Angela Martinez-Gonzalez
Supervisory General Attorney

Attachment: Resolution Agreement

cc (w/ enclosure): Kathleen Sullivan, Internal Legal Counsel (via email)

Katy Anthes, Colorado Commissioner of Education (via email)