



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

December 23, 2017

Sent via electronic mail

Chris D. Funk
Superintendent
East Side Union High School District
830 North Capitol Avenue
San Jose, CA 95133-1316

(In reply, please refer to case no. 09-14-1242.)

Dear Superintendent Funk:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above referenced complaint against the East Side Union High School District (District). The complainant alleged that the District discriminated against the Student (Student) and other students on the basis of race and against the Student's mother based on national origin.¹ Based on the allegations, OCR investigated:

1. whether the District discriminated against Latino students in school discipline when it disciplined them more harshly than students of other races;
2. whether the District discriminated against the Student by disciplining him more harshly on the basis of race than similarly situated white students;
3. whether the District retaliated against the Student by involuntarily transferring him from his home school after he complained of discrimination against Latino students in school discipline; and,
4. whether the District discriminated against the Student's mother, who is limited English proficient (LEP), by not providing her with a meaningful opportunity to participate in important school-related matters regarding the Student when it did not provide her with important educational discipline information that is provided to English-speaking parents in a language that she could understand.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance. The District receives funds from the Department and is subject to Title VI and the regulation.

To investigate this complaint, OCR interviewed the complainant, the Student, the Student's mother, and District employees who oversee the discipline and data systems in the District. OCR reviewed documents

¹ OCR previously provided the District with the identity of the complainant and the Student. We are withholding their names from this letter to protect their privacy.

and information provided by the complainant and the District, including the District's discipline policies and procedures and discipline and enrollment data for the 2013-2014, 2014-2015, and 2015-2016 school years.² OCR also reviewed more than 1,000 first time 2015-2016 discipline referrals, involving defiance/disruption and Latino or white students, at three high schools in the District.³ For the 2013-2014, 2014-2015, 2015-2016, and 2016-2017 school-years, OCR obtained and reviewed policies and procedures regarding School Resource Officers (SROs) and related Memoranda of Understanding and documentation of efforts to reduce disproportionate discipline of students of color. For the 2011-2012 through 2013-2014 school years, OCR obtained and reviewed discipline and enrollment data, climate reports and achievement data.⁴

Prior to OCR's completion of the investigation, the District requested to enter into an Agreement Reached During Investigation pursuant to Section 302 of OCR's complaint processing manual. OCR determined that such an agreement was appropriate, and the District voluntarily agreed to enter into the attached Resolution Agreement (Agreement), which when fully implemented, is intended to resolve the compliance concerns raised with respect to allegations one, two, and four. With respect to allegation three, OCR determined that there was insufficient evidence that the District was in violation of Title VI and its implementing regulation. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

District Overview

This District is a high school district located in San Jose, California, and includes students in grades nine through twelve at eleven traditional high schools, five alternative high schools, six charter schools, and one adult school. According to data provided by the District to OCR, in 2013-2014, the District had a total enrollment of approximately 22,932 students. Latino students accounted for the largest portion of students, at 45.8%, Asian students accounted for the next largest group at 41.2% of all students, while white students accounted for 7.3%, African-American students were 3.0%, students of multiple races were 1.7%, Native Hawaiian or Pacific Islander students were .6%, and American-Indian or Alaskan-Native students were .3% of the District's students, and the District reported that .1% of students' race/ethnicity was "missing."

According to District data, in 2013-2014, almost one third (30.9%) of the District's students were LEP and/or were from families whose primary language was not English.⁵ The majority of these students, 63.1% were students who speak Spanish, while 21.4% spoke Vietnamese at home, and the third most common language was Filipino or Tagalog at 5.6%.

² Unless otherwise noted, all references to policies and procedures, refer to such policies and procedures in place during these years.

³ The high schools are Evergreen Valley, Oak Grove, and Santa Teresa High Schools. This accounted for 16.1% of all such first time defiance/disruption referrals in 2015-2016.

⁴ The school-year for which the complaint was filed was 2013-2014, and therefore OCR analyzed the 2013-2014 data most extensively. Although OCR initially obtained some data and other information from the 2011-2012 and 2012-2013 school years, the focus of OCR's investigation was the 2013-2014, 2014-2015 and 2015-2016 school years. As such, unless otherwise noted, the factual findings described herein are specific to the three year time period of 2013-2014 to 2015-2016.

⁵ OCR notes that California Department of Education (CDE) data has much higher numbers for students from LEP families, and therefore, this data may not reflect all such students in the District. For example, according to CDE data, in 2013-2014, 17,460 or 65.1% of the District's 26,489 students were English Learners or Fluent English Proficient, indicating their primary language/language spoken at home was not English. Available at <https://data1.cde.ca.gov/dataquest/>.

Issue #1: Whether the District discriminated against Latino students in school discipline when it disciplined them more harshly than students of other races.

Legal Standard

The Title VI regulations, at 34 C.F.R. § 100.3(a) and (b), provide that a school district may not directly or through contractual arrangements, treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. To determine whether a school district has discriminated against a student on the basis of race in the discipline process, OCR looks at whether there is evidence that the student was treated differently than students of other races under similar circumstances, and whether the treatment has resulted the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and 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 school district's actions were based on the student's race.

Factual Findings

Discipline Data & Recordkeeping

Overall, the discipline information analyzed to date by OCR reflected statistically significant⁶ racial disparities for Latino students as compared to white students, at every level of discipline except expulsion – from referrals to in-school-suspensions, out-of-school-suspensions, discipline transfers, and citations for one or more years during 2013-2014, 2014-2015, and 2015-2106 school years. The data showed that these racial disparities were driven, at least in significant part, by greater disparities in discipline for subjective and minor offenses. For example, racial disparities in discipline for offenses such as defiance and disruption were statistically significant, while more objective and serious offenses such as possession, use, or sale of drugs or weapons were either more likely to involve white students some years or, where Latino students were more likely to be disciplined for these offenses, the disparity was not statistically significant.

Discipline Data

Discipline Consequences

2013-2014 Discipline Data

In 2013-2014, Latino students were disproportionately disciplined, as compared to white students, at every level of potential disciplinary consequence, to a statistically significant degree, for all consequences except expulsion. Specifically, Latino students were:

- 1.49 times more likely to be referred for discipline than their white peers⁷;
- 2.15 times more likely to receive one or more in-school suspensions than their white peers⁸;
- 1.5 times more likely to receive one or more out of school suspensions than their white peers⁹;

⁶ As used herein, a racial disparity in rates of discipline is deemed “statistically significant” if it is 90% or more likely that the disparity is *not* the result of random chance. Some disparities are statistically significant at even higher confidence rates, such as 95% or 99%, as noted. OCR tested the racial disparities discussed herein using a Chi-square test, and/or the Fisher’s Exact Test.

⁷ Statistically significant at 99%.

⁸ Statistically significant at 95%.

- 1.48 times more likely to receive a discipline transfer than their white peers¹⁰;
- 3.2 times more likely to be expelled than their white peers¹¹; and,
- 2.25 times more likely to receive a citation than their white peers.¹²

The District's data on the number of days of suspension in 2013-2014, showed that Latino students also bear the brunt of lost instructional days due to District discipline actions. Specifically, while Latino students were 45.8% of the District's enrollment, Latino students accounted for 71.23% of days of lost instruction due to suspensions, at 4,193.5 total suspension days. White students were 7.3% of District enrollment and accounted for 7.86% of suspension days, with a total of 462.5 such days.¹³

2014-2015 Discipline Data

OCR's initial analysis of the District's discipline and enrollment data for the 2014-2015 school year also showed statistically significant racial disparities in discipline for referral rates, in-school suspensions, and out-of-school suspensions, as well as disparities that were not statistically significant with respect to citations. Specifically, while Latino students accounted for 45.5% of students enrolled in the District, Latino students accounted for 72.5% of all discipline incidents.¹⁴ Similarly, LEP students were also overrepresented in discipline incidents, as they accounted for 13.8% of all students, but over 31% of all discipline incidents. In addition, Latino students were¹⁵:

- 1.43 times more likely to be referred for discipline than their white peers¹⁶;
- 3.48 times more likely to receive one or more in-school suspensions than their white peers¹⁷;
- 1.3 times more likely to receive one or more out-of-school suspensions than their white peers¹⁸; and,
- 1.25 times more likely to receive a citation than their white peers.¹⁹

However, white students were more likely to be expelled or receive a disciplinary transfer than Latino students in 2014-2015.

2015-2016 Discipline Data

Consistent with the 2011-2012 CRDC data, and the 2013-2014 and 2014-2015 District data, OCR's initial analysis of the District's data for the 2015-2016 school year also showed that discipline was disproportionately issued to Latino students. While Latino students accounted for 45.3% of students

⁹ Statistically significant at 99%.

¹⁰ Not statistically significant at 90%.

¹¹ Not statistically significant at 90%.

¹² Statistically significant at 99%. African-American students were disciplined at even greater disproportionate rates as compared to their white peers, at every consequence level except expulsion. The racial disparities for African-American students were statistically significant at 90% or higher for all consequences except expulsions and transfers.

¹³ African-American students, who accounted for just under 3% of student enrollment, accounted for 5.2% of all suspension days (306.9).

¹⁴ African-American students accounted for just 2.8% of District enrollment, but over 6.8% of discipline incidents.

¹⁵ In a shift from the 2013-2014 data, according to the data provided by the District for 2014-2015, white students were more likely to be expelled or to receive a disciplinary transfer than Latino students.

¹⁶ Statistically significant at 99%.

¹⁷ Statistically significant at 99%.

¹⁸ Statistically significant at 90%.

¹⁹ Not statistically significant at 90%.

enrolled in the District, they comprised 74.4% of all discipline incidents.²⁰ Similarly, while LEP students accounted for 13.3% of all students, they accounted for just over 26.2% of all discipline incidents. Specifically, the 2015-2016 data reflected statistically significant (at 99%) racial disparities for Latino students in referral rates, in-school suspensions, out-of-school suspensions, and disciplinary transfers, as well as disparities that were not statistically significant for citations. White and Latino students were almost equally likely to be expelled. In 2015-2016, Latino students were:

- 1.87 times more likely to be referred for discipline than their white peers²¹;
- 7.4 times more likely to receive one or more in-school suspensions than their white peers²²;
- 2.21 times more likely to receive one or more out-of-school suspensions than their white peers²³;
- 1.93 times more likely to receive a discipline transfer than students of all other races²⁴;
- 1.1 times more likely to receive an expulsion than their white peers²⁵; and,
- 2.53 times more likely to receive a citation than their white peers.²⁶

Discipline Offenses – Subjective vs. Objective Offenses

In 2013-2014, offenses involving possession, use, and sale of weapons, drugs, and tobacco accounted for the largest percent of the District's first referral discipline offenses reported to OCR, at 42.48%. Fights and other offenses involving use of force, violence, or threats accounted for the next largest portion of offenses, at 23.67%. Defiance accounted for 11.29%, while miscellaneous other offenses accounted for 8.39%, obscenity related offenses were 7.60%, while property related offenses were 4.55%, and sexual assault and harassment related offenses were 2.04% of the 1,276 first referral offenses reported for 2013-2014.

Among Students enrolled in the District, Latino and African-American students were much more likely than white students to be referred for discipline for a subjective offense, according to the 2013-2014 data. For example, Latino students were 7.88 times more likely than white students to be referred for discipline for the subjective offense of defiance (statistically significant at 99%). In contrast, Latino students were almost equally likely to be referred, as white students, for the more objective offense of possession, use, or sale of drugs or weapons.²⁷ Latino students were also 2.59 times more likely to be referred for a property related offense (robbery, theft, etc.) (statistically significant at 95%), and 1.54 times more likely to be disciplined for fighting related offenses (statistically significant at 95%). White students were 1.56 times more likely than Latino students to be referred for sexual assault or harassment (not statistically significant). Latino and white students were also roughly equally likely to be referred for obscenity.

²⁰ African-American students made up just 2.7% of District enrollment, but 7.3% of all discipline incidents.

²¹ Statistically significant at 99%.

²² Statistically significant at 99%.

²³ Statistically significant at 99%.

²⁴ Statistically significant at 99%. No white students received involuntary transfers; therefore this comparison is to all other students.

²⁵ Not statistically significant at 90%.

²⁶ Not statistically significant at 90%. African-American students were more likely to be disciplined than white students at statistically significant rates (90% or higher) in a number of discipline categories, including referrals, in-school suspensions, and out-of-school suspensions. LEP students were also more likely to be disciplined than non-LEP students at statistically significant rates (90% or higher) in a number of categories, including referrals, in-school suspensions, and out-of-school suspensions.

²⁷ This disparity of 1.14 times was not statistically significant. Similarly, while African-American students were 7.25 times more likely than white students to be referred for the subjective offense of defiance, they were 1.82 times more likely to be referred for the more objective offenses of possession, use, or sale of drugs, tobacco, or weapons.

District Student Discipline Policies & Training

Overview

Since the initiation of this investigation, the District began implementing several research-based alternatives to exclusionary discipline. However, the District did not change its discipline related policies and procedures or discipline matrix.²⁸ The District's disciplinary policies track the California Education Code, providing for more specific and severe consequences for more serious offenses. However, for less serious and often more subjective consequences, such as willful defiance/disruption (Section 48900(k) of the California Education Code) (hereinafter 48900(k) or "defiance/disruption"), the District's policies provide little guidance regarding the types of behavior that should trigger removal of students from the classroom, and the appropriate length of such removals (e.g. anywhere from removal for part of a class period to an in-school-suspension, to one to five days of home suspension, recommendation for expulsion, or involuntary transfer).²⁹

Board Policies

District Policy, at BP 5144³⁰ titled "Discipline" states, in part, that "high expectations for student behavior, effective classroom management and parent involvement can minimize the need for discipline. Staff shall use preventative measures and positive conflict resolution techniques whenever possible." In addition, "[w]hen misconduct occurs, staff shall implement appropriate discipline and attempts to identify and address the causes of the student's behavior. Continually disruptive students may be assigned to alternative programs or removed from school in accordance with the law, Board policy and administrative regulation." BP 5144 further states that "[s]taff shall enforce disciplinary rules fairly, consistently, and without discrimination," and "the Superintendent or designee shall provide professional development as necessary to assist staff in developing classroom management skills and implementing effective disciplinary techniques." According to the District's Parent Handbook, the District's behavior policy's goal is to "facilitate[e] learning," "developing responsible attitudes and habits," and "providing a safe and healthy environment."

BP 5144 states that suspensions shall be imposed only when "other means of correction fail to bring about proper conduct," except a pupil may be suspended upon a first offense for several serious offenses, including bringing a weapon to school and assault, or if the student's present causes a danger to persons or property or threatens to disrupt the instructional process.

Regarding readmission of expelled students, BP 5114 states that the school board must have rules establishing a procedure for filing and processing requests for readmission and the procedure must be made available to the pupil at the time the expulsion order is entered. The Board is required to readmit the pupil unless the Governing Board finds that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety. The District's policies do not provide similar guidance for students who are transferred from their home school for disciplinary reasons, and then may be eligible to return.

²⁸ The District did not report any significant discipline policy changes during the three years of discipline analyzed here (2013-2016), or any other school discipline policy changes as recently as June 7, 2017.

²⁹ In addition, one area where California law had been amended to limit the use of expulsion for more minor misbehavior, but the District's policies and procedures had not been amended as of June 2017.

³⁰ OCR reviewed the Board Policies discussed here (5144, 5114) on December 9, 2015, and, according to the District, these policies had not been changed as of June 2017. The District's Board Policies are available at <https://www.boarddocs.com/ca/esuhsd/Board.nsf/vpublic?open#>.

California School Discipline Laws & District Uniform Disciplinary Chart

The District's "Uniform Disciplinary Chart" (Discipline Chart) provides school sites with guidance on the appropriate consequences for various types of misbehavior. The Discipline Chart divides conduct based on seriousness, with more severe consequences for more serious behavior. The consequences generally coincide with California Education Code Section 48900 *et. seq.*, the section that defines the offenses for which a suspension can be issued, and are divided into categories: (a) mandatory expellable offenses; (b) quasi mandatory offenses; (c) discretionary expulsion; and, (d) other violations ("classification 48900(k) for following offenses if student is suspended").

The California Education Code governs student discipline in all public schools in the state, including the District. The California Education Code provides less discretion to districts in disciplining more serious behavior, such as possession of a gun or brandishing a knife, while district's have significant discretion in addressing less serious behavior, such as defiance/disruption.

Expulsion & Suspension

California law mandates expulsion for any students engaged in the most serious forms of misbehavior, including possession of a firearm and brandishing a knife.³¹ According to the District's Discipline Chart, students who commit these offenses will be automatically suspended and recommended for expulsion and the police notified in all instances.

The next category of disciplinary offenses under California law is sometimes referred to as recommendation for expulsion offenses. These include causing serious physical injury to another person, except in self-defense and possession of any knife or other dangerous object of not reasonable use to the pupil.³² If a student has engaged in such behavior, the district shall recommend the expulsion, unless the principal or superintendent determines that expulsion should not be recommended under the circumstances or that alternative means of correction would address the conduct. According to the Discipline Chart, for these offenses, the District administrator determines if a recommendation for expulsion is necessary based on the seriousness of the offense, the student's prior discipline record and other circumstances. Students may receive a suspension, involuntary transfer, police citation, community service, counseling, and/or mandatory attendance to classes/interventions.

The third category includes behaviors which are categorized as less serious but still potentially expellable offenses. The Discipline Chart explains that, for any such offenses, which includes disruption/defiance, harassment, fights, threats, or intimidation, the District "may use one or more" of 21 different consequences, that range from a warning or lunch detention, to Saturday School, in-school suspension, out-of-school suspension, community service, police notification, involuntary transfer, recommendation for expulsion, or other consequences. No other criteria are listed to guide administrators on how to select a consequence for such misbehavior, and no definitions of offenses, such as "obscenity/profanity/vulgarity," or "terroristic threats," are provided.

The Discipline Chart also defines different types of potential 48900(k) disruption/defiance violations, providing some broad guidance on consequences for first, second, and third offenses. For example, the consequence for a first dress code offense is described as "warning, send home to change, confiscate as appropriate," while a second offense includes "send home to change, detention, Saturday School, confiscation, parent conference," and a third offense includes "1-5 day suspension," and "possible

³¹ Cal. Educ. Code § 48915(c).

³² Cal. Educ. Code § 48915(a).

involuntary transfer.”³³ The chart lists multiple possible consequences for each offense – first, second, third – but does not explain whether all of the consequence listed should be administered, or if not, what criteria staff should use to determine the appropriate consequence(s) to select. There is no information for administrators to determine the length of suspension or other consequence, where an option is provided, such as 1-5 days suspension. In addition, recommendation for expulsion also appears to be a potential consequence for some such violations of 48900(k), despite the change to California law that no longer allows expulsion for such an offense.

According to the Discipline Chart, 48900(k) first time violations of academic integrity including plagiarism, or technology misuse, “causing or inciting a campus disruption/disturbance, false alarm,” or “accessory to fight/assault,” may result in anything from a warning or referral to the classroom teacher policy, to a 1-5 day suspension or even “police notification.” Other 48900(k) offenses that are listed include “use of cell phones or other electronic devices” which can result in a warning, confiscation, release to a parent on a first offense, to a 1-5 day suspension, confiscation, release to parent on a third offense.

California Education Code Section 48900.5 requires that, prior to suspending a student, a school must exhaust other means of correction, which may include behavior supports, counseling, referral for psychological evaluation and restorative justice, unless the student causes a danger to persons or has violated a specific offense. The 2015-2016 Parent Handbook and Discipline Chart did not include this provision of California law. In 2014, the California Education Code was changed to no longer allow students to be expelled for violations of 48900(k) defiance/disruption. The Discipline Chart had not been updated, as it still included “recommendation for expulsion,” as a possible consequence for a violation of 48900(k).

Involuntary Discipline Transfers

The District’s use of involuntary transfers is based on California Education Code Section 48432.5, which authorizes districts to “adopt rules and regulations governing procedures for the involuntary transfer of pupils to continuation schools.” Section 48432.5 requires that these rules include written notice to the student and his/her parent/guardian of the transfer, an opportunity to request a meeting and present evidence/witnesses, and that decisions to transfer be based on a violation of California Education Code Section 48900 and be in writing stating the facts and reasons for the transfer. According to District administrators, recommendations for involuntary discipline transfers are sent to the District’s Director of Student Services, who determines if they are appropriate, and students typically cannot return to their home school if the victim is still at the site, or if the student committed a mandatory expulsion offense.³⁴

District BP 5119.1, titled “Involuntary Transfer to Continuation School” allows for students to be transferred to continuation schools based on violations of California Education Code Section 48900, habitual truancy, or irregular attendance.³⁵ The policy further states that prior to such a transfer, the student and parent/guardian shall be given written notice of the proposed transfer informing them of the opportunity to request a meeting with the designee or Superintendent. At that meeting, a parent/guardian shall “[b]e informed of the specific facts and reasons for the proposed transfer” and “[h]ave the

³³ The California Education Code, at Section 48900, enumerates 18 different bases for suspending a student, stating that a “pupil shall not be suspended from school or recommended for expulsion, unless . . .the pupil has committed an act as defined” in the section (subdivisions a-r). Dress code violations are not listed as a suspendable offense.

³⁴ This refers to the California Education Code Offenses that result in mandatory expulsion, such as possession of a firearm, brandishing a knife, or sale of drugs.

³⁵ BP 5119.1, “Involuntary Transfer to Continuation School” is available at <http://www.boarddocs.com/ca/esuhsd/Board.nsf/goto?open&id=86PSY359B806>.

opportunity to inspect all documents relied upon, question and evidence and witnesses presented, and present evidence on the pupil's behalf." The decision to transfer a student shall also be provided in writing, along with the facts and reasons for the decision and shall indicate whether the decision is subject to periodic review, and the process for such review. In addition, BP 5119.1 states that a yearly review is available for involuntary transfers that extend "beyond the end of the semester following the semester during which the acts leading directly to the involuntary transfer occurred."

According to BP 5119.2, "Involuntary Transfer to Continuation School Without Time Limits: Yearly Appeal Procedure," "all involuntary transfers to continuation schools without a definite time limit will be for the remainder [of] the student's high school years" and such "transfers may be appealed for review annually." BP 5119.2 further states that "[a]ll parents/guardians will be notified of the fact that the length of the transfer is for the remainder of the student's high school years" and a parent/guardian may appeal a decision not to recommend that a student return to their comprehensive high school. Upon appeal, an appeal hearing panel is appointed to hear the appeal. At the appeal hearing, the parent/guardian will have the opportunity to present "all pertinent information as to why the student should be reinstated" to the panel, and if the appeal is denied, the parent/guardian may appeal to the Board of Trustees. This appeal procedure may be used annually by a parent/guardian.

Training Staff on the District's Discipline Policies

In response to OCR's initial requests for information regarding training on school discipline in 2014, the District provided general information from professional conferences, as well as three trainings that were available to staff, one in the 2012-2013 school year on alternative to suspension/expulsion and two in the 2013-2014 school year on discipline basics and bullying and discipline safeguards. The District also holds regular meetings with its site assistant principals, where discipline issues were on the agenda and discussed. OCR obtained evidence that trainings in prior years had not adequately addressed consistency in discipline decision-making. During the 2016-2017 school-year, OCR interviewed administrators who oversee discipline in the District. These administrators told OCR they were working to implement trainings and regular meetings in an effort to provide greater consistency in discipline decision-making across the District.

Lack of Consistency in Application of Discipline Policies

OCR found evidence that the District's discipline policies were not consistent at different schools and are not implemented consistently. Even though the District has a Discipline Chart, different sites have different discipline matrices, and different approaches to discipline decision-making. During OCR's investigation, the District was working with sites to ensure that students were not being unnecessarily suspended (*e.g.*, suspensions for less serious behavior). Specifically, the District was developing clearer guidelines on alternatives to exclusionary discipline consequences such as out-of-school suspension, so that some administrators would have readily available alternatives to suspension when appropriate. The District had also established a committee on discipline, which was working on a district-wide discipline matrix for teachers to use for classroom disturbances.

OCR also found that the District had not clearly established how criteria in the Discipline Chart was to be applied, and had not developed any written guidance for site administrators regarding how to apply the criteria. The District also had no other written information to guide staff on determining the appropriate consequence for a particular offense in a consistent manner. With regard to the administration of such consequences, OCR found that more recently the District is using monthly meetings with site discipline administrators to discuss scenarios and improve consistency. OCR found that District administrators were also working to identify behavior that was resulting in referrals, but was not serious enough to warrant suspension, and to train staff to be more consistent in their responses.

Interventions

The District provided OCR with information regarding a Student Support Services Program (SSSP), “to provide a comprehensive program which emphasizes prevention, education, intervention, and referral support services as positive alternatives to existing disciplinary measures.” The District’s SSSP includes Healthy Start, School Linked Services, Multi-Service Teams, and Student Assistance Programs. “Students who demonstrate high risk behaviors are identified by observations, referrals by staff, friends, family, other agencies, or themselves” for such support. The District did not provide information with respect to whether such programs were effective.

In 2016, the District reported a restorative justice program had been in place, but the staff member leading the program had left the District. In June of 2017, the District provided OCR with information about an alternative discipline effort utilizing Positive Behavior Interventions and Support (PBIS) that was underway, reporting that one District school, Evergreen Valley, was in year two of implementation of PBIS in 2016-2017, and one school, Mt. Pleasant, was in year one of implementation in 2016-2017. The District also planned to begin implementing PBIS at three more schools: Oak Grove, Independence, and Piedmont Hills during the 2017-2018 school year. District administrators told OCR the District has been working to reduce student discipline referral rates and implement multi-tiered systems of support for its students, and provide additional professional development for staff.

Climate Reports & Staff & Student Interviews

The District regularly conducted a California Healthy Kids (surveys students) and California School Climate (surveys staff) surveys regarding school climate. In 2013-2014, the California Healthy Kids survey showed that significant percentages of students (ninth and eleventh graders were surveyed) generally did not agree or strongly agree that the schools in the District treated students fairly or with respect, or that rules were clear.³⁶ And, approximately one third of students expressing an opinion also agreed that they were disciplined for breaking small rules, and that it was easy to get kicked out of class or suspended.

The 2013-2014 Staff Survey showed that although a majority of staff believed students were treated fairly and with respect, and that rules are clearly communicated, approximately 20-30% of staff, disagreed with these statements.³⁷ 49% of staff said that disruptive behavior was an “insignificant” or “mild” problem, while 34% said it was a moderate problem, and just 17% responded that it was a “severe” problem. Staff reported alcohol and drug use as more significant problems, as 45% of staff listed alcohol and drug use as a “moderate” or “severe” problem – this was the highest percent for various types of offenses, which included theft, fighting, and weapons. Staff were also more likely to report the need for additional professional development on meeting the social, emotional, and developmental needs of youth, and the needs of English Learners. For example, just 12% of staff strongly agreed that their school “provides adequate counseling and support services,” or “emphasizes helping students with social, emotional, behavioral problems,” 64% of staff indicated that they need professional development on meeting social, emotional, and developmental needs of youth, and 54% of staff said they need professional development on serving English Learners.

³⁶ Survey response options often include: “Strongly Disagree,” “Disagree,” “Neither Disagree or Agree,” “Agree,” and “Strongly Agree.”

³⁷ East Side Union High School District website, “Safety/Security.” Available at <http://www.esuhd.org/Students--Parents/SafetySecurity/index.html>.

School Resource Officer & Student Citations, Arrests, and Referrals

The District contracts with San Jose Police Department (Police Department) for law enforcement support. The District Board Policies and Administrative Procedures allow for the citation, questioning, and arrest of students on campus, but do not define when School Resource Officers (SROs)³⁸ should get involved in a particular situation. Specifically, the District's policies and procedures regarding SROs, as well as the Memorandum of Understanding with local law enforcement that was in place from the 2013-2014 school year until November 15, 2017 (MOU 1), did not explain when SROs should be involved in an incident for possible questioning, citation, or arrest.

According to MOU 1, which was in place during most of OCR's investigation of this case, the Assistant Superintendent for Instruction, was the contact for SJPd SROs, and the head SRO is described as "Act[ing] as District Security Coordinator." The District agreed to pay off duty Police Department Officers on an hourly basis for their services. The SRO duties included: assist in supervising and monitoring students and be familiar with the discipline sections of the education code; work with students on conflict resolution and mediation; being familiar with "young people and the issues that confront" them; assist school administrators with criminal violations when requested; and being available for emergencies.

In September of 2016, the District administrators who oversee discipline told OCR that the District's SROs did not receive District training with regard to their campus duties. OCR found that from at least 2013 through the fall of 2015, SROs were closely involved in the school discipline processes in the District. The officers often worked closely with site administrators who oversee discipline and the site administrators sometimes followed the lead from the officers and their approach under the penal code. In response to a news story in September, 2015 that profiled an autistic District student who was arrested by an SRO for scribbling his initials on the sidewalk in front of a District school, and data analyzed in the story that the District had among the highest rate of referrals to law enforcement in the country in 2011-2012, the District Superintendent issued guidance on October 23, 2015. The guidance stated in part that to reduce the number of youth involved in the juvenile justice system, District site administrators would work with law enforcement to ensure students were only cited on campus for a list of more serious offenses, such as robbery, sexual assault, and brandishing a knife.³⁹

On November 15, 2017, the District entered into a new MOU with the Police Department (MOU 2), which defines the roles of SROs and school site administrators, including that school discipline matters are to be handled by school administrators.

Student Discipline File Reviews

Background

OCR also conducted individual discipline file reviews of discipline incidents during the 2015-2016 school year, to assess evidence of different treatment in discipline of Latino students as compared to similarly

³⁸ The District refers to these officers as Campus Police Officers, rather than SROs. For the purposes of this letter, OCR has used the term SROs.

³⁹ NBC Bay Area News, "School District Called Police on Students 1,745 Times in a Single Year," Shaban, Bott, and Villareal, September 30, 2015. Available at <http://www.nbcbayarea.com/investigations/School-District-Called-Police-on-Students-1745-Times-in-Single-School-Year-330015791.html>.

situated white students.⁴⁰ OCR reviewed the files to assess whether students were similarly situated, based on the individual descriptions of their behavior which resulted in their first discipline incident of the year, and then compared the severity of the consequences given to the Students.⁴¹ OCR selected first referrals involving defiance/disruption incidents for file review analysis from three traditional high schools in the District: Evergreen Valley, Oak Grove, and Santa Teresa High Schools.⁴² OCR reviewed 1,003 (16.1%) of such first referral defiance/disruption incidents involving white or Latino students in the District. Santa Teresa had the second largest disparity in the District between white and Latino referral rates for first time defiance/disruption offenses, at 1.99 times, and this disparity was statistically significant. Evergreen Valley also had a disparity of 1.62 times that was not statistically significant. And, Oak Grove had the smallest disparity of the three schools and the entire District, at just 1.21 times (also not statistically significant).

File Review Results

OCR's file review found some evidence of potentially more severe treatment in discipline of Latino students, as compared to similarly situated white students, at two of the three schools reviewed. Specifically, with respect to the most common defiance/disruption referrals for refusing to follow directions/class disruption, tardy/truancy, and no show detention offenses at Santa Teresa High School (which accounted for over 80% of the files reviewed for this site), Latino students were more likely than white students to receive the most severe discipline consequence given (such as an out-of-school suspension or Saturday School) and white students were more likely than Latino students to receive the least severe discipline consequence (such as a warning or detention).

Similarly, at Evergreen High School, among the four most common offense types, which accounted for over 71% of the files reviewed, Latino students were more likely to receive the most severe consequences while white students were more likely to receive the least severe consequences among two offense areas – closed campus and cell phone violations. For academic integrity violations, white students received more severe treatment and for tardies/truancy offenses the results mixed.⁴³ At Oak Grove High School – where the data reflected the smallest overrepresentation for Latino students – OCR did not find evidence that Latino students received harsher consequences for these first time defiance/disruption incidents. In several categories, white students received slightly harsher consequences for the most common offenses, such as tardy/truancy, cell phone, and closed campus violations, while the results were mixed for refusing to follow directions/classroom disruption. None of these incidents involved exclusionary discipline consequences for either white or Latino students.

The file review also uncovered specific instances of Latino students who were seemingly treated differently than their similarly situated white peers, such as the following incidents:

⁴⁰ In order to ensure that students were similarly situated, OCR compared first student referrals of the 2015-2016 school year for defiance disruption incidents, reviewed the descriptions of the incidents to ensure they were similar in severity, and then compared the consequences meted out for Latino and white students.

⁴¹ Because there were significantly more Latino students in the District, for the file review OCR selected files for all white students from the schools listed above for the particular first time offenses identified (48900(k) defiance/disruption offenses), and randomly sampled a similar number of Latino students who received first time referrals for the same offenses.

⁴² OCR selected defiance/disruption incidents for review because these were the most common offenses for which students in the District were referred at least one time during the 2015-2016 school year. OCR selected the three schools based on a number of factors, including demographics and defiance/disruption referral rates.

⁴³ Where OCR found that white students received harsher treatment in academic integrity violations, the incidents all involved non-exclusionary discipline for both white and Latino students (e.g. warning vs. detention or Saturday School).

- Two incidents involved horseplay – one Latino student and one white student. According to the incident reports, the white student hit a male student in the groin area, on purpose, while the Latino student hit a friend in the head. The Latino student received harsher discipline of an out-of-school suspension for one day, while the white student received a class suspension for one hour/period. Additional investigation would be necessary to determine if there was a legitimate nondiscriminatory reason for the more severe consequence for the Latino student.
- In terms of class disruption incidents, the most severe consequence was given to a Latino student, who received a two day out-of-school suspension for a class disruption. The Latino student “refused to comply” and was “disrupting the class and disrespecting the teacher while using profanities.” Other defiance/disruption incidents that OCR reviewed may have been as serious, and did not result in a two-day out-of-school suspension. For example, a white student was referred for dangerous behavior that included trying to ride a cart in lab class and putting forceps into a light socket in the class and received one hour/period of class suspension.
- Two students disciplined for cell phone use – one white and one Latino – seemed to be similarly situated, as both descriptions described repeated cell phone use in class. However, the Latino student received the consequence of 1 hour of detention counseling and contacting the parent, while the white student received a warning/counseling, even as the referral comments for the white student stated, “I think he needs detention and possibly a meeting with his guidance counsellor too.”

Analysis

District-wide Different Treatment

OCR considers both direct and circumstantial evidence of racially discriminatory intent when addressing allegations of discrimination. Circumstantial evidence is evidence that creates an inference of discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances. It may include, but is not limited to, whether the impact of a disciplinary policy or practice weighs more heavily on students of a particular race; whether there is a history of discriminatory conduct toward members of a student’s race; the administrative history behind a disciplinary policy or decision; and whether there had been inconsistent application of disciplinary policies and practices to students of different racial groups.

OCR’s investigation showed that Latino students were overrepresented in discipline in the District each of the three years analyzed, from 2013-2014 to 2015-2016. In 2013-2014, the overrepresentation of Latinos was statistically significant (at 99% or higher confidence level, unless noted), as follows: referral rate (1.49 times); in-school-suspension rate (2.15 times) (95% confidence); out-of-school suspension rate (1.5 times); and, citation rate (2.25 times). In 2014-2015, Latino students were overrepresented at statistically significant rates (at 99% or higher confidence level, unless noted), as follows: referral rate (1.43 times); in-school-suspension rate (3.48 times); and, out-of-school suspension rate (1.3 times) (90% confidence). And, in 2015-2016, Latino students were overrepresented in discipline at statistically significant rates (99% or higher confidence level, unless noted), as follows: referral rate (1.87 times); in-school-suspension rate (7.4 times); out-of-school suspension rate (2.21 times); and involuntary discipline transfer rate (1.93 times more likely than students of all other races).

The 2013-2014 data also showed that Latino students were significantly more likely to be disciplined for the subjective offense of defiance,⁴⁴ while Latino and white students were roughly equally likely to be disciplined for the more serious and objective offenses of possession, use, or sale of drugs or weapons.⁴⁵ OCR identified that the District had inconsistent oversight and minimal training and guidance with respect to discipline under the subjective offenses that fall under disruption/defiance.⁴⁶ For those offenses, the disparity for both Latino and African-American students was over 7 times, as compared to white students. OCR's initial review of more recent 2015-2016 data raises similar concerns regarding the application of subjective discipline offenses, as overall, Latino students were 1.87 times more likely to be referred than white students.⁴⁷ However, for the subjective offenses under defiance/disruption (these offenses accounted for the largest percentage of first time referrals at 37.7% of all such first time referrals), Latinos were 2.62 times more likely to be referred than white students, as compared to the more objective category of fighting, for which Latino students were just 1.63 times more likely than white students to be referred (fighting incidents accounted for 5.7% of all first time referrals).⁴⁸

OCR's review of individual student discipline files from the 2015-2016 school-year raised further concerns regarding seemingly different and more harsh treatment of Latino students, compared to similarly situated white students at two of the three high schools subject to OCR's file review. Specifically, OCR found evidence that at two of the three schools analyzed – Santa Teresa and Evergreen – Latino students were more likely than white students to receive harsher discipline, including exclusionary discipline in some cases, for similar, first time referrals for defiance/disruption incidents. In addition, OCR found specific discipline incidents that were seemingly similar, and for which Latino students received harsher punishment or incidents for which the white student's behavior was potentially more serious, yet the two students received the same consequences. Additional investigation would be necessary to determine if the District has a legitimate, nondiscriminatory reason for these instances of seemingly different treatment.

In addition, OCR determined that based on the District's MOUs with the Police Department, the SROs are employees of the District and are therefore a program or activity of the District, for which the District is responsible for Title VI compliance. OCR identified a concern because the citation data provided by the District for 2013-2014 shows Latino students were disproportionately more likely to receive citations than white students (2.25 times), to a statistically significant degree, despite the fact that white and Latino students were almost equally likely to be disciplined by the District for the most serious offenses of drugs or weapons. The MOU 1, which was in place during most of OCR's investigation (until November 15, 2017), did not clearly define the role of SROs, to ensure that District and law enforcement officers act consistently across race in determining which matters are handled by school staff as school discipline issues, and which matters are handled by SROs as potential criminal matters.

To make a compliance determination regarding this allegation, OCR would need to conduct further interviews with site administrators, teachers and other staff involved in issuing consequences, and conduct further interviews with Latino and other students receiving different consequences for offenses

⁴⁴ Similarly, African-American students were also more likely to be disciplined for subjective offenses than white students.

⁴⁵ Although African-American students were somewhat more likely to be disciplined than white students for such objective offenses (such as possession of weapons or drugs) this disparity was 1.82 times, whereas for the subjective category of defiance/disruption, the disparity was much greater as African-American students were 7.25 times more likely to be disciplined.

⁴⁶ Gang dress or behavior is also included in defiance/disruptive activities, and the District's policies provide very little guidance as to what falls under these categories.

⁴⁷ Statistically significant at 99%.

⁴⁸ OCR's initial analysis of this data did not compare possession of weapons or drugs, and additional investigation, if warranted, would have include such an analysis.

that are categorized similarly. However, prior to OCR completing this investigation, the District expressed its willingness to enter into a voluntary agreement, and OCR determined that it is appropriate to resolve the allegations with the attached Agreement. As such, OCR did not reach a compliance determination with respect to this allegation.

Issue 2: Whether the District discriminated against the Student on the basis of national origin by disciplining him more harshly than similarly situated white students.

Legal Standard

The Title VI regulations, at 34 C.F.R. § 100.3(a) and (b), provide that a school district may not directly or through contractual arrangements, treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. To determine whether a school district has discriminated against a student on the basis of race in the discipline process, OCR looks at whether there is evidence that the student was treated differently than students of other races under similar circumstances, and whether the treatment has resulted the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and 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 school district's actions were based on the student's race.

Factual Findings

Background

The Student was XX XXXXXXXXX XXXXX Latino student in the District during the 2013-2014 school year, when this complaint was filed. The Student's parents are LEP, and their primary language is Spanish. The Student attended his home school (School 1), a traditional high school in the District his XXXXX XXXXX XXXX, and for the beginning of the Student's XXXXX XXXXX XXXX, 2012-2013. During 2011-2012, the Student was disciplined for several low level "defiance" related offenses – one incident resulted in an in-school suspension and none resulted in out-of-school suspensions – and once for a mutual fight off campus after school, which resulted in a three day out-of-school suspension in February 2012.

Discipline Incident

The Student began the 2012-2013 school year at School 1 and on August XX, 2012, the Student was searched by a police officer, who found the Student in possession of a knife. The Student stated that the knife was in his pocket mistakenly because he used it for his job. The police officer cited the Student, and he received a three day out-of-school suspension, August XX-XX, 2012, for a violation of California Education Code Section 48915(a)(2). The suspension notice was in English only.

The District's Discipline Chart shows that a student in possession of a knife may be referred for expulsion, or may receive a suspension, police citation, involuntary transfer, community service, counseling, or mandatory attendance to classes/interventions. According to the District, although the Student could have been expelled, it chose not to pursue expulsion because he did not brandish the knife. According to District data, six students in total, including the Student, were involuntarily transferred from School 1 that school-year, five of whom were Latino. The sixth student was identified as multiracial in the District's discipline data.

A few days after the incident, the District disciplined the Student with an involuntary disciplinary transfer to another comprehensive high school in the District (School 2). The Student began attending School 2 on or about September XX, 2012, and spent the remainder of the year without incident. That summer of 2013, the Student attended summer school back at School 1, also without incident. The Student's attendance and discipline records, provided by the District, do not show any disciplinary incidents for the Student after the District transferred him out of his home school in the fall of 2012 – either during the 2012-2013 school year at School 2, or at School 1 during the summer of 2013. As explained above, although the District's Discipline Chart lists involuntary disciplinary transfer as a possible consequence, the District policies only address disciplinary transfers to continuation schools, so the process or criteria the District used here for the Student's transfer is not published nor was it provided to the Student or the Student's mother.

Student's Return to Home School Prohibited

After successfully attending 2013 summer school at School 1, the Student believed his disciplinary transfer was over because it had been almost one year since the incident. Therefore, he attempted to remain at School 1 at the beginning of the 2013-2014 school year. He enrolled in School 1 for the 2013-2014 school year and began attending classes on the first day of the new year, on or about August XX, 2013. However, on the second day of the year, on or about August XX, 2013, the principal told him he could not attend the school.

District records and the District's explanations to OCR as to why the Student did not attend School 1 for the 2013-2014 school year were not consistent. District documents stated that the Student was a "No Show" at School 1. However, in response to OCR's request for information, the District told OCR that he was not allowed to attend School 1 because his disciplinary transfer was extended. According to the District, the Assistant Superintendent of Instructional Services at the time, had refused the Student's requests to return to School 1 because the other student involved in the altercation that School staff believed led to the Student carrying a knife, still attended the school, and they were worried about the safety of the other student. The District also told OCR that the Assistant Superintendent was concerned about the Student returning to School 1 because the principal stated that the Student had allegedly threatened her and the principal was still at the School. However, this was the first time District records mentioned this alleged threat by the Student. Although the Student had not had any discipline incidents since being transferred out of School 1, the Assistant Superintendent decided that "another year at a different site would ensure that [the Student] had demonstrated self-control in terms of not engaging in altercations, attending classes regularly, and passing courses."

After the Student was denied the ability to return to his home school, he was out of school for several months. Initially, the District did not provide written notice to his parents in any language, and the family told OCR they were told only verbally and in English that the Student could not attend School 1. Just over two months later, on October XX, 2013, the Student's parents received a letter in English and Spanish from the District explaining that the District was aware the Student was not enrolled in any school and the District would like to assist him in getting enrolled. The letter was not consistent with the District's BP 5119.2, described above, regarding involuntary transfers and yearly appeal procedures. As discussed above, this policy specifically references transfers to continuation schools, and the Student was transferred to another comprehensive school. In response to OCR's request for a District policy applicable to involuntary transfers between comprehensive schools, the District did not provide a citation and OCR was not able to find one on the District's website in its Board policies and procedures section.

The District offered to re-enroll the student at School 2, or at another comprehensive high school in the District. On or about November XX, 2013, District emails indicate that the parents met with District administrators, and they discussed enrolling the Student at a comprehensive high school. However,

because the Student had already missed several months of school and the Student would need to catch up on credits, his family requested that he be allowed to attend an alternative school (School 3), which would facilitate credit recovery. However, the District refused this request, and staff at School 3 were instructed not to enroll the Student. Several weeks later, on or about November XX, 2013, the District offered placement at School 2, School 3, and two other comprehensive schools. The District sent the family a letter in English and Spanish the next day, on November XX, 2013, offering these placements. The Student elected to attend the alternative school, School 3, to catch up on credits, and according to the District, he enrolled on December X, 2013.

The Student attended School 3 for the remainder of the 2013-2014 school year. Although the Student was offered a choice of alternative or comprehensive schools, the complainant told OCR that the Student/family chose an alternative school because he was behind on credits, in-part due to missing much of the first semester of the 2013-2014 school year when he was denied enrollment at his home school. As an alternative school, School 3 offered shorter instruction days than the Student would have received at a comprehensive school in the District, and the school offered no extracurricular activities such as sports for its students.⁴⁹

Analysis

The complainant alleged that the District's refusal to allow the Student to return to School 1 reflected harsher discipline because he is Latino. Here, the information OCR gathered to date raised concerns about the possible different treatment of the Student based on race or national origin in terms of the length of the disciplinary transfer. The District's data showed that the District-wide and School impact of the District's discipline transfer policies and practices weighed more heavily on Latino students – which as discussed above is an additional type of circumstantial evidence that may raise an inference of discrimination. For example, in 2013-2014, while 83 Latino students received involuntary disciplinary transfers in the District, just 9 white students received such a transfer. White students accounted for 7.3% of all students and 8% of disciplinary transfers while Latino students accounted for approximately 45% of students, but over 74% of all disciplinary transfers. Overall, Latino students were 1.48 times more likely to receive a disciplinary transfer than white students. Similarly, Latino students were also overrepresented among such transfers from School 1. While no white students at School 1 received an involuntary discipline transfer in 2012-2013 or 2013-2014, five of the six students who received an involuntary discipline transfer in 2012-2013 were Latino, and the sixth was multiracial. In 2013-2014, nine of the ten students who received a disciplinary transfer were Latino, and the other was African-American.

With respect to the District's legitimate, nondiscriminatory reason for the transfer, the information the District had noted in its files as to why the Student did not return to his home school, that the Student was a "no show," was not accurate. Second, the District stated its legitimate, nondiscriminatory reason for continuing the Student's discipline transfer for the 2013-2014 school year did not seem to be supported by the evidence OCR gathered to date. Specifically, the Associate Superintendent determined that the Student posed some ongoing concerns, and that he "felt another year at a different site would ensure that [the Student] had demonstrated self-control in terms of not engaging in altercations, attending classes regularly, and passing courses." However, the evidence provided by the District showed that the Student had completed almost the full prior school-year at School 2 and summer school at his home school without any disciplinary or other problems. The Associate Superintendent also extended the Student's transfer because he stated that the Student had threatened the principal. However, this allegation was not

⁴⁹ XXX XXXXXXXX XXX XX XXXXXXXX XX XXXXXXX XXXXXXX XXX XXX XXXXXX XX XXXX XXXXXXX
XX XXXX XXXXXXX.

included in the initial discipline records regarding the incident, but rather was raised a year later when the Student sought to return to his home school.

Finally, the District's policy on discipline transfers did not discuss transfers to other comprehensive schools, and therefore did not clearly authorize the Student's transfer or the extension of his transfer. To the extent the District relied on BPs 5119.1 and 5119.2 regarding involuntary transfers to continuation schools, the District did not follow the procedures therein, including by not providing the Student with written notice of the transfer initially (in English or Spanish), and later by not providing the Student with an appeal hearing after he requested to return to his home school for the 2013-2014 school year. Such deviations from disciplinary policies or practices can be circumstantial evidence that raises an inference of intentional discrimination. These issues raised concerns that the District's stated legitimate nondiscriminatory reasons for extending the Student's transfer may not have been supported and may have been pretextual.

OCR would need to conduct additional interviews with respect to the reasons for the extension and review additional files to determine whether similarly situated white students in the District were subjected to comparable extensions of their disciplinary transfers, and to conduct interviews with District and school staff who made such decisions. However, OCR did not complete this comparison of potentially similarly situated white students and its investigation of this allegation, prior to the District's request to enter into an Agreement to resolve OCR's concerns. As such, OCR did not reach a compliance determination with respect to this allegation.

Issue #3: Whether the District retaliated against the Student by involuntarily transferring him from his home school after he complained of discrimination against Latino students in school discipline.

Legal Standard

The Title VI regulations, at 34 C.F.R. § 100.7(e), prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to a materially adverse action by the school district, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the school district can provide a nondiscriminatory and/or nonretaliatory reason for the materially adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Factual Findings and Analysis

The complainant alleged that the Student's initial disciplinary transfer out of the school for possession of a knife in 2012 was retaliatory because the Student had complained of the principal's treatment of other students based on their race or national origin. The District denied that the principal retaliated against the Student and told OCR that the Student was disciplined for possession of a knife. The Student did not dispute that he was found in possession of a knife in August 2012. After review and initial investigation of this allegation, OCR determined that the alleged protected activity and adverse action (the initial disciplinary transfer in 2012 for possession of a knife), were untimely, as both occurred in 2012, and the complaint was filed with OCR outside of the 180 day timeframe. Therefore, OCR is hereby dismissing this allegation consistent with OCR's Complaint Processing Manual.

Issue #4: Whether the District did not provide the Student's mother who is LEP with a meaningful opportunity to participate in important school-related matters when it did not provide her with important educational discipline information that is provided to English-speaking parents, in a language she could understand⁵⁰.

Legal Standard

The Title VI implementing regulations, at 34 C.F.R. § 100.3(a) and (b), provide that a recipient of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others. Section 100.3(b)(2) provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

On July 17, 1970, pursuant to its authority under Title VI, the Department of Education issued a memorandum entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" (May 25, 1970), reprinted in 35 Fed. Reg. 11,595 (July 18, 1970) (hereinafter May 25th memorandum). The May 25th memorandum clarified OCR policy under Title VI on issues concerning the responsibility of school agencies to provide equal educational opportunity to limited English proficient national origin minority students.

The May 25th memorandum states that school districts must adequately notify national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate. School districts have an obligation to ensure meaningful communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any programs, service, or activity of a school district that is called to the attention of non-LEP parents.

School districts must develop and implement a process for determining whether parents are LEP and identify their language needs. The process should be designed to identify all LEP parents, including parents or guardians of children who are proficient in English and parents and guardians whose primary language is not common in the district. School districts must provide language assistance to LEP parents effectively with appropriate, competent staff – or appropriate and competent outside resources.

⁵⁰ During the investigation and resolution of this complaint, OCR was also investigating translation and interpretation issues in the District through case number 09-15-1253. X---paragraph redacted---X. In case number 09-15-1253, OCR also identified compliance concerns regarding translation and interpretation for LEP families, and the District entered into a Section 302 Agreement on November 13, 2015, to address OCR's Title VI concerns.

Factual Findings

Substantial LEP Population in the District

According to District data provided to OCR, in 2013-2014, almost one third (30.9%) of District's students were identified as LEP, and therefore had parents or guardians whose primary language was not English. Most of these students' families spoke either Spanish or Vietnamese. Almost twenty percent (19.5%) of the District's students (4,463) were LEP and came from families whose primary language was Spanish – the most prevalent language other than English among District families. 6.6% (1,519) of Students in the District were LEP and came from families whose primary language was Vietnamese. Another 1,093 students or 15.4% of the District's enrollment were LEP and came from families whose primary languages were among over 37 other home languages spoken by families in the District.⁵¹

District Policy: LEP Parent Communications

OCR requested the District's policies and procedures regarding translation and interpretation for information for LEP parents and guardians. The District provided one relevant Board Policy, BP 5020 "Parent Rights and Responsibilities." BP 5020 states that the District "shall take all reasonable steps to ensure that all parents/guardians who speak a language other than English are properly notified in English, and in their home language of the rights and opportunities available to them pursuant to Education Code 48985." California Education Code Section 48985 requires that, "[i]f 15 percent or more of the pupils enrolled in a public school . . . speak a single primary language other than English . . . all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in the primary language, and may be responded to either in English or the primary language." The District did not provide any other policy or document that describes the process for addressing parent or student oral interpretation needs.

Translation of the Student's Disciplinary Information

The Student's mother is LEP. Her primary language is Spanish. She told OCR that although she is LEP, the District did not provide her information in the language she understands, which is Spanish, and instead regularly sent most written information to her only in English. She also told OCR that the District often did not provide an oral interpreter for her in meetings, including some IEP⁵² and discipline meetings. Specifically, she told OCR that she did not receive written discipline information about the Student, such as suspension forms, in Spanish. In addition, she told OCR that during a XXXXXXXX XXXXXXXXXX meeting for the Student on or around May XX, 2014, an oral interpreter was not provided for approximately 40 minutes of the 2.5 hour meeting. The Student's mother said she had to ask her son to interpret for her and explain what was going on in the meeting during that time.

OCR requested a copy of all discipline and other communications that the District provided to the Student's parents/guardians in Spanish. The District did not provide OCR with any such discipline documents for the Student that had been translated into Spanish. The District did provide copies of October 2013 and November 2013 letters to the Student's parents, in English and also translated to Spanish. These letters were sent to help get the Student re-enrolled in school after he was not allowed to return to School 1 in August 2013.

⁵¹ According to CDE data, an even greater portion of the District's students came from homes where the primary language was not English in 2013-2014, as 17,460 students, or 65.9% of the District's enrollment, were either English Learners or Fluent English Proficient (FEP) students, 9,594 (33.2%) of whom came from homes where Spanish was spoken.

⁵² X---paragraph redacted---X.

Analysis

Although a high proportion of the District's student population had parents or guardians who spoke a primary language other than English in 2013-2014 and the other years reviewed by OCR, the District has no Board Policies regarding oral interpretation for LEP parents or guardians, and no District-wide procedures to implement its policy regarding written translations (BP 5020). The District provided little to no guidance to school sites regarding written translation and oral interpretation. In addition, although OCR requested discipline and other documents, including suspension forms, regarding the Student that were translated into Spanish, the District was unable to provide any such translated discipline document. The District did not assert to OCR at any time during the investigation, that such documents had been provided in Spanish to the Student or his parents, although some such documents were provided in English.

In addition, the District did not provide OCR with any documents that were translated to Spanish, regarding the disciplinary transfer of the Student. The only translated information the District provided to OCR were two letters sent after the Student obtained an attorney and after the Student was not allowed to return to his home school. As discussed above, the parent also alleged that the District did not otherwise provide her equal access to this critical information about her son's education; she stated that in at least some meetings held about the suspension and transfers, her son had to interpret because an interpreter was not provided by the District. Various documents the District provided did not indicate whether an interpreter was provided in meetings with the parent/guardian regarding the Student.

The evidence described above, including the lack of established District policies regarding translation and interpretation and the District's inability to provide translated discipline documents for the Student, raised concerns as to whether the District provided a meaningful opportunity to participate in important school-related matters by not providing important educational discipline information that is provided to English-speaking parents, in a language the parent could understand. To make a compliance determination regarding this allegation, OCR would need to conduct additional interviews and review additional documentation to determine what discipline information was provided to English speaking parents, as compared to the discipline information that was provided to the Student's mother in Spanish, including the extent to which meaningful oral interpretation regarding the Student's discipline was provided. However, OCR also did not complete the investigation of this issue, prior to the District's request to enter into an Agreement to resolve OCR's concerns. As such, OCR did not reach a compliance determination with respect to this allegation.

Conclusion

The District has entered into the enclosed Agreement with OCR, which is intended to address the compliance concerns identified herein. Pursuant to the Agreement the District will, among other things: 1) establish school climate oversight responsibilities among its administrative team; 2) engage a Stakeholder Equity Committee on school discipline matters; 3) conduct a root causes analysis regarding race/national origin and school discipline and develop a corresponding corrective action plan; 4) revise various policies and procedures; 5) continue to develop school-wide tiered supports and a range of interventions to support students; 6) regularly provide parent/guardian information sessions and staff training regarding school discipline; 7) collect and analyze and publish school discipline data; 8) provide training to law enforcement on campus to ensure nondiscriminatory administration of discipline; 9) annually administer a climate survey; 10) develop Board Policies and Administrative Regulations regarding translation and interpretation of important educational information for LEP parents/guardians; and, 11) individual remedies for the Student.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently.

This letter sets forth OCR's determination in 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.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. 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, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR would like to thank the District for its cooperation in resolving this case. If you have any questions regarding this letter, please contact OCR attorney Brian Lambert, at 415-486-5524 or Brian.Lambert@ed.gov.

Sincerely,

/s/

Brian Lambert
Acting Team Leader

cc: Glenn Vander Zee, Associate Superintendent of Educational Services (via email)