

# **School Discipline and Disparate Impact**

**A Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, DC**

**Briefing Report**

## Letter of Transmittal

The President  
The President of the Senate  
The Speaker of the House

Sirs:

The United States Commission on Civil Rights (“Commission”) is pleased to transmit this report, *School Discipline and Disparate Impact*. The report is drawn from a briefing that the Commission held on February 11, 2011 that examined the effect that the U.S. Department of Education’s Fall 2010 Disparate Impact initiative has had on schools and school districts across the country. This federal initiative was implemented to look at differences in discipline outcomes between students of color and other similarly-situated students. The initiative’s aim is to identify whether the application of exclusionary discipline policies has had a disparate impact on students of color. During the briefing the panelists, teachers and administrators from racially diverse public school districts described how their particular schools have responded to this initiative. The Commission inquired as to whether the schools have changed their policies and practices and what those changes have been. In addition, the Commission inquired into whether school districts maintain comprehensive data that allows them to track the effectiveness of their discipline policies; whether teachers are appropriately trained to implement these policies; and what other methods are being used by districts to evaluate the effectiveness of their policies. Finally, the U.S. Department of Education provided background information on its disparate impact initiative and how the disparate impact theory is being implemented in its enforcement work.

The briefing identified a common theme among most of the teachers. This is that disciplinary problems can be greatly reduced through individualized instruction based on the student’s capabilities, cultural sensitivity or competency, parental involvement and support, and effective school leadership. School administrators indicated that disciplinary problems could be reduced through consistent application of a transparent and uniform school-wide disciplinary policy. Many of the school administrators also indicated that they had successfully reduced discipline disparities and overall expulsions through the adoption of nationally-tested behavior management programs.

This report was unanimously approved on October 21, 2011 by Chairman Martin R. Castro, Vice Chair Abigail Thernstrom, and Commissioners Roberta Achtenberg, Todd Gaziano, Gail Heriot, Peter Kirsanow, David Kladney, and Michael Yaki.

For the Commission,

A handwritten signature in black ink, appearing to read "Martin R. Castro", with a long, sweeping flourish extending to the right.

Martin R. Castro  
Chairman



## Table of Contents

|  |     |
|--|-----|
| Executive Summary .....  | 1   |
| Summary of Proceedings .....   | 3   |
| Panel 1. Teachers .....  | 3   |
| Allen Zollman .....  | 3   |
| Andrea Smith .....   | 3   |
| Jamie Frank.....   | 4   |
| Louise Seng.....   | 4   |
| Patrick Welsh.....   | 5   |
| Discussion.....  | 5   |
| Panel 2. School Administrators.....  | 9   |
| Suzanne Maxey.....   | 9   |
| Osvaldo Piedra.....  | 9   |
| Joseph Oliveri.....  | 10  |
| Edward Gonzalez.....   | 10  |
| Discussion.....  | 11  |
| Panel 3. U.S. Department of Education Official and School Administrators.....  | 15  |
| Ricardo Soto.....  | 15  |
| Hardy Murphy.....  | 16  |
| Hertica Martin.....  | 17  |
| Douglas Wright.....  | 17  |
| Discussion.....  | 18  |
| Speakers' Written Statements.....  | 23  |
| Panel 1 – Teachers .....   | 23  |
| Panel 2 – School Administrators.....   | 31  |
| Panel 3 – U.S. Department of Education Official and School Administrators..... | 53  |
| Summary of Law and Background Materials .....                                  | 72  |
| Commissioner Statements.....   | 78  |
| Speaker Biographies .....  | 122 |
| Appendix A.....  | 128 |
| Summary of Public Comment.....   | 128 |
| Public Comment Letters .....   | 129 |
| Appendix B.....  | 139 |

|  |     |
|--|-----|
| USCCR Letter to Schools .....          | 139 |
| School District Response Letters ..... | 141 |

## **Executive Summary**

The Commission held a briefing entitled, “School Discipline and Disparate Impact” on February 11, 2011 to examine the effect of the U.S. Department of Education’s disparate impact initiative announced in the fall of 2010 for schools and school districts across the country. The Commission asked teachers and administrators from racially diverse public school districts how they have responded to the new initiative; specifically, whether their teachers and administrators have changed their policies and practices as a result, and what those changes were. The Commission was interested also in whether the districts kept statistics to track the effectiveness of policies; how they train their teachers in implementing discipline policies; and what other means the districts used to evaluate whether their policies worked.

The Commission asked the U.S. Department of Education (ED or Department) to describe its disparate impact initiative and supply case documents indicating the manner in which the Department implemented disparate impact theory in its enforcement work. The Department’s civil rights enforcement unit, the Office for Civil Rights (OCR), provided documents relating only to closed cases, which showed investigations that proceeded to resolution based initially on a disparate impact theory. The Department’s policy as stated during the briefing is that statistically disparate results create a presumption of discrimination that must be rebutted by the school or district with evidence that the school or district has a legitimate educational justification and that there are no equally effective alternative policies that would achieve the school’s educational goals. The Department indicated that it would continue to use disparate impact theory in its investigations, including those currently open, in addition to disparate treatment theory.

Teachers appearing before the Commission were Mr. Allen Zollman, Ms. Andrea Smith, Ms. Jamie Frank, Mrs. Louise Seng, and Mr. Patrick Welsh. Administrators appearing before the Commission were Ms. Suzanne Maxey, Principal at TC Williams High School in Alexandria City, Virginia; Dr. Osvaldo Piedra, Assistant Principal, East Lake High School, Pinellas County, Florida; Mr. Joseph Oliveri, Retired Director of Alternative Schools for the Austin Independent School District, Texas; Mr. Edward Gonzalez, Associate Superintendent, Department of Prevention and Intervention, Fresno Unified School District, Fresno County, California; Dr. Hardy Murphy, Superintendent, Evanston/Skokie District 65, Cook County, Illinois; Dr. Hertica Martin, Executive Director for Elementary and Secondary Education, Rochester Public Schools, Olmstead County, Minnesota; and Dr. Douglas Wright, Superintendent, San Juan School District, Blanding, Utah. Mr. Ricardo Soto, Principal Deputy Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, appeared for the Department.

Points of agreement among most of the teachers were that disciplinary problems were greatly reduced among all students by attention to appropriate levels of difficulty in instructional materials, sensitivity to individual students and their backgrounds, parental involvement and support, and effective leadership by a school principal. Most, but not all of the teachers

reported no effort by school administrators to interfere with classroom discipline, but some reported onerous procedural and paperwork burdens before any disruptive student could be removed from class.

Points of agreement among the school administrators were the importance of the following: telling students what the rules are; why the school has those rules, what the consequences are for violating those rules, and being consistent in applying the rules. Also effective in their view was maintaining an approach that sought ways to change the school to better meet the needs of the students, rather than inflexibly following a pre-set view or imposing zero-tolerance rules that students knew produced unfair results; training teachers in understanding different cultures and personalities; devising special programs for behaviorally high-risk students; instituting parent engagement and education programs; and/or adopting one of several nationally-tested behavior management programs that had reduced disparities and overall expulsions in other districts.

Two of the speakers (Dr. Wright, San Juan, Utah and Dr. Martin, Rochester, Minnesota) were administrators from districts currently under investigation by the U.S. Department of Education's Office for Civil Rights for possible violations under the new discipline initiative. Dr. Wright's district uses nationally-tested behavioral support programs mentioned by other speakers, expanded the role for guidance counselors, and instituted a student support system; Dr. Martin's district uses some of the same techniques and nationally-tested programs discussed in the briefing.

Mr. Soto of the U.S. Department of Education's Office for Civil Rights (OCR) provided an overview the office's work and mission, which is to ensure equal access to education through vigorous enforcement of civil rights. Mr. Soto stated that OCR's disparate impact initiative stemmed from data showing a sharp increase in the numbers of students nationwide who were suspended or expelled, which OCR views as an indication of possible violations of Title VI of the Civil Rights Act of 1964 and addresses using both disparate treatment and disparate impact theories.

## **Summary of Proceedings**

### ***Panel 1. Teachers***

#### **Allen Zollman**

Mr. Zollman teaches English as a second language in an urban school to students in fifth through eighth grades, and also remedial reading and math courses. The student body is multi-ethnic.

He described his teaching methods developed over the years that blend instruction and pacing, and have reduced disciplinary problems in his classes. He remarked that accurate pacing and attention to the appropriate difficulty level of instructional material result in many fewer behavior problems, many of which result from boredom with already-learned material or frustration at being presented with material that is too difficult. He testified that he has never been told to take into account disparate impact on racial groups in his disciplinary referrals, but if he were, he would have three choices: one, to disregard the directive; two, to comply and live with the resulting chaos; or three, to stop teaching in a public school.

Mr. Zollman stated that on those occasions calling for a student's removal from his class (termed a "referral"), the school's disciplinary procedures require that a teacher fill out a two-page form to document the offenses and even so, do not allow removal until the third infraction. Mr. Zollman testified that on those occasions such procedures resulted in extended disruptions, particularly since those students (regardless of ethnicity) know of such policies, take advantage of them to continue their disruptions, and sometimes encourage students to join in the disruptions who would not otherwise do so. He read aloud excerpts of interactions that he has set down in writing with students who know well that they may not be removed immediately. The result on those occasions, according to Mr. Zollman, is that 29 other children (the remainder of the class) are prevented from learning, which he believed had the greater disparate impact.

#### **Andrea Smith**

Ms. Smith is a sixth-grade mathematics teacher at E.L. Haynes Public Charter School in Washington, D.C., which has 600 students in grades Pre-Kindergarten through 8<sup>th</sup> grade. The student body is 54 percent black, 25 percent Hispanic, 18 percent white, and 3 percent Asian. 62 percent of the students qualify for free or reduced lunch under federal guidelines, and 21 percent are English-language learners.

She told the Commission that data drawn from the school showed that black males and also special-needs students were disproportionately suspended, but that suspension was not effective in eliciting better behavior since the same students were repeatedly suspended. The



school developed a tracking system that gave the teachers suspension data from their classes on a weekly basis to help get at the causes of disciplinary problems, and developed a program called “relational trust” to help students understand that their teachers are being fair when they hold them to high standards in a caring way. The school staff has also participated in race and equity in education seminars to discuss racial inequities in the school, and to help the teachers confront any inequities in teaching and school structure.

Ms. Smith related her work experience at other schools, choosing in one case to leave a tight-discipline school where student/teacher/parent relationships were strained by race, and in another leaving a school with lax discipline. Although she had not formed conclusions as to solutions, she did not believe that discipline problems were the result of single-parent families or deeply ingrained behavior characteristics of any particular student.

### **Jamie Frank**

Ms. Frank has been a teacher in public schools with widely differing economic and racial characteristics in suburban Washington, D.C. for 11 years, ranging from 80 percent minority schools to affluent school districts where over 80 percent of school parents were college graduates. She related the pressure that she believes that teachers now experience to focus on categories of students targeted as needing attention by laws such as the No Child Left Behind Act, which sets up adequate yearly progress (AYP) standards for all students, but separates them under major racial/ethnic headings for reporting purposes.

Her view was that this pressure affected discipline policies as well, and that in some school districts teachers were ordered to reduce racially-disparate suspensions in spite of threatening behaviors toward teachers involving weapons. For example, in her school teachers were ordered to substitute a day of “exclusion” at home for what otherwise would have been a suspension. Her view was that the schools felt pressured to pass some minority students through high school regardless of how many days they did not appear for classes to keep graduation numbers high for each racial group. She testified that reduced disciplinary standards for some minority students stemmed from policies that prevented removals from school and substituted “in-school intervention” that did not have to be reported as suspensions.

Ms. Frank stated that she believes the causes of behavior infractions are socioeconomic, not race-based, and include the failure of some students’ parents to support them in school endeavors.

### **Louise Seng**

Mrs. Seng taught for 34 years in an inner city school in Allentown, Pennsylvania, whose approximately 900 students in grades six, seven and eight were comprised of approximately 90 percent minorities, of which half were Hispanic.

Mrs. Seng stated her commitment to racial equality and also her belief that her colleagues in the school felt the same. Because of this commitment, she and her colleagues had stayed at the school in preference to accepting jobs in wealthier schools. Her view was that racial and ethnic minority students at her school were disciplined more frequently because they often came from families that had not taught the sort of self-control necessary to thrive in school, and moreover, where it was considered acceptable to solve problems with violence both at home and at school. Some of these students lacked basic necessities such as regular bedtimes, adequate sleep and nutritious meals, and either fell asleep in class or had trouble sitting still. To address this, Mrs. Seng helped run a conflict resolution program that she believed was successful in reducing disruptions. She stated that she was never asked by a school administrator to reduce disparities in discipline rates across racial groups, but that such a demand would have made it even harder for all students to learn, an unfortunate outcome.

### **Patrick Welsh**

Mr. Welsh has taught English at T.C. Williams High School in Alexandria, Virginia since 1970, published a book, *Tales Out of School*, and written frequently on education and youth culture for the Washington Post, USA Today, and the New York Times. He acknowledged the controversial nature of discipline as it interacts with race, but gave his view that certain students, chiefly African-Americans who bear the legacy of discrimination and are children of unmarried teenage mothers, caused disproportionate amounts of disciplinary trouble in his school. He pointed out that race was less an issue than what he termed an inter-generational cycle of dysfunction involving poverty, unwed teen pregnancy, and absent fathers.

Mr. Welsh explained that the number of discipline violations in his school has varied a great deal over the years depending largely on the skill of the principal. He stated that the solution lies not in civil rights lawsuits, but in interventions by principals and teachers who are good at dealing with students. He noted that his new school principal, Suzanne Maxey, who was also a speaker at this briefing, has been successful in reducing disciplinary infractions through her skill in dealing with students and her visibility throughout the school. By contrast and prior to her tenure, there were two different principals over four years during which there were frequent hallway fights that the unsuccessful principals avoided witnessing, with predictable results.

His view is that even with reductions in disciplinary referrals, certain African-American students will be disproportionate among that group due to the cycle of dysfunction in their lives. He added that white administrators who want to move up the career ranks play it safe by not disciplining adequately, which often results in white parents' removal of their children from those schools. Mr. Welsh believes the unfortunate result of the failure to discipline is that kids who pay the price of chaotic schools are mostly black.

### **Discussion**

Commissioner Kirsanow asked if disciplinary problems had increased over the last 25-30 years, and if so, to what did the panelists attribute the increase?

Mr. Welsh replied that disciplinary problems had ebbed and flowed depending on the principal, since some principals has been afraid to confront them, and also he thought that students were often distracted by their cell phones.

Commissioner Kirsanow then asked the panelists whether the disparity in discipline rates was a result of racial discrimination or actually merited, and also whether Asian students presented similar disciplinary problems relative to other minority students.

Ms. Frank responded that in one of her schools, Vietnamese students clashed with Guatemalan gang members, but where there was a strong administrator conflicts were not brought inside the school. Weak administrators, on the other hand, were afraid of disparity in discipline rates being publicized in the Washington Post and declined to impose appropriate discipline.

Mrs. Seng responded that in her experience, the discipline in her school was merited, and as for discipline rates of other ethnic groups such as Asians, her view was that regardless of ethnicity or race, children of new immigrants were not as frequently disciplined because they came from families that worked hard and expected a lot from their children.

Commissioner Kirsanow asked the panelists what they thought would be the result of pressure to relax disciplinary standards. Mrs. Seng and Mr. Welsh answered that it would be negative. No panelists disagreed.

Commissioner Gaziano asked whether boys or girls were the most disruptive. Three panelists thought girls were significantly more disruptive (Welsh, Seng and Frank).

Commissioner Castro asked whether the panelists had information on harsher punishment of minorities as compared with white students for the same offense. Ms. Frank responded that in fact, African-American students were treated more leniently with respect to truancy so the school could avoid having to report disparities. Commissioner Castro then asked if the panelists could determine whether a particular teacher or administrator was acting based on racial discrimination. Mr. Welsh said he did not feel that he could, since in his experience, some teachers simply did not know how to handle hyper-masculine black students and unintentionally made things worse.

Commissioner Castro asked about “relational trust” that Ms. Smith had recounted. She answered that like Mr. Welsh, she could not tell if a teacher was discriminatory, but that some teachers were more successful with students of different races, a response echoed by Mr. Zollman.

Commissioner Titus acknowledged the difficulties teachers face, and although disagreeing with some of the statements by panelists, asked whether they had substantive policy suggestions. Mrs. Seng suggested sending in researchers as substitute teachers for a week to see for themselves what was happening. Mr. Welsh doubted that merely a bureaucratic memo or teacher training could provide a solution. His response was that the curative process was already going on, and involved continuously trying to find the best principals, better teachers,

and invited Commissioner Titus to substitute-teach in his school. Commissioner Titus responded that she would be glad to come to the classroom, but wanted insights into how to fix a systemic problem. Ms. Smith said that teacher training would be part of the solution, since she had entered the teaching profession through the Teach for America program that did not prepare her adequately. Mrs. Seng said that perhaps the effort should be directed specifically to a local school district, since each area had different problems and one solution would be unlikely to benefit all.

Commissioner Heriot asked for specific information, such as that given by Mr. Zollman, as to what their procedures were for disciplining students; and Vice Chair Thernstrom added a question asking to what degree they were confined by legal restrictions.

Ms. Frank said that in her school the administrators were told to reduce their suspension numbers. As a result, they developed a euphemism --“in-school exclusion or intervention” -- which allowed the school to avoid reporting the data as suspensions. In addition, the teachers had to fill out a form that required contacting a parent three times before disciplinary action was possible, and that usually a minority student simply reappeared in school even if parents did not respond. Student of parents who communicated with the school were more likely to receive merely lunch detention.

Commissioner Kirsanow asked what the effect of retaining disruptive students was on the learning experience, and Ms. Frank stated that it was “horrible.” She said that a lax discipline policy meant that the usual punishment/reward system would not work, regardless of race. Students with involved parents, on the other hand, usually made better decisions, again, regardless of race.

Mr. Zollman added that his students tell him that they like the detentions, because they are a haven of tranquility insulated from the mayhem in the school. Mrs. Seng agreed.

Commissioner Achtenberg observed that any indication of racial prejudice on the part of schools or teachers would necessitate remedies. Mr. Zollman asked how such prejudice would be measured, which Commissioner Achtenberg agreed was the difficulty in this area, and one which the Department of Education was attempting to refine, perhaps inartfully. She also observed that she would like to hear from scholars and other experts on this topic.

Vice Chair Thernstrom asked panelists to address Commissioner Kirsanow’s question about any disparities in discipline between Asians and African-Americans or Latinos, whether current laws impeded effective discipline, and the particular disciplinary problems of students from chaotic home environments thwarting effective school remedies. Ms. Frank answered that programs such as the KIPP boarding schools were very successful, but were not replicable in large numbers. She also said that college-ready academic achievement and disciplinary problems were connected, and it did not make sense to force all students onto the same college path when technical or vocational programs might engage certain students more. She suggested that students might find being paid for achieving high grades an incentive. Vice Chair Thernstrom observed that panelists had not clarified what exactly

constituted disciplinary problems. Several panelists stated that disciplinary problems were defined as major disruptions, not minor infractions such as eating in class.

\*\*\*

## ***Panel 2. School Administrators***

### **Suzanne Maxey**

Ms. Maxey is the principal of T.C. Williams High School in Alexandria City, Virginia, and won the Washington Post Distinguished Educational Leadership Award for Montgomery County Public Schools. Ms. Maxey was also a teacher for fourteen years and a principal in four schools in two states and three jurisdictions. She referred to her experience in widely different educational and disciplinary systems as a basis for her comment that the formula for successful discipline has not changed. She tells students 1) what the rules are, 2) why the school has those rules, 3) what the consequences are for violating those rules; and requires her administrators and teachers to be consistent in applying this formula.

Ms. Maxey distinguished certain violations of school rules that administrators have no choice but to enforce, which include drugs, alcohol, weapons, and fighting. She then described a very large category, chiefly insubordination, which she considered discretionary. Ms. Maxey described an example of effective but humane discipline that occurred in her school involving a student from a low-income family who became disruptive in class because his week's lunch money had been stolen. The student was removed from his classroom by the teacher, but upon discovering the basis for his behavior, Ms. Maxey gave him \$20 of her own money (teachers often do this, she said), took him back to his teacher, and explained what had happened. He apologized to the teacher, and was readmitted to class.

Ms. Maxey concluded her comments by noting that sometimes teachers do not cooperate with humane discipline, or sometimes the infraction is so serious that it cannot be ignored, but good teachers and administrators do impose discipline humanely.

### **Oswaldo Piedra**

Dr. Oswaldo Piedra has taught for over twenty years in public elementary, middle and high school, and is an assistant principal with East Lake High School in Pinellas County, Florida. Dr. Piedra presented slides showing discipline policy development processes and also discipline discrepancy statistics for his school. (His slides are included in his written statement.)

Dr. Piedra's slides displayed discipline disparity statistics that he stated were similar to national-level statistics. These showed that Hispanics, African Americans, males generally, and low-SES (socio-economic-status) students were referred (removed) disproportionately compared to the general student body.

He stated that a desegregation lawsuit filed against his county in 1964 resulted in a court order lifted in the year 2000 when the district achieved unitary status, and that the school has attempted to close the achievement and discipline gaps between racial and ethnic groups. To reach these goals, Pinellas County has developed, in conjunction with the University of

South Florida, a behavior intervention system called “Problem Solving and Response to Intervention” that informs students ahead of time what is expected of them, and teaches them models of expected behavior. To assist with this program, the school has computer tracking systems to determine attendance, tardy attendance, grades and related indicia, so that appropriate services are targeted to students who need them.

Dr. Piedra stated that his school had successfully implemented a system that shifted its approach to determining what in the school was not meeting the needs of students, instead of finding which students were not complying with existing school requirements.

## **Joseph Oliveri**

Mr. Joseph Oliveri is the former principal of the Alternative Learning Center and Director of Alternative Education for the Austin Independent School District (AISD), serving students in grades K-12, and co-chair of the Joint City of Austin/AISD Steering Committee on Gang Activity.

Mr. Oliveri described his 11-year experience as head of six to nine schools (the exact number varying with the year) to which students were removed, and stated that AISD has removed African-American students at a rate greater than their representation in the total school population, although the disparity has decreased over the years. The same disparity was present for Hispanics, although less so; whites and Asians were removed at a rate lower than their representation in the student population (the removal rate for Asians was far below). Mr. Oliveri recommended that Commissioners review a 2010 report entitled, “Texas’ School-to-Prison Pipeline: School Expulsion: The Path from Lockout to Dropout”<sup>1</sup> which found disproportionate minority representation.

Mr. Oliveri told the Commissioners that the disparities were the result in some cases of prejudice, in others, ignorance of cultural differences, zero-tolerance rules inequitably applied between races, and removal for -- in his view -- minor infractions such as skipping classes or truancy. He also stated that disparities in academic skills go with discipline infractions, and recommended that potential solutions include using community resources such as mental health and social service agencies, better teacher training, character education, and use of programs such as Positive Behavior Support mentioned by other panelists.

## **Edward Gonzalez**

Mr. Gonzalez is Associate Superintendent in charge of the Department of Prevention and Intervention for the Fresno Unified School District, the 4<sup>th</sup> largest school district in California. He is a five-time recipient of the *Who’s Who Among America’s Teachers* honor, and was chosen as the inaugural *National School Administrator of the Year* by the School Library Journal in 2003.

---

<sup>1</sup> [http://www.texasappleseed.net/index.php?option=com\\_docman&task=doc\\_download&gid=380&Itemid](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=380&Itemid) (accessed April 19, 2011).

Mr. Gonzalez presented his own research findings that looked at six disproportionately disciplined subgroups in the Fresno District, which he stated has the highest concentration of poverty in the country. In Fresno schools, African-Americans were referred for expulsion at a rate three times their population numbers, as were special education, foster care, male and middle school students. (Mr. Gonzalez's slides are appended to his written submitted statement). His slides showed that disparities had somewhat lessened for blacks, special education, and male students, but rates for foster-care and middle school students had risen. Middle school students in particular had difficulty adjusting to a new school with a teaching structure consisting of many different teachers over a school day in place of just one, resulting in a middle school discipline rate of 40 percent of all expulsion referrals.

He described a class he had instituted, called the Men's Alliance for behaviorally high-risk students (mainly African-American and Hispanic), that has reduced the number and length of suspensions considerably, currently down 45 percent for number of suspensions. He is planning to expand the program to more schools because of its success. By requiring teachers to conform to procedural requirements, the school has reduced the number of expulsion referrals by 20 percent and actual expulsions by 40 percent. Mr. Gonzalez also drew attention to the disparately low percentages of Hispanics and African-Americans placed in gifted and talented classes (fewer than 2.5 percent).

As did Ms. Maxey, Mr. Gonzalez emphasized the importance of developing personal relationships with students. He implements this by talking individually with students in school; by visiting the barrio, housing projects and alternative placement schools; and by recognition of students as individuals whether he sees them in school or in their homes.

## **Discussion**

Commissioner (now Chairman) Castro asked for Latino expulsion statistics. Mr. Gonzalez said that Latinos make up about 63 percent of the district, but have lower referral rates of 58 percent. He added that if African-Americans were removed from the totals, Latinos would make up a disproportionately high portion of referrals. Commissioner Castro asked Mr. Gonzalez to comment on a National Council of La Raza report on disparities in incarceration that showed that Latino youth in the prison system are punished more harshly than white students, and also an earlier report by the Campaign for Youth Justice showing the same results for African-American youth. Mr. Oliveri agreed with Commissioner Castro that patterns in this country have not changed, and that we need to learn more in order to have a better understanding of other cultures and expectations.

Ms. Maxey added that school expectations of good behavior were skewed in favor of what was easy for girls, so that boys or students who were more physically active had a hard time conforming. Also, she agreed with studies showing that personal relationships are much more important for Latino and African American students, and that some teachers were unable to adjust to this. Dr. Piedra stated that cultural and language differences of minority parents resulted in their failure to understand and take advantage of the appeal process after the imposition of discipline, and in their difficulties resulting from the absence of bilingual



administrators or bilingual translations. Also problematic for such parents were the inconvenient hours during which administrators are available.

Commissioner Castro asked whether any of the panelists could offer effective discipline alternatives that did not have a racially adverse impact. Mr. Gonzalez stated that it was very important to understand students' cultures, which would require teacher training and recruitment of teachers of color. Ms. Maxey pointed out as an example of differences that non-white parents did not write excuses for student absences, for reasons perhaps relating to comprehension or multiple jobs. Mr. Oliveri said that existing policies were the best that could be devised and that over time the numbers would improve.

Commissioner Kirsanow asked Ms. Maxey to expand on her remarks. She stated that the disparities were a result of black and Hispanic kids being more physically active, needing more personal interaction with teachers, having dysfunctional families, and even trying to function when they knew their parents were illegally in this country and had no social security numbers that would allow them to go to community colleges. Commissioner Kirsanow followed up his question by asking how she explained the good behavior of kids who had the same negative influences. She observed that in those circumstances there was usually a factor such as a strong mother or father in the home who did make the effort to meet with administrators or teachers, or even teachers who informally took responsibility for kids by buying their clothes and lunches. For example, she said her football coach provides his kids free breakfasts in addition to the federal lunch program; coaches them after school; cooks them dinner and oversees a study hall until 8 pm. That approach has generally resulted in higher grades among his students.

Commissioner Kirsanow asked if there were statistics on differences in discipline handed out by teachers to students of a race different from that of the teacher. Mr. Gonzalez replied that he had not seen such data; Ms. Maxey and Dr. Piedra both said they had. Dr. Piedra stated that data from his school showed that white teachers were likelier to impose discipline for offenses that minority teachers would not punish. Ms. Maxey disagreed that it was clear-cut as to race, instead observing that it was more likely due to the age of the teachers, or whether they had been trained in European school traditions [that expected obedience to teachers]. Mr. Gonzalez stated that there were many factors that should be considered as leading to the dysfunction that he witnessed -- many of them historical, such as the legacy of slavery and discrimination.

Commissioner Heriot asked whether the panelists make it a practice to investigate the facts before making a decision by speaking to a teacher who has recommended discipline. Ms. Maxey replied that, ideally, she would do so in addition to speaking with the parents and the student. Time pressures, however, sometimes prevented it, often with unfortunate results.

Commissioner Heriot asked Mr. Oliveri how he determined that a teacher was meting out discipline inappropriately by race. Mr. Oliveri answered that he did as much investigating as he could, and counseled the teacher if necessary. He noted that after adoption of the behavior support program, they had a systematic way to help teachers work with diverse populations. Commissioner Heriot asked how to find such data; Dr. Piedra answered that his school

district housed that information in a central database. Ms. Maxey responded that they did not keep such data. Mr. Gonzalez offered two suggestions for obtaining data: Dr. Robert Horner at the University of Oregon who has developed the School-Wide Information System, and Randy Sprick who developed “Safe and Civil Schools Training” at [www.safeanddrugfreeschools.org](http://www.safeanddrugfreeschools.org). Mr. Oliveri stated that his school district, Austin Independent School District, also uses the Safe and Civil Schools Training.

Commissioner Titus referred to panelist comments about mental health services and the DREAM<sup>2</sup> Act as important, and asked about how schools are helping special-needs students, whose challenges are different from some of the problems addressed so far. Mr. Gonzalez answered that special education students in some districts are 90 percent male, and African American special education students are particularly numerous in disciplinary actions. Ms. Maxey stated that from the point of view of a special education student, school is particularly difficult in that it forces them to do what they are not easily able to do. Mr. Gonzalez responded that alternate options such as wood shop, metal shop, engines and other such classes have been removed because of high-stakes testing, resulting in charter schools’ emergence to provide such classes. In his district, they have lost 11,000 students in the last eight years, in his view, because of the lack of viable options.

Ms. Maxey observed that the No Child Left Behind law has forced schools to address every subgroup of students, which is good, but has damaged the elective programs, such as vocational programs that do not figure into preparation for standardized tests. She stated that there are specialized vocational schools, but in her experience, kids do not want to leave their friends behind. Dr. Piedra agreed that electives had been negatively affected by the law.

Commissioner Gaziano began his questioning by observing that the impact of not enough discipline meant that education was disrupted, and asked if there was some way to measure such disruption. Ms. Maxey responded that the result was measured in fights breaking out, not data. Mr. Gonzalez stated that another way of measuring is to look at declining enrollment. Commissioner Gaziano observed that the decline might be for other reasons. Ms. Maxey stated that in her view, education is an art, not a science, and that good teachers and administrators should be used as models for others. She also pointed out that at her school the administrators are balanced by race, sex and age, which was important.

Commissioner Achtenberg posed a hypothetical in which data showed punishment of black students at disproportionately high levels, whereas white students were treated more leniently. In that situation, she asked how panelists would change their discipline practices. Ms. Maxey replied that she would talk individually to the teacher responsible for the disparity. Mr. Oliveri said that he would first observe the class and then point out to a teacher that he or she dealt with students differently by race.

Vice Chair Thernstrom observed that there was data on black teachers versus white teachers’ discipline practices that showed that black teachers are even tougher on black kids than white teachers are. Also, the Vice Chair said that too many principals stay behind closed doors

---

<sup>2</sup> See [http://durbin.senate.gov/public/index.cfm/files/serve?File\\_id=d15181fd-e37b-4ad6-9ca3-c5b2850c140c](http://durbin.senate.gov/public/index.cfm/files/serve?File_id=d15181fd-e37b-4ad6-9ca3-c5b2850c140c) (accessed May 23, 2011).

instead of walking into classrooms and hallways to learn what is going on. She noted that whether or not some kids are more physically active, they will still have to go out into the world to work or go on to higher education where there are expectations about behavior that they will have to meet. For example KIPP schools,<sup>3</sup> although a success, are so demanding of teachers that they are not a model that can be scaled up nationally. Ms. Maxey responded that once she imposed strict discipline about small things, like hats and earphones, she found that major infractions lessened.

\*\*\*

---

<sup>3</sup> See <http://www.kipp.org>. (accessed Sept. 26, 2011).

### ***Panel 3. U.S. Department of Education Official and School Administrators***

#### **Ricardo Soto**

Mr. Ricardo Soto, Principal Deputy Assistant Secretary in the Office for Civil Rights (OCR or OCR/ED) in the Department of Education (ED or Department) told commissioners that he had represented school districts on education issues including discipline policies and student removals before coming to OCR and thus understood schools' point of view. He provided an overview of OCR's work and mission, which is to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights. Although OCR enforces civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, age, and disability, he focused on Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin. Title VI extends to all state education agencies, public K12 schools, public colleges and universities, and vocational, proprietary, and rehabilitation schools or agencies, plus libraries and museums receiving federal funding from the U.S. Department of Education.

OCR investigates and resolves discrimination complaints filed by anyone on behalf of those covered under its civil rights acts, and may also initiate compliance reviews, which involve more than one school, if OCR finds problems that are particularly acute or widespread. OCR also issues policy guidance and technical assistance to schools to promote voluntary compliance. It has twelve regional offices around the country with approximately 600 lawyers, investigators and other staff who have considerable expertise in resolving these issues. He noted that Secretary Duncan gave a speech in March 2010 announcing a reinvigorated OCR that would strive to make Dr. King's dream of a colorblind society a reality.

Mr. Soto related data gathered by OCR/ED showing almost 250,000 more suspended students nationwide than just four years earlier, and a 15 percent rise in expelled students. He stated that OCR viewed these data as an indication of disparate results for minorities that caused harms such as school dropouts, incarceration, and lessened employment and college opportunities. OCR also viewed these data as possibly indicating discrimination in violation of the civil rights laws.

He declined to discuss open cases, but offered an explanation of their legal theories governing OCR's enforcement efforts with regard to student discipline. First, he stated that Title VI requires school disciplinary policies and practices to be consistently applied to students regardless of race. He stated also that OCR's Title VI regulations prohibit both intentional discriminatory treatment on the basis of race, color or national origin and disparate impact results produced by facially neutral practices or policies for which a school cannot show a substantial legitimate educational justification or the absence of equally effective alternative policies.<sup>4</sup> OCR does not require for a finding of discrimination that a

---

<sup>4</sup> Mr. Soto cited 34 C.F.R. Section 100.

school have the intent to discriminate, but that “the evidence establishes that a facially neutral discipline policy, practice, or procedure causes a significant disproportionate racial impact and lacks a substantial legitimate educational justification.”<sup>5</sup>

Mr. Soto explained further by stating that “even if there is a substantial legitimate educational justification, a violation may still be established under disparate impact if the evidence establishes that there are equally effective alternative policies, practices, or procedures that would achieve the school’s educational goals while having a less significant adverse impact.”<sup>6</sup>

He concluded his remarks by stating that the “answer to an equal, unfair, or ineffective student discipline ... is not to abandon discipline”<sup>7</sup> or use a single approach for all schools or students, but to impose discipline in a non-discriminatory manner. He stated that OCR is using all its tools to help bring this about and is committed to ensuring that all students receive the best education possible, but he views the increasing numbers of disciplinary sanctions for subjective offenses as an indication that rules are not imposed fairly.

## **Hardy Murphy**

Dr. Murphy is Superintendent of School District 65, a K-8 district serving approximately 7,000 students in Evanston, Illinois. He described his district as 40 percent white, almost 30 percent African-American, 15 percent Hispanic, and the remainder Asian and others. Of the African-American students, about 75 percent receive free and reduced lunch benefits. Of the Hispanic students, about 80 percent receive free and reduced lunch benefits; virtually no white students receive free or reduced cost lunches.

Dr. Murphy remarked that his district, like many others, faces disparities in educational outcomes but has won many awards for innovative programs that address these disparities. Other achievements are the extension of the school day through the teacher negotiation process, the institution of a behavior management system, programs to keep students in school, parent engagement and education programs, and sensitivity training for faculty and staff.

Dr. Murphy described his new teacher appraisal system that tracks individual student academic growth, and triggers discussions if goals are not met. He does not consider either being on free and reduced lunch or having problems at home extenuating circumstances, for example. He stated that a considerable body of research shows that high expectations are critical for each student, but that teacher understanding of a student’s cultural history helps considerably by looking at each child positively. As a result, children are more likely to see classroom experiences as supportive and caring, rather than alienating, which helps to steer them away from rejection of school and the larger society. Aberrant behavior then becomes a less practical choice for students and disengagement a less desirable choice for their parents.

---

<sup>5</sup> Briefing Transcript at 136, February 11, 2011.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

He concluded by saying that his district has created a program in which students who would otherwise be suspended are invited with their parents to come into school and get a day of counseling with administrators and teachers, and that this program has succeeded in reducing the number of suspensions.

## **Hertica Martin**

Dr. Hertica Martin is Executive Director for Elementary and Secondary Education in Rochester Public Schools, Minnesota. She noted that the Rochester Public School District is one of the five school districts under investigation by the Office for Civil Rights in the Department of Education.

Her schools have been under reform for the last four years, following a report showing an over-representation of African American males expelled from school, as shown in the statistics she provided to the Commission.<sup>8</sup> The statistics also showed that 29 percent of those suspended were students with disabilities and most of those were black males. The district developed a five-year plan to address the disparities, which included initiatives on efficacy, equity, core strengthening, interventions, and positive behavior/intervention supports (PBIS). Other programs include training on the “role of whiteness;” impact of race on learning; “courageous conversations about race;” culturally relevant classrooms; job-embedded coaching; crisis intervention; efficacy for parents, students and staff; and mentorship for students.

She said that PBIS teaches how to promote appropriate behavior in all students to reduce disparities, and that PBIS strategies have resulted in a decrease of 363 suspensions and expulsions over two school years, although disparities remain. The district remains concerned about the disparities. Dr. Martin gave an example of what not to do: singling out misbehaving students for humiliation or exclusion, because it results in an escalation of punishment and denies students the opportunity to learn.

## **Douglas Wright**

Dr. Douglas Wright is Superintendent of Schools for the San Juan School District, Blanding, Utah. His district is also one of five currently under investigation by OCR/ED. He described his district in the southeast corner of Utah as very rural and geographically very large, unlike the other districts represented at the Commission briefing. Due to the approximately 8,000 square-mile-size of his district, it faces unique challenges, such as 2900 students in 12 schools, 52 percent of whom are American Indian chiefly from the Navajo Reservation, but also including students from two other sovereign Indian tribes. All of these tribes govern under individual treaties between each tribe and the United States, adding further administrative complexities. In response, the district has provided training to teachers to help them become more culturally sensitive, has developed a Navajo language curriculum, and

---

<sup>8</sup> Appended to her written statement, below.

helped students to recognize the value of their culture and experiences while fitting into the larger culture as a whole.

His district has put into effect disciplinary policies and practices that address behavior in the least oppressive manner possible to protect students and maintain an effective learning environment. The district uses the PBIS program mentioned by other briefing speakers, and is also implementing the OLWES Bullying Prevention Program, which together with an expanded role for guidance counselors in their elementary schools will address discipline disparities in their system. The hiring of elementary school counselors was the result of receiving a grant from the Department of Education that will not be renewed due to changes in grant application rules. Dr. Wright observed that his district would like to see more money funneled into that program and less into investigations that don't provide direct services to students.

Dr. Wright stated that in general, evidence shows that building a system of support rather than discipline helps students succeed. He remarked that previous speakers had described the role of principal as more of a counselor, which he agreed was more important than disciplinary actions.

In answer to the question posed by the Commission's letter<sup>9</sup> asking how schools had changed their policies in response to OCR/ED disparate impact initiative, he stated that his district reviews its policies and procedures on a regular basis to stay current with best practices and in compliance with changing laws and regulations. Specifically, his district created a hierarchy of disciplinary actions that distinguished serious from less serious offenses while complying with the Safe and Drug-Free Schools and Communities Act of 1994's zero-tolerance policies. The district has also implemented some agreements with the Navajo Nation to provide school resource counselors, although that has at times created problems stemming from harsher discipline.

## **Discussion**

Commissioner Gaziano stated his concern with OCR's interpretation of Title VI as authorizing disparate impact-based enforcement, noting that several justices in *Alexander v. Sandoval* in dicta<sup>10</sup> viewed disparate impact regulations as problematic. Aside from such concerns, however, Commissioner Gaziano stated that OCR could have chosen not to use disparate impact, since such enforcement created a very heavy burden on schools to justify disparities in the absence of evidence of actual discrimination. He posited a hypothetical situation in which fears of OCR enforcement would pressure a teacher to impose less discipline than justified on one group, resulting in unequal treatment of, or intentional discrimination against other students, and asking Mr. Soto how this impact would be measured. Mr. Soto answered that his office did look at racial disparities, but actually conducted both kinds of investigations, meaning different treatment and disparate impact, and on occasion did find disparate treatment in discretionary offenses.

---

<sup>9</sup> The letter is reproduced in the Appendix, below.

<sup>10</sup> *Alexander v. Sandoval*, 532 U.S. 275 at 285, 286 (2001).

Commissioner Gaziano asked specifically what OCR would do if it found that a teacher was not sufficiently disciplining a student because he or she wanted to get racially equivalent results that would placate OCR; Mr. Soto responded that no one was suggesting that discipline should be based on disparate impact theory, just that the district should fairly implement disciplinary policies and procedures, regardless of race, national origin or color. Commissioner Gaziano stated that any disparate impact-based enforcement would trigger a heavy burden on schools. Commissioner Gaziano asserted that Mr. Soto's written statement mandated that a school meet this heavy burden of justifying their disparate results, rather than OCR bearing the burden of showing that the school's actions were in violation of Title VI. The Commissioner stated that OCR's policies in fact created a double burden on schools by requiring not only an affirmative showing that disparities were the result of fair procedures but an affirmative showing that there was no equally effective alternative disciplinary policy that resulted in fewer disparities.

Mr. Soto answered that in OCR's investigations, disparate results data are used to raise the issue of a Title VI violation, but that OCR then examines the data for different treatment, which is typically where it finds a possible violation. At that point OCR again goes back to whether there is disparate impact.

Commissioner Castro referred to the comments questioning the *ultra vires* nature of disparate impact regulations by some justices in the Sandoval majority<sup>11</sup> as nonbinding dicta, with which Commissioner Gaziano agreed. Commissioner Castro then called attention to Mr. Zollman's written statement and oral remarks, which posited a conundrum in which a school had two different disciplinary standards; one in which discipline was imposed entirely based on equitable treatment for those violations involving serious or criminal offenses; the other based on disparate impact data and thus sensitive to the race of the violator for those infractions involving minor offenses. Commissioner Castro asked Mr. Soto if that was what OCR was advocating. Mr. Soto responded emphatically that OCR was not advocating such a policy, but in its investigations did find unequal treatment in the imposition of discipline for lesser, or discretionary violations. In such cases, OCR then attempted to ensure that all procedures available to some students would be available to all students at all times, and entered into resolutions with schools that addressed these concerns. Mr. Soto stated that he applauded the work that other speakers were doing, and acknowledged the sensitivity of the issues.

Commissioner Castro drew attention to a report by the Commission's Florida State Advisory Committee on school discipline that he valued greatly, and recommended that relevant work of the Commission's state advisory committees (SACs) be included in the Commissioners' briefing books in the future. He stated that the Florida SAC report<sup>12</sup> found that there was a pathway to prison in the Duval County schools resulting from suspensions and expulsions that made it more likely that disciplined students, many of whom were African-American, would drop out and be at higher risk of incarceration. Commissioner Castro also noted that the Florida SAC report asserted that school discipline data in that state showed increased

---

<sup>11</sup> The transcript shows the word "dissents" but is likely a typographical error, since the comments were made in the majority opinion in that case.

<sup>12</sup> The report is available from the USCCR's Robert S. Rankin Memorial Library.



disproportion, and also that school behavior codes were written at a comprehension level beyond that of most students. The SAC's recommendations were that the Duval County school board examine the effectiveness of expulsions and zero-tolerance policies, institute initiatives such as Positive Behavior Supports to replace existing programs, and rewrite the school code to make it understandable for students at sixth or seventh grade reading levels. He invited panelists to comment on these proposals.

Dr. Martin said that she had no disagreement with them, but that she recommended examining why students misbehaved at certain times or in certain teachers' classrooms, and whether the misbehavior was due to boredom or being targeted unfairly by a teacher. She also recommended that teachers be prepared to deal with diverse populations and deal with each student individually.

Dr. Wright stated that he agreed that providing social support to students, not just discipline, was key, but that schools needed help from other social service providers. Dr. Murphy agreed, also pointing to the seminal case of *Brown v. Board of Education*<sup>13</sup> as the beginning of racial disparities, such as in special education, and stating that those incarcerated are also disproportionate in disabilities. He praised efforts like the Harlem Children's Zone<sup>14</sup> as models for public education. Commissioner Castro asked that the Florida SAC report be made part of the public record of the briefing and also any other SAC reports that were relevant. He also noted that multiple factors appeared to be causative, including poverty, and asked Dr. Wright to comment.

Dr. Wright answered that poverty was a factor, but in his district (including a portion of the Navajo Reservation) the long distances that some students had to travel to school were also a factor. Other factors included, for example, students sent to live with grandmothers or other relatives unfamiliar with the school system or even students living with parents who had been separated from their own families very early in life in Bureau of Indian Affairs boarding schools. He stated that his district was fortunate in having Navajos comprise 25% of the teaching staff to serve as role models, but more were needed.

Dr. Martin stated that poverty does not affect expectations for learning, pointing to her own experience coming from a single parent home, and that even in schools that had 90 percent poverty levels students learned successfully. She recommended studying the successes of such schools and replicating those strategies. Dr. Martin added that there may be many reasons for misbehavior that have nothing to do with race.

Commissioner Kirsanow noted that Title VI is different from Title VII, remarking that disparate impact theory in Title VII serves to ferret out disguised intentional discrimination that some civil plaintiffs would not have the resources to substantiate through pretrial discovery. He observed that education civil rights enforcement does not need disparate impact theory because both schools and OCR have access to data. He asked Mr. Soto what data OCR currently has showing the effectiveness of OCR's resolutions in this area. Mr. Soto answered that OCR does not have such data, but that OCR monitors a district after entering

---

<sup>13</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>14</sup> See <http://www.hcz.org> (accessed May 17, 2011).

into a resolution agreement to make sure that the agreement addresses the violations OCR found. He reiterated that OCR uses both theories in its investigations under Title VI, but that most cases involve disparate treatment. He added that Assistant Secretary Ali was previously with the Education Trust in California that collects a great deal of data, and intends to improve OCR's data collection to assist in researching these issues.

Commissioner Kirsanow asked Mr. Soto which party to his enforcement proceedings makes the determination as to the nature of the remedy, or whether it was both OCR and the school district. Mr. Soto affirmed that it was both.

Commissioner Achtenberg referred to her own experience running a Title VI compliance group in the fair housing area that used disparate impact theory for help in devising a set of best practices tailored to the individual case. She asked Mr. Soto how OCR devised specific plans in their resolution agreements. Mr. Soto answered that he was very familiar with such plans from his previous work representing school districts in OCR investigations. In his view, such plans permitted the district to offer alternatives to remedies suggested by OCR, and in fact allowed flexibility also at earlier stages of the investigation before OCR invoked a more formal disciplinary process. He added that some districts appreciated OCR's identification of disciplinary practices that needed correction.

Commissioner Achtenberg seconded Commissioner Kirsanow's point about measuring results with data, which in her view would allay unfounded fears about the imposition of political correctness for its own sake.

Commissioner Heriot asked for a description of how OCR conducts its individual case investigations versus compliance reviews of multiple school districts, and whether compliance reviews encompass more than just discipline.

Mr. Soto answered that compliance reviews do not just encompass one issue, and may be brought pursuant to many of the statutes that OCR enforces, such as Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act. Typically, OCR's field offices will look at data that is publicly available, including state websites, and also at OCR's civil rights data collection that is refreshed every two years. Then OCR looks at county-wide or school district databases to determine if there is a concern about the programs and policies of a particular school. Commissioner Heriot asked whether if OCR found something worth investigating after looking at the data it would decide at that point to open a compliance review; Mr. Soto answered that was correct. Commissioner Heriot asked also what OCR's procedures and approval processes were for opening such reviews. Mr. Soto responded that the findings are reviewed in OCR headquarters in Washington, often leading to requests for more information that include the visibility of the issue in the community. Once that information is received, headquarters officials make a decision, and the regional office then takes charge of the investigation.

Commissioner Heriot asked whether a recommendation to open an investigation targeted certain issues such as discipline, or even indicated that discipline was not among the issues to be examined. Mr. Soto answered that targeting was not always done and that although OCR

had opened around 40 compliance reviews, only a very few involved discipline and all are still open. Commissioner Heriot asked how long the compliance reviews usually take; Mr. Soto answered that they can take from several months to years. For example, when Assistant Secretary Ali came to OCR in May 2009 there were several reviews still open from 2007-2008.

Commissioner Heriot asked whether Mr. Soto had furnished the Commission with the identities of those school districts that were being investigated with compliance reviews, since he could not comment on open investigations; he replied that he had done so.<sup>15</sup>

Commissioner Gaziano commented that he might formulate a letter to OCR, with input from fellow commissioners. He asked whether OCR was able to collect data that showed that there was not enough classroom discipline, and how OCR might make such determination based just on data and documents. Mr. Soto answered that he would defer to his fellow panelists' greater classroom experience for comments on that question. Dr. Murphy observed that in his experience, classrooms where there was insufficient discipline would occasion a high number of parent complaints (Vice Chair Thernstrom interjected that only some schools would show this) and second, that absenteeism would increase where students would be afraid to come to school, or if their parents would feel they were unsafe in coming to school.

Commissioner Kirsanow asked Drs. Murphy, Martin and Wright how much of their time was spent on disciplinary problems. Dr. Murphy answered that it was a small amount because most students with difficulties did not present disciplinary challenges. He acknowledged a disproportionate number were African American, but even so were a very small percentage of students. His view was that in his district most students were behaving well. Dr. Martin agreed with Dr. Murphy; Dr. Wright commented that because his district had fewer administrators compared to those of the other panelists he spent between five and ten percent of his time on discipline.

Commissioner Castro asked if language barriers presented a problem for students in understanding the codes of conduct. Dr. Wright agreed that this was a problem in his district, because Navajo was not a written language until recently, and there were family literacy problems with both Navajo and English language announcements the schools sent home with students. Dr. Martin added that her district has bilingual specialists who help with translations. Dr. Murphy's district translates materials and sends out additional notices that identify major infractions that will result in suspensions to help alert parents throughout the year.

Vice Chair Thernstrom then thanked all the panelists for their participation and ended the briefing.

\*\*\*

---

<sup>15</sup> See OCR written statement, below.

## **Speakers' Written Statements**

### ***Panel 1 – Teachers***

#### **Allen Zollman**

**Remarks for the U. S. Commission on Civil Rights  
Hearing on Disparate Impact  
February 11, 2011**

Good morning. My name is Allen Zollman. I teach English as a Second Language (ESL) to students in grades five through eight, in an urban Pennsylvania middle school. My regular classload consists of students from Southeast Asia, West Africa, the Middle East, the West Indies, and Latin America. In addition to that, I also teach two remedial classes per day—in reading and in math—to classes more closely representing a cross-section of the school's population, which is about 74% African-American, 15% Asian, 6% Latino, 3% white, and 2% 'other'. Altogether the school has about 325 students, ages 10-14.

My school district has a general discipline policy spelling out a broad framework. There are also district-level protocols for suspensions and transfers between schools, neither of which I am involved with. Then each school has specific procedures on which the teachers are briefed verbally and in writing. Teachers are told that the primary responsibility for classroom management rests with them, which is normal and reasonable.

For me, discipline does not mean punishment. It means teaching young people to make good decisions. It means creating the conditions where students will receive meaningful consequences for behavior—good or bad. It's a commonsensical notion. We arrive on time, things run on schedule. We damage somebody's property, we make restitution. We show off, we get 'time-out'. On a deeper level, discipline means providing the necessary order and conditions for teaching and learning to be possible.

I seldom need to refer a student out for disciplinary support. This is not because my voice is loud or my personality is forceful. It's not even that I know a lot of classroom management techniques, although I do know a few. It's because generally I am able to keep the students involved in learning with meaningful content and motivating tasks. It also helps that in my role I can often control the difficulty level of the material and the pace of instruction. Under these conditions my own behavior management techniques are usually sufficient for maintaining order. But sometimes a teacher cannot control the pace of instruction, or the difficulty level, or how engaging the material is. For example, some courses are scripted and instruction proceeds in lockstep. For many students, the pace will be too slow and they will

become bored. Or the pace will be too fast or the tasks too difficult, and they will become frustrated.

Some students tolerate boredom or frustration reasonably well, and others do not. When the instructional task is not well-matched to the general performance level of the class, some students may start acting out. But even when the instructional tasks are *on the whole* well-matched to the level of the class, there will unavoidably be a few students at either end for whom the material is a little too easy or a little too hard. And this is where they can get into trouble and make bad choices.

What does it look like when this happens? Pencil tapping, drumming on the desk, humming, calling out, chatting across the room, dancing in one's seat, singing, choral singing, exchanging insults in jest or in earnest, talking back to the teacher, use of profanity, standing up and telling stories to the class, wandering around the classroom handling objects or touching other students, leaning into the hall and addressing passers-by, engaging in horseplay, play-fighting, and real fighting.

When a student disturbs the decorum and instructional progress of a class, is not responding to requests or reminders, or generally has tried a teacher's patience to the limit, the teacher *can* call the office and request help. This is where the school's disciplinary procedures come into play. Before the student can be removed and placed in 'time out', the teacher must prepare a disciplinary referral—what many of us used to call a 'pink slip'. This is a two-page form with space for three offenses—not just one—and a checklist of measures taken by the teacher *before* issuing this referral. These measures include a private conference with the student, a change of seat location, a lunch time or after-school detention, or a phone call to a parent. Sometimes the foregoing strategies are effective, but often they are not. What is important to note here is that in order to get a disciplinary referral for disruption in my school, there must be three infractions and they must be documented in writing **BEFORE** the student can be removed from the classroom.

I should digress and mention that there is a higher level of offense that receives immediate attention from administrators and results in immediate removal of the student from the classroom. Such offenses include possession of a weapon, possession of drugs or alcohol, aggravated assault, and sexual assault. But for mere disruption, it is no simple thing to have a student removed *at the time of the disruptive behavior*. This means that for extended periods of time, it can happen that very little teaching and learning will take place in a given classroom.

Acknowledging that my job is to keep students in the classroom and to teach them, let's suppose that I have recorded infractions of a particular student over time, and have pursued the requisite measures: that is, spoken to the student, changed the student's seat, called the parent—I do not give detentions, they do not seem to improve behavior—and suppose now that I have prepared a written disciplinary referral. Under our rules, that student may now be removed and taken to the room designated for time-out, which we call *in-house suspension*. The student may spend one period or more there, and then return to class. A further step may be a hearing with an administrator, which could lead to an out-of-school suspension. But

suspensions do not seem to occur very often, and when they do, it seems that several teachers had independently issued referrals and it all added up. Officially there is a follow-up process associated with the referral, but in practice I generally do not learn whether a disciplinary hearing took place, or if it did, what actions were taken. So I cannot comment on discipline carried out beyond the classroom. I *can* report that each of the last five principals under whom I have worked has spoken at faculty meetings of being under pressure from district administrators to keep the number of suspensions down.

When I need administrative cooperation, I really do need it. Yet the need to build up a case to refer a misbehaving student and then wait for action at a higher level leaves me dealing with the problem myself for a while or, more often, persuades me to let things continue as they are without issuing a referral, in other words, teach through chaos. Indeed, because of behavior problems, there are times when very little teaching or learning takes place.

In such an environment, students see few meaningful consequences for their actions, so they not only continue to misbehave but the behaviors get more brazen, with more and more students joining in the fun, until even the quote-unquote ‘good’ kids are acting out. They often become cynical, reminding teachers that nothing will happen to them.

Here is an illustrative dialogue between me and an eighth grade girl who would not stop talking over me:

Z: You have two choices: either stop talking or I will have you removed.

Girl: I’m going to torture you. I’m doing this because I can’t be removed. I CAN’T be removed.

The foregoing example contradicts any notion that the student didn’t know what she was doing or ‘didn’t know better’. The following interchange likewise shows self-awareness and deliberateness. A boy and girl were involved in an escalating verbal dispute. (BLANK stands for profanity.)

Z: Tom, if she threatens you, just let me know.

Girl: I just did threaten him. I’m going to smack the BLANK out of him. I’m going to BLANK him up.

They know when they’re being aggressive, when they’re avoiding demands, when they’re showing off. And they know when they’re preventing others from learning. They make these choices—these bad choices. The less we are willing or able to respond, the more they will control the classroom, the hallways, and the school.

The disciplinary framework, which exists to provide back-up support, strongly encourages me to deal with problems at my own level. However I have never been told to make disciplinary referrals with a thought to disparate impact. I am not aware of any change in policy to this effect.

Were I directed to issue discipline referrals to students from different groups proportionally, it would represent an even greater constraint on effective discipline. In such a case, I can foresee one of three avenues to pursue:

A) Disregard the directive, refer students as I saw fit, and see what happens—but it would probably annoy my superiors.

B) Do nothing and live with the chaos, understanding that there would be even more times when little teaching and learning took place.

C) End my public school teaching career early and pursue other activities where there is more control over the work situation.

Ultimately, each instance of misbehavior in the classroom is unique and requires a customized response. It doesn't matter what the ethnicity of the student is—if a child acts out and creates a distraction, the other students will not learn. We are talking about disparate impact. As a teacher, what is the greater disparate impact? When one student can say in effect, "Cave in to my demands or I will shut you down—and there's nothing you can do about it", then 29 other children will be prevented from learning. *That* is the greater disparate impact. Thank you.

Additional comment: suppose we did discipline proportionally by ethnicity. We have reached the maximum allowable number of referrals with group  $x$  for disruptive behaviors. We will have to stop issuing referrals. Shall we likewise stop when we reached the maximum number of referrals for serious offenses, like weapons possession, sexual assault, or physical assault? If we say no—for these offenses there can be no withholding of discipline—then we have two disciplinary standards, one for minor 'disruptive' offenses and another for serious 'criminal' ones. This would be an incoherent policy.

## **Andrea Smith**

I am a sixth grade mathematics teacher at E.L. Haynes Public Charter School located in Northwest Washington, D.C. E.L. Haynes serves 600 students, grades preK-8. Our student body is 54% African-American, 25% Latino, 18% White, and 3% Asian. In addition, 62% of Haynes students qualify for free or reduced lunch and 21% are English Language Learners.

Early on this school year, the teaching staff at my school was presented with disaggregated school wide discipline data. Out-of-school suspension rates for the first quarter of the school year broken down by race were included in the data. Teachers were asked to reflect with their colleagues about what the data revealed. We drew several conclusions from that data in a matter of minutes. First, we were suspending African-American males more than any other subgroup. We were also suspending students with special needs more than other subgroups. This meant as teachers we were referring and sending African-American males and students with special needs out of class more than any other subgroup. Second, we weren't effectively engaging and connecting with all students in a way that resulted in equitable academic outcomes, specifically African American males and special needs students. Finally, suspension was not an effective consequence as evidenced by repeated suspensions. Recently

we have started using a new discipline inputting/tracking system at my school. This new system does allow us to track and disaggregate discipline referrals and consequences on a weekly basis. Using this data, grade level teams can address discipline trends and try to get at the root of what is causing and perpetuating these trends.

I believe part of what is causing the disproportionality in student discipline referrals and suspensions at our school, is what we call at Haynes, “relational trust.” One of the main predictors of if a student will go to college is positive relationships with their teachers in middle school. Discipline and relational trust are inextricably linked. In my experience, the more a student trusts that I will be fair, and hold them to high standards in a firm, yet caring way, the less discipline issues arise. Relational trust is not a science. Moreover, it plays out in small ways that few outsiders would note as significant in a classroom. It’s the room to tell a joke when a student is singing during a lesson instead of confronting the student with a more abrasive redirection. It’s a greeting at the door, or a question about how Chewy the dog is doing. It is recognizing what a student needs, even when they don’t know they need it, or can’t articulate what they need. It’s listening to a student when they come to you with a problem, or sitting them down to have a conversation just to check in.

One’s racial dispositions can influence relational trust. At my school I have been encouraged to examine and question how my own racial dispositions affect my teaching and my students. The E.L. Haynes staff has participated in Race and Equity in Education Seminars in which we began the conversation about racial inequities in our school. In order to eliminate the racial achievement gap, I believe we must commit ourselves to addressing racial inequities in our teaching and school structures. We must face our own racial experiences, and recognize what we contribute to the racial experiences of our students. As a white teacher, this is a recognition that is not always easy to make, and is not always clear cut, specifically when it comes to discipline. I often question if my discipline approach is perceived by a student as being racially influenced, or creates a learning environment in which the student doesn’t feel affirmed. I have questioned if I am the best person to be teaching the students in my classroom.

Unfortunately, my experience has not led me to answers and solutions. It has led me to conclude that race matters when it comes to student discipline and school culture. I have chosen to not continue working at schools where I believed student-teacher-parent relationships were strained in part by race, even though the school was known for having tight discipline policies. I have also been disheartened working in schools with dismal discipline and no vision for student success. My experience has also proven to me that discipline issues in a school are not a result of some student’s not being able to behave or single parent families. I do know that all students can learn and succeed if they are provided a positive learning environment in which they are affirmed, challenged, supported, and held accountable for their actions. In order to address the discipline challenges and disproportionality of race in discipline referrals, educators must address the issue of race head-on. We need educators and community members who are committed to having on-going conversations that address our role in the disparities in student discipline and achievement in our schools.



**Jamie Frank**

## Personal Statement

For the past eleven years I have been a teacher in the suburban DC metro area. Over that time I have seen significant changes both in the classroom and in the demands placed on teachers. I have taught in highly diverse schools, where over 80% were minority students. I have also taught in extremely affluent communities, with over 80% of parents having graduated from college. These experiences have shown me there is great disparity in the way students are treated, the expectations held for them, and the measures of success.

No longer can teachers focus on individual student success, we must focus on the demographic makeup of students, and how they measure on standard-based assessments. We disaggregate data, focus on students most in academic need, and pay special attention to those sub-categories that we need to meet AYP. District and school-wide policies are made to protect those numbers, and to ensure the best possible outcome for each school. Teachers are taken to task when students are failing, misbehaving in their class, and performing below the standards.

Expectations are placed on teachers to ensure that the numbers are met, thereby paying specific focus on those sub-groups (i.e.: Hispanic, African-American, ESL, Special ED, etc.). This disparity not only impacts the disciplining of these students but the day-to-day classroom expectations for these students. Their ability to pass the course, the test, or whatever the measure is for an individual class, teachers are under pressure to ensure that students succeed. While this may sound like the obvious objective of all educators, the problem lies in the focus on the test scores, and on the numbers.

Several years ago, I worked at a school that was told by Central Office Superintendents that they had too many suspensions, and they must creatively discipline students. Specifically the number of minority suspensions had to be closer to the percentage of the whole student body. However, the students continued to behave harshly (knives in school, threatening teachers, disruptive classroom behavior, etc.) and because of the concern over published suspension numbers, the administrators allowed students to go home, and called it a day of exclusion. These students would be back in the same classroom the next day. In this situation, the school continues these practices, and since student graduation rates for minorities are relatively high, minority students are given a pass when they act up.

I serve on a number of Civic Education boards, and I have heard similar concerns from teachers around the country. School districts via administrators place huge burdens on teachers to ensure the numbers allow for AYP; not only in academic achievement but with attendance, graduation rates, and suspensions. Over the past 3 years, several counties in the DC metro area have removed their loss of credit policy. The reason for this change has been due to inequitable distribution of students losing credit for classes, resulting in a failure to graduate on time, with the majority of students being minority. The purpose of the loss of credit policy (generally when a student cuts class 5 or more times in a semester) reinforces the need that students attend class. When attempting to eradicate truancy issues within the

County, it became apparent that the largest percentage of truancy cases being investigated were for minority students. Once this was identified, fear of not being racially sensitive arose and the policies were changes. Currently without the loss of credit, there is no penalty for failing to attend classes.

Additionally, it is the policy that students are allowed to make up all of the work, re-teaching and reassessing for the missed days must be done by the teachers, and students can receive disciplinary actions by administrators if they choose to follow up. All absences whether excused or unexcused are to be considered the same. The burden of truant students then falls on the teachers. While statistical evidence shows that this policy was put into effect to ensure that racial disparity cannot be found for students whom do not attend classes, student attendance has been significantly impacted with its removal. This policy change was meant to benefit minority students. At the same time, there has been a State-wide decision to remove all In-School Suspension programs throughout the State of Maryland. Students cannot be disciplined by being removed from class (denied their education), thus the policies have been replaced by non-documented programs like In-school Inclusion or In School Intervention, all essentially the same, but not listed as suspensions.

From my experience working with students all along the socioeconomic spectrum, I believe that the real issue lies in the social and economic situation for students. The real issue of student success, albeit attendance, discipline, or achievement, continues to be socioeconomics.

Regardless of the race or ethnicity of a student it comes back to the parents, the economic situation they are in, and the support they provide. In my experience, the focus on which students get the attention, are disciplined the most, or have the least chance of success does not reflect a racial divide, as much as an economic one.

I could go on and on of how the need to meet the numbers has affected education but I am sure you will hear similar tales from many other teachers.

## **Louise Seng**

My name is Louise Seng. I am a resident of Catasauqua, Pennsylvania, and I taught eighth-grade social studies (Government and Law) at Harrison-Morton Middle School in Allentown, Pennsylvania for thirty-four years. I retired in 2006. Approximately 900 sixth, seventh, and eighth grades are enrolled at Harrison-Morton each year, 90% of whom are racial and ethnic minorities. (The 90% figure includes Asian-American students.) A little over 50% of the students at Harrison-Morton were Hispanic. The majority of Hispanic students at Harrison-Morton were of Puerto Rican extraction, but there were also students from a range of other Latin and South American backgrounds.

Discipline at Harrison Morton was a challenge. In the year before I retired, there were 50 students suspended for a total of 200 infractions -- just during the months before Christmas.

Although I do not have exact data available, I believe that students from racial and ethnic minority groups were disciplined more frequently than those from other backgrounds. In my observation, racial prejudice or bias on the part of my fellow teachers or administrators was not a cause of these disparities in discipline. As far as I was able to tell, all of my colleagues were committed to racial equality and to equality of opportunity for our students. Indeed, many of my colleagues chose to teach at Harrison-Morton over wealthier schools because they were committed to helping students from poor backgrounds succeed against often long odds.

In my opinion, racial and ethnic minority students were disciplined more frequently because more of them came from families in which they had not learned the self-discipline necessary to thrive at school. Some came from families where they observed violence at home, and they therefore thought that it was acceptable to use violence to solve problems. It was not terribly unusual, for example, for one student to throw a chair at another during the middle of class because the second student made a nasty verbal comment. (While I was usually able to prevent such scuffles from breaking out in my class, other teachers – whether because of lack of experience or something else – sometimes had more trouble keeping students in line.) I noticed also that some students came from homes where they weren't expected to do homework, or to be home by a certain time, or to go to bed by a certain hour. Students who had been up or out late would sometimes fall asleep in class or would behave disruptively simply because they were tired. Some seemed to eat poor diets outside of school, and I believe that this might have contributed to hyperactive behavior in the classroom. Getting students to stay focused and pay attention was a constant challenge. Many students had trouble sitting still and paying attention – again, I suspect because they had not learned these skills at home.

For several years, I helped run a program called Conflict Resolution that I believed was effective in reducing discipline problems. My colleagues and I trained students to serve as peer mediators. The trained peer mediators helped other students to resolve conflicts. Though the peer mediation program was not always effective at deterring student-to-student fights, it did prevent some fights from occurring.

During my years teaching, I was never approached by an administrator (or anyone else) about reducing disparities in discipline. Because I am no longer teaching, I don't know exactly how my former school will respond to the new Department of Education initiative. I do hope that the Obama initiative doesn't lead to pressure on teachers at Harrison-Morton to use less discipline. As I said above, maintaining discipline in a school like Harrison Morton can be challenging. Lowering discipline standards could make it even harder for students from all racial and ethnic groups to learn, which would be an unfortunate outcome indeed.

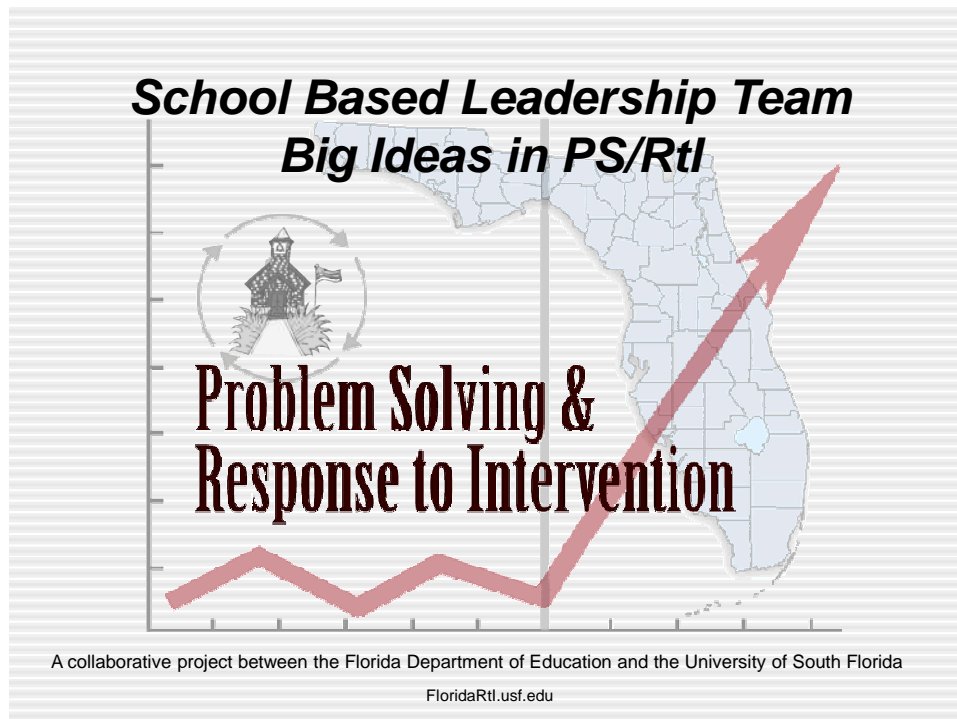
\*\*\*

## ***Panel 2 – School Administrators***

Oswaldo Piedra

Dr. Oswaldo Piedra, Eastlake High School

The Pinellas County School District, Florida, has taken great steps forward to reduce learning and discipline gaps among African American and non-African American students. Our school district, through professional development, has trained teachers, administrators, and other school personnel in the Response to Intervention (RtI) structure to reduce academic and behavioral gaps between African American and Non African American students. Currently, the school district is in its second year of implementing the RtI process through the School Based Leadership Team (SBLT). Assisting the SBLT to develop strategies to reduce achievement and behavioral gaps is a new computer data management system that allows school personnel to track attendance, discipline and academic progress to detect areas of concern. The SBLT implementing the RtI process develops strategies to help reduce behavioral and academic gaps by providing the appropriate instructional service to struggling students.

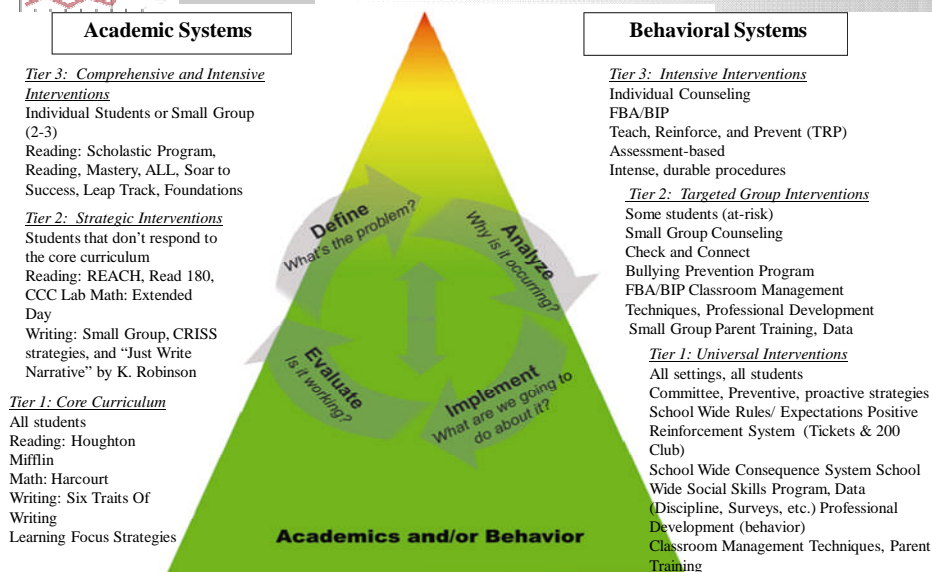


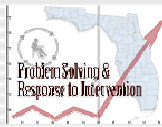


## Consensus Building: Beliefs

- PS/Rtl is a General Education Initiative-Not Special Education
- Improving the effectiveness of core instruction is basic to this process
- NO Child Left Behind Really Means “NO”
- Assessment (data) should both inform and evaluate the impact of instruction
- Policies must be consistent with beliefs
- Beliefs must be supported by research
- How do you spell AYP?

## Three Tiered Model of School Supports: Example of an Infrastructure Resource Inventory





## A Shift in Thinking

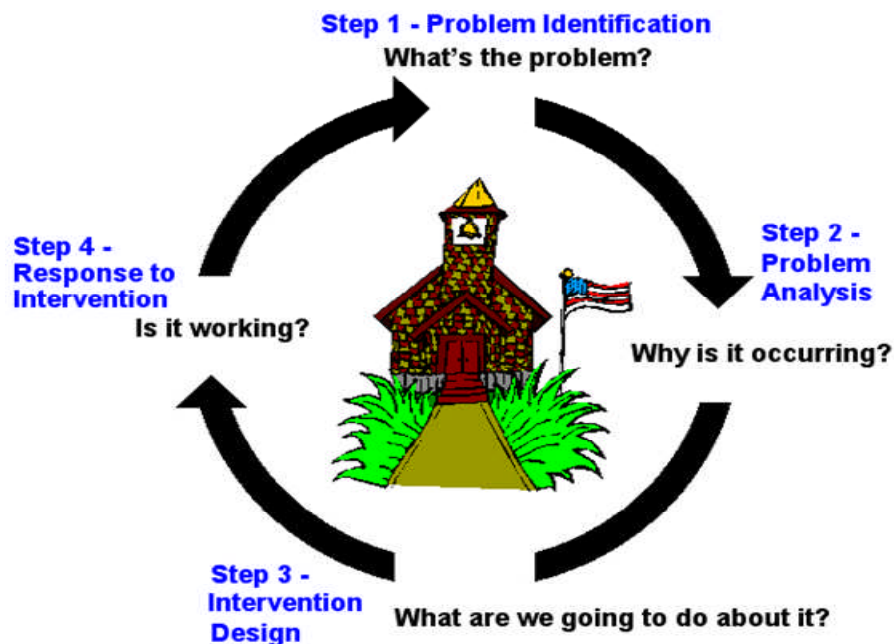
The central question is not:  
**“What about the students is causing the performance discrepancy?”**

but

**“What about the interaction of the curriculum, instruction, learners and learning environment should be altered so that the students will learn?”**

This shift alters everything else

Ken Howell





## Step 1 - What's the Problem?

In order to identify a problem, you've got to start with three pieces of data

- Benchmark level of performance
- Student level of performance
- Peer level of performance



## Step 2- Why is it occurring?

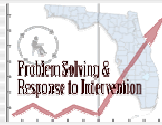
Goal: The development of hypotheses about probable causes for the identified problem.

Assessments are then conducted to gather information to determine which are most / least likely

Prediction statement:

***The problem is occurring because \_\_\_\_\_.***

***If \_\_\_\_\_ would occur, the problem would be reduced.***



### Step 3- What are we going to do about it?

- Effective teaching strategies consider both **what** to teach and **how** to teach it.
- Making good decisions will increase student progress.
- It is critical that the instruction be matched to the problem.

Howell & Nolet, 2000

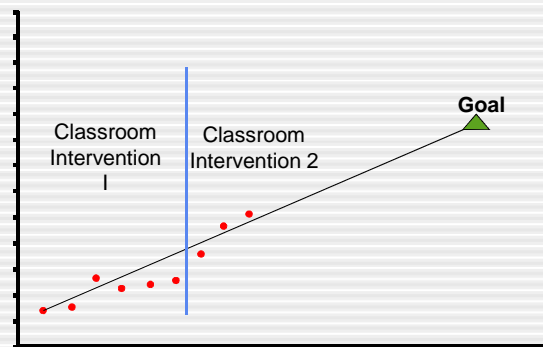


### Step 4- Is it working?

#### Progress Monitoring

Making **instructional decisions** based on the review and analysis of student data

Progress monitoring always includes graphing







## Steps in the Problem-Solving Process

1. **PROBLEM IDENTIFICATION**
  - Identify target skill
  - Data- current level of performance
  - Data- benchmark level(s)
  - Data- peer performance
  - Data- GAP analysis
2. **PROBLEM ANALYSIS**
  - Develop hypotheses( brainstorming)
  - Develop predictions/assessment
3. **INTERVENTION DEVELOPMENT**
  - Develop interventions in those areas for which data are available and hypotheses verified
  - Proximal/Distal
  - Implementation support
4. **RESPONSE TO INTERVENTION (RtI)**
  - Frequently collected data
  - Type of Response- good, questionable, poor



## Example- Behavior

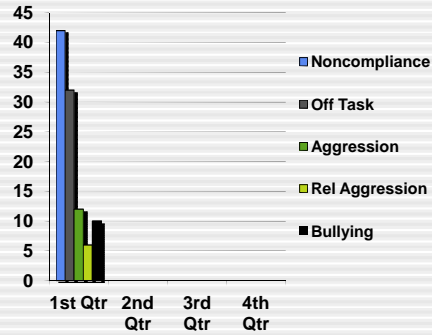
- Current Level of Performance:
  - Complies 35% of time
- Benchmark (set by teacher)
  - 75%
- Peer Performance
  - 40%
- GAP Analysis:
 

|                            |                         |                    |
|----------------------------|-------------------------|--------------------|
| ▪ Benchmark/Target Student | 75/35= 2.1 X difference | SIGNIFICANT GAP    |
| ▪ Benchmark/Peer           | 75/40= 1.9 X difference | SIGNIFICANT GAP    |
| ▪ Peer/Target Student      | 40/35= 1.1 X difference | NO SIGNIFICANT GAP |
- Is behavior program effective?
- No, peers have significant gap from benchmark as well.



## Referral Analysis

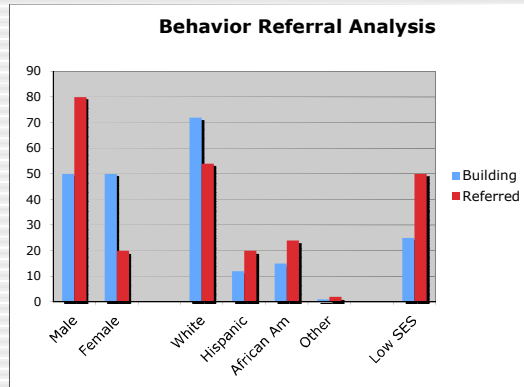
- 42% Noncompliance
- 30% Off-Task/Inattention
- 12% Physical/Verbal Aggression
- 6% Relational Aggression
- 10% Bullying



## Building-Level Behavior Data

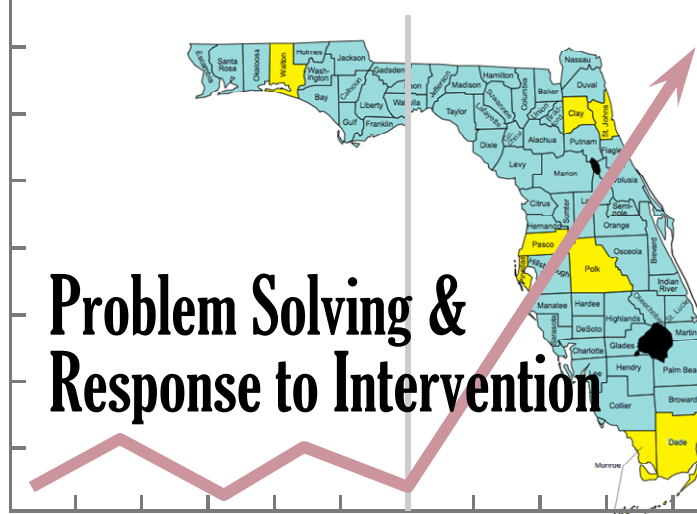
| <u>% Building</u>    | <u>% Referred</u> |
|----------------------|-------------------|
| Male 50%             | 80%               |
| White 72%            | 54%               |
| Hispanic 12%         | 20%               |
| African American 15% | 24%               |
| Other 1%             | 2%                |
| Low SES 25%          | 50%               |

**Central Question: For which of these groups is the discipline plan inequitable?**





# Final Thoughts



\*\*\*

## **Joseph Oliveri**

Hello, my name is Joseph P. Oliveri and I am a retired administrator from the Austin Independent School District in Austin, Texas, a district of almost 80,000 students. My official job title was Director of Alternative Education. I supervised and principaled six (6) schools. These schools served over 9,000 students during a school year. Travis County Juvenile Justice and I cooperatively administered two of these schools. Students gained entry to these schools either by being arrested for offenses committed in the community (short term lockup) or remanded by a judge (long term lockup). Another school treated alcohol and substance offenders and was jointly administered by the Phoenix House program and me. The three other schools were removal schools, DAEPs or Discipline Alternative Education Programs, solely administered by me and covering all grades, an elementary, middle and high school.

The focus of my response to you concerns my eleven years of experience with the three removal schools. Austin ISD has removed African American students at a rate greater than their representation in total population. This was true all throughout my years of work and continues today although at lesser rates. Hispanics, who now represent over half of the total school population, are removed at slightly above their representation in the total population. Whites have always had removal rates below their representation. My focus is on what we in Texas call “discretionary removals for serious or persistent misbehavior.” In almost all offense categories, AAs and special education students lead in the total removals.

A Texas Appleseed report entitled: *The Texas’ School-to-Prison Pipeline, School Expulsion: The Path from Lockout to Dropout* (April 2010) states as one of its conclusions:

Disproportionate representation of minority students in disciplinary referrals has plagued schools since desegregation. Texas Appleseed’s research supports earlier findings that show that African American students are most often disciplined for low-level, “subjective” offenses like “serious or persistent misbehavior.” The impact of disproportionate expulsion is of grave concern given both the achievement gap for minority students and their elevated dropout rates. If Texas is serious about addressing the achievement gap and high dropout rates for minority students, it must take a close look at the role that disproportionate disciplinary referrals play.

This disparity, in my experience is quite complex to explain. Is it prejudice? Yes, in some cases it appears that it is. Is it based on ignorance of cultural differences? Yes, in some cases it may be. Is it based on a strict adherence to “zero tolerance” regulations. Yes, I think it was more so in the past than it is today, although this is certainly a factor.

I have experienced cases where a White student and an African American committed the same offense at the same school and the AA was removed and the W student was permitted to remain on the campus. It happened too often to not make one feel that it may be symptomatic of other reasons behind the removal. And it contributes to the continued disparate removal of AAs. The information sources of this apparent prejudice were from the

parents of the AA student removed as well as other administrators from the removal school after I inquired about the removal details.

Another removal I have never understood is the removal of students to the DAEP for cutting classes or skipping school. To me this is symptomatic of others problems best addressed within the home school environment.

Disparities in academic abilities often go hand in hand with disparities in discipline. Many AAs and Hs do come to school without the academic skill set that would put them on par with their White peers. Sometimes class size and cultural unawareness cause some teachers to react to their behaviors differently than they would if they were White. Taking the time to learn about them and their cultural differences is a luxury many teachers feel they cannot afford to take. So they do what they feel they are paid to do and maintain discipline by removing the disruptive student.

The problem is that if we do not take other actions, often for this student the cycle repeats its self over and over until feeling they have no other choice, they drop out of school.

In an earlier report by Texas Appleseed entitled *The Texas' School-to-Prison Pipeline, Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance* (October 2007) states as one of its conclusions:

... Equally troubling are data-driven indicators that the greater predictor of whether a student will be sent to a DAEP is where he or she attends school— and not the nature of the offense. Add to this mix some districts' practice of referring very young children to DAEPs, and it becomes all the more imperative that, as a state, we assess how these policies contribute to the "criminalization" of student misbehavior that is removing large numbers of students from the classroom.

For too many juveniles, their disciplinary removals from school are an introduction to the "school-to-prison pipeline." Whether the focus is on equity and fairness in the discipline process, or the link between discipline and academic failure or dropout, the numbers reported here are of grave concern. If Texas wants to meet its stated goals of reducing dropout, eliminating the achievement gap between white and minority students, and ensuring that its students are engaged and learning, better ways to maintain safety and order in classrooms must be found.

Well, if a student does something that calls for their removal, shouldn't they be removed? Do we just ignore their behavior just because they are AA? Of course the answer is, "no." But we do need to take steps to make informed decisions about an incident, be open to intent and self-defense as a plausible action, and work quickly to involve parents, even to the point of formalizing agreements on acceptable school behavior between them, their child and the school.

We need to expand our potential solution sources to include links to community mental health and social service agencies.

We also need to be preemptive in addressing the needs of students who are at risk of developing problematic behavior that impinge on school safety and learning opportunities for all students and teachers in the classroom. We need to provide teachers with the specialized training they need to work with students such as TESA (Teacher Expectations/Student Achievement) and GESA (Gender/Ethnicity and Student Achievement) training. We need to establish school-wide and District-wide practices and programs such as Positive Behavior Support, Character Education and we need to establish means and methods that help students to build relationships with peers and adults that will secure their future success.

(Note: I'm not sure I will include the following-JPO)

Inclosing, *The Texas' School-to-Prison Pipeline, Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance* (October 2007) suggests a best practice model:

### A Multi-layer Approach to Successful School Discipline

Research-based programs exist that are effective in reducing both disciplinary referrals and school violence. Studies show that successful programs do the following:

- Target all students;
- Use well-coordinated methods and approaches that are “research-based” and deemed effective;
- Implement positive behavioral expectations and supports school-wide;
- Provide adequate training and ongoing support to ensure effective implementation;
- Involve school administrators, teachers, students, parents, mental health professionals, and community resources; and
- Incorporate regular, rigorous evaluation to determine if the programs to improve behavior are continuing to work.

And

Promising Practices from:

*The Texas' School-to-Prison Pipeline, Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance* (October 2007)

#### Reducing Referrals in Austin Schools

Sixty Austin schools—40 elementary schools, 14 middle schools, five high schools, and the local Disciplinary Alternative Education Program—will implement the Positive Behavior Support (PBS) program before the end of 2007.

It is a school-wide program—a base upon which to begin building the three-tiered model discipline program endorsed by the U.S. Department of Education. Ten schools began using Positive Behavior Support five years ago—and already

disciplinary referrals are dropping.

An Austin elementary school with the highest number of discretionary referrals to the DAEP decreased its referral rate to one of the lowest in the district after instituting PBS, according to Jane Nethercut, Positive Behavior Coordinator for Austin ISD.

Data for 2004-05 documents a greater awareness of school rules, a drop in bullying, and an increased percentage of students reporting they “feel safe” in school on Austin campuses implementing Positive Behavior Support.

A PBS team on each campus develops global themes for the school—such as “show respect”—along with a set of behavioral expectations to reinforce those themes. Teachers and staff discuss these in class, provide examples, and positively reinforce positive behaviors.

Interventions with students with problem behaviors are creative and individualized. For example, a student who is physically aggressive at school might be referred to counseling by an outside group, such as SafePlace, which offers shelter to women who are physically abused. Another student might be paired with an on-campus mentor who offers advice and models positive behavior.

Accurate tracking of disciplinary data helps identify repeat offenders and adapt strategies to reach them.

The Austin school district plans to implement PBS in every school in the district by the year 2010.

\*\*\*

## Edward C. Gonzalez

Associate Superintendent of the Department of Prevention and Intervention Fresno Unified School District, Fresno, CA

### REPORT TO THE COMMISSION ON CIVIL RIGHTS

February 11, 2011

#### **SECTION 1: DISPROPORTIONALITY**

Fresno Unified School District, with an enrollment of 72,000, is the 4<sup>th</sup> largest District in California. Demographically, the ethnic make-up of the District is as follows: Hispanic (62%); Asian-American (13%), White (13%), African-American (10%). Native Americans and other groups comprise the remainder. One of my primary goals upon arrival in July 2010 was to address the issue of Discipline.

Disproportionality in FUSD. In the area of student expulsions in 2009/2010, the Disproportionality was stark in reference to the following particular student subgroups: 1) African-Americans; 2) Special Education students; 3) Students in Foster Care; 4) Male students; 5) Middle School students (7<sup>th</sup>/8<sup>th</sup>); and Native American students. The Disproportionality is evidenced in the data tables below:

#### ***EXPULSION REFERRALS - 2009/2010 (180 days)***

| SUBGROUP               | % OF ENROLLMENT | % OF EXP REFERRALS | DISPROPORTIONALITY |
|------------------------|-----------------|--------------------|--------------------|
| African Americans      | 10.69%          | 30.35%             | 284%               |
| Special Ed students    | 9.50%           | 27.42%             | 289%               |
| Foster Care students   | 1.04%           | 2.80%              | 269%               |
| Male students          | 50.91%          | 76.10%             | 149%               |
| Middle School students | 15.05%          | 37.38%             | 248%               |
| Native Americans       | 0.66%           | 0.88               | 133%               |

#### ***EXPULSION REFERRALS - 2010/2011 (as of Day 90)***

| SUBGROUP               | % OF ENROLLMENT | % OF EXP REFERRALS | DISPROPORTIONALITY |
|------------------------|-----------------|--------------------|--------------------|
| African Americans      | 10.26%          | 26.20%             | 255%               |
| Special Ed students    | 9.42%           | 22.43%             | 238%               |
| Foster Care students   | 0.99%           | 2.95%              | 298%               |
| Male students          | 51.11%          | 75.65%             | 148%               |
| Middle School students | 14.76%          | 40.15%             | 272%               |
| Native Americans       | 0.64%           | 1.48%              | 231%               |



To address these concerns, the District has initiated numerous interventions. Beginning in 2009/2010, the District began implementation of a K-12 Behavioral Intervention curriculum, "Safe & Civil Schools." SCS provides a three-tiered approach to behavioral referrals, empowering adults to take more control and responsibility in regard to modification of inappropriate behaviors. "Capturing Kids' Hearts" is another training, exclusively targeted at high school and middle school students. The Men's Alliance, an intervention class targeted at behaviorally-"at-risk" male students, was debuted this school year at three high schools and has already shown great promise in mitigating student suspensions, expulsions, and unexcused absences.

***THE MEN'S ALLIANCE MID-YEAR REPORT – 2010/2011 - BEHAVIOR,  
ATTENDANCE, AND ACADEMICS (as of Day 84)***

|                  | 2009/2010<br>(180 days) | 2010/2011<br>(as of Day 84) | DIFFERENCE | % CHANGE |
|------------------|-------------------------|-----------------------------|------------|----------|
| STU SUSP PER DAY | .31                     | .17                         | -.14       | -45.16%  |
| DAYS OF SUSP     | 1.93                    | 0.40                        | -1.53      | -79.27%  |
| UNEXC ABSENCES   | .96                     | .65                         | -.31       | -32.29%  |
| GPA              | 1.2                     | 1.5                         | .3         | +25.00%  |

In combination with these curricular and programmatic interventions, we have also focused on additional training regarding the expulsion process, and have clarified requirements and enhanced scrutiny of all referrals. Ed Code violations have been separated into three tiers – 1) Mandatory, 2) High-Priority, and 3) discretionary. The following is a list of the violations in each category:

**MANDATORY: (ED CODE 48915c)**

- Possession of a firearm
- Sale of a controlled substance
- Brandishing of a knife
- Sexual battery, or attempted sexual battery
- Possession of explosives

**HIGH-PRIORITY: (ED CODE 48900)**

- Fight or battery using a weapon
- Furnishing of a controlled substance
- Possession of a knife
- Assault/battery upon a staff member
- Arson

## DISCRETIONARY: (ED CODE 48900)

- All other violations listed under Ed Code 48900 are considered discretionary. Ed Code requires expulsion only when other means of correction have not proven feasible. I have also initiated the expectation that non-Mandatory and non-High-Priority expulsion referrals will show evidence of a “good-faith” effort on the part of the site administration to make a home visit.

Our mid-year Expulsion report indicates that the combination of these interventions and strategies shows promise in reducing overall expulsions and Disproportionality in discipline. Three of the four largest subgroups – Males, African-Americans, and Special Education students—show decreases in Disproportionality. Middle school students, especially 8<sup>th</sup> graders, continue to be an area of concern.

Two other areas of increase need further examination. The greater Fresno area has become somewhat of a Mecca in California for the placement of students in Foster Care. There are 35 Group Homes which currently reside within the boundaries of Fresno Unified. A high percentage of these students arrive with great emotional, academic, and social needs. Unfortunately, the Licensed Childcare Institutions (LCI's) have not always worked collaboratively with school Districts, so important information regarding the high needs of these students is not always been forthcoming. The Department of Prevention and Intervention, working in tandem with our Special Education department, has initiated meetings with Group Home leaders at our high schools, and begun the process of improving our information sharing.

The final subgroup of Discipline Disproportionality—Native Americans—has increased sharply in 2010/2011. Numerically, this is a very small subgroup, and the total number of expulsion referrals as of Day 90 in 2010/2011 is only 4, so it may be premature to consider this disproportionate this year.

**SECTION 2: EXPULSION DATA**

Overall, the total number of expulsion referrals has dropped in 2010/2011, as well as the number of actual expulsions, as evidenced by the charts below:

## COMPARISON OF 2009/2010 AND 2010/2011 EXPULSIONS

***EXPULSION REFERRALS BY SCHOOL LEVEL***

| <b>LEVEL</b>      | <b>2009/2010 PER DAY</b> | <b>2010/2011 PER DAY<br/>(as of Day 90)</b> | <b>% CHANGE</b> |
|-------------------|--------------------------|---|-----------------|
| Elementary School | .82                      | .49   | -28.0%          |
| Middle School     | 1.42                     | 1.22  | -14.1%          |
| High School       | 1.55                     | 1.33  | -14.2%          |
| FUSD              | 3.79                     | 3.04  | -19.7%          |

**ACTUAL EXPULSIONS**

|                                  | 2009/2010 PER DAY | 2010/2011 PER DAY<br>(as of Day 81)* | % CHANGE |
|----------------------------------|-------------------|--------------------------------------|----------|
| Expulsion Referrals              | 3.79              | 2.90                                 | -23.4%   |
| Canceled, Stopped, or Terminated | 0.38              | 0.86                                 | +128.8%  |
| Actual Expulsions                | 3.41              | 2.04                                 | -40.3%   |

*\*Actual Expulsions were calculated per day as of Day 81, due to the fact that there were still several cases pending beyond that date.*

Reasons for the decrease in expulsions in 2010/2011 mirror the reasons listed in the Disproportionality section. Of particular note is the Number of Referrals canceled or stopped this year. This can happen from one of three ways—they can be stopped by an Administrative Hearing Panel, a Manifestation Determination team in Special Ed, or by me as the Associate Superintendent of the Department of Prevention and Intervention.

**SECTION 3: DISPROPORTIONALITY IN EQUITY AND ACCESS**

Although not specifically concerning discipline disproportionality in equity and access is of fundamental importance in understanding the historical and on-going struggles of “at-risk” subgroups, particularly subgroups of ethnicity. The chart below illustrates the disproportionality in regard to the percentage of students identified as Gifted and Talented, as disaggregated by ethnicity:

***GIFTED AND TALENTED EDUCATION (GATE)***

| ETHNICITY        | TOTAL ENROLLMENT | TOTAL GATE IDENTIFIED | % OF ENR ID'd AS GATE |
|------------------|------------------|-----------------------|-----------------------|
| WHITE            | 9,552            | 1,180                 | 12.35%                |
| HISPANIC         | 45,200           | 1,126                 | 2.49%                 |
| AFRICAN-AMERICAN | 7,962            | 220                   | 2.76%                 |
| ASIAN-AMERICAN   | 9,617            | 403                   | 4.19%                 |
| OTHER            | 1,089            | 63                    | 5.79%                 |
| TOTAL FUSD       | 73,420           | 2,992                 | 4.08%                 |

Clearly, students of color, specifically African-American and Hispanic students, are lagging far behind other ethnicities in GATE identification status. This has disturbing ramifications, both to students and their families, as it reinforces stereotypes of racial and ethnic inequities in innate cognitive abilities.

**SECTION 4: NEXT STEPS**

Fresno Unified is pursuing additional interventions and programmatic changes that we believe will continue to reduce Disproportionality among “at-risk” groups of students. These include the following:

- Expansion of the Men’s Alliance program

The Men’s Alliance is currently at three Fresno Unified High Schools, but will expand to two additional high schools in the 2011/2012 school year.

- Improved networking with Licensed Childcare Institutions (LCI’s) and Group Homes  
FUSD’s Department of Prevention and Intervention (DPI) has devised a standardized protocol for the admission of students into our area Group Homes. In addition, FUSD have scheduled meetings at our high schools and invited Group Home staff to come to the table, share concerns, and work together with the District to enhance the opportunities for Group Home students to meet with success. I have also made arrangements for me and my Coordinator in charge of Foster Youth to make visits to each of our Group Homes.

- Full implementation of Safe & Civil Schools and “Capturing Kids’ Hearts” curricula

The 103 schools in the District were divided into four cohorts, and implementation of the SCS curriculum began in 2009/2010. The Department of Prevention and Intervention will recommend additional personnel to assist with training and augment the monitoring of implementation in 2011/2012.

- Creation of a Work Team on Diversity

This Work Team consists of approximately two dozen FUSD employees, with a representation of both genders and all numerically-significant ethnic groups, who study the District’s current practices in a wide variety of areas in order to address concerns and make recommendations for systemic changes.

- Corrective Reading and other academic programs

Corrective Reading has not only shown promising results in academic advancement, it has had the unforeseen consequence of showing some ability to mitigate certain behaviors that result in suspension and/or expulsion.

- Credit Recovery expansion

All FUSD high schools offer Credit Recovery options, and the District also utilizes two high school continuation programs to augment credits. In addition, FUSD is expanding its credit recovery options by implementing Extended Learning and on-line courses.

- Proposal to create a pilot intervention class, the Renaissance Academy Scholars (RAS)

RAS features a self-contained classroom setting, augmented with remediation, music, art, computers, academic competition, and field trips embedded into the instructional model. This class would exclusively target behaviorally-“at-risk” students in 8<sup>th</sup> grade.

As of this writing, it is still in draft form and has yet to be submitted to the FUSD Board of Trustees.

### **SECTION 5: CONCLUDING REMARKS**

Fresno Unified School District is committed to addressing the problem of Discipline Disproportionality that has been ongoing in urban districts throughout the country for more than a generation. The interventions described, as well as some others not mentioned, have exhibited promise thus far.

Overall expulsion referrals have dropped, and when this is combined with a drop in disproportionality, however slight, the result has been a huge decrease in the number of expelled students from each “at-risk” subgroups when compared to last year. We recognize that our challenges are great, but we have a forward-thinking Board and a visionary Superintendent, Mike Hanson, who deserve much credit for their efforts to improve educational opportunities for all students.

\*\*\*

## REPORT TO THE COMMISSION ON CIVIL RIGHTS



Washington D.C. - February 11, 2011

Edward Gonzalez

## EXPULSION REFERRALS – 2009/2010 (180 days)

- DISPROPORTIONALITY

| SUBGROUP               | % OF ENROLLMENT | % OF EXP REFERRALS | DISPROPORTIONALITY |
|------------------------|-----------------|--------------------|--------------------|
| African Americans      | 10.69%          | 30.35%             | 284%               |
| Special Ed students    | 9.50%           | 27.42%             | 289%               |
| Foster Care students   | 1.04%           | 2.80%              | 269%               |
| Male students          | 50.91%          | 76.10%             | 149%               |
| Middle School students | 15.05%          | 37.38%             | 248%               |
| Native Americans       | 0.66%           | 0.88%              | 133%               |

SECTION 1: DISPROPORTIONALITY



**EXPULSION REFERRALS – 2010/2011 (as of day 90)**  
 • DISPROPORTIONALITY

| SUBGROUP               | % OF ENROLLMENT | % OF EXP REFERRALS | DISPROPORTIONALITY |
|------------------------|-----------------|--------------------|--------------------|
| African Americans      | 10.26%          | 26.20%             | 255%               |
| Special Ed students    | 9.42%           | 22.43%             | 238%               |
| Foster Care students   | 0.99%           | 2.95%              | 298%               |
| Male students          | 51.11%          | 75.65%             | 148%               |
| Middle School students | 14.76%          | 40.15%             | 272%               |
| Native Americans       | 0.64%           | 1.48%              | 231%               |



**THE MEN'S ALLIANCE MID-YEAR REPORT – 2010/2011 – BEHAVIOR, ATTENDANCE AND ACADEMICS (as of day 84)**  
 • DISPROPORTIONALITY

|                            | 2009/2010 (180 days) | 2010/2011 (as of day 84) | DIFFERENCE | % CHANGE |
|----------------------------|----------------------|--------------------------|------------|----------|
| STUDENT SUSPENSION PER DAY | .31                  | .17                      | -.14       | -45.16%  |
| DAYS OF SUSPENSION         | 1.93                 | .40                      | -1.53      | -79.27%  |
| UNEXCUSED ABSENCES         | .96                  | .65                      | -.31       | -32.29%  |
| GPA                        | 1.2                  | 1.5                      | .3         | +25.00%  |



## EXPULSION REFERRALS BY SCHOOL LEVEL

- DISPROPORTIONALITY

| LEVEL             | 2009/2010<br>PER DAY | 2010/2011<br>PER DAY<br>(as of day 90) | % CHANGE |
|-------------------|----------------------|--|----------|
| Elementary School | .82                  | .49                                    | -28.0%   |
| Middle School     | 1.42                 | 1.22                                   | -14.1%   |
| High School       | 1.55                 | 1.33                                   | -14.2%   |
| FUSD              | 3.79                 | 3.04                                   | -19.7%   |



## ACTUAL EXPULSIONS

- DISPROPORTIONALITY

|                                    | 2009/2010<br>PER DAY | 2010/2011<br>PER DAY<br>(as of day 81)* | % CHANGE |
|------------------------------------|----------------------|---|----------|
| Expulsion Referrals                | 3.79                 | 2.90                                    | -23.4%   |
| Canceled, Stopped<br>or Terminated | 0.38                 | 0.86                                    | +128.8%  |
| Actual Expulsions                  | 3.41                 | 2.04                                    | -40.3%   |

\*Actual Expulsions were calculated per day as of day 81, due to the fact that there were still several cases pending beyond that date.





**GIFTED AND TALENTED EDUCATION (GATE)**

- DISPROPORTIONALITY

| ETHNICITY        | TOTAL ENROLLMENT | TOTAL GATE IDENTIFIED | % OF ENROLLED IDENTIFIED AS GATE |
|------------------|------------------|-----------------------|----------------------------------|
| WHITE            | 9,552            | 1,180                 | 12.35%                           |
| HISPANIC         | 45,200           | 1,126                 | 2.49%                            |
| AFRICAN-AMERICAN | 7,962            | 220                   | 2.76%                            |
| ASIAN-AMERICAN   | 9,617            | 403                   | 4.19%                            |
| OTHER            | 1,089            | 63                    | 5.79%                            |
| TOTAL FUSD       | 73,420           | 2,992                 | 4.08%                            |

SECTION 3 : DISPROPORTIONALITY IN EQUITY AND ACCESS



\*\*\*

***Panel 3 – U.S. Department of Education Official and School Administrators***

**Ricardo Soto**

**STATEMENT OF  
RICARDO SOTO  
PRINCIPAL DEPUTY ASSISTANT SECRETARY  
OFFICE FOR CIVIL RIGHTS  
U.S. DEPARTMENT OF EDUCATION**

**BEFORE THE  
U.S. COMMISSION ON CIVIL RIGHTS' BRIEFING**

**FEBRUARY 11, 2011**

**Introduction:**

Thank you for inviting the Department of Education's Office for Civil Rights (OCR) to the U.S. Commission on Civil Rights' briefing on school discipline and disparate impact. I am Ricardo Soto, the Principal Deputy Assistant Secretary in OCR. I am pleased to be able to share with you the work that my office, under the leadership of Assistant Secretary Russlynn Ali, is doing to enforce the civil rights laws and to support schools in meeting their obligations to create and maintain the safe and orderly educational environments that are necessary for our nation's students to learn and thrive.

I understand the challenges that educators and administrators face when they are administering student discipline; because before coming to OCR, I dealt with them too. Prior to my work at OCR, I represented school districts on education issues which included providing advice regarding discipline policies and procedures, including the review of recommendations for suspension and expulsion by school administrators. I also served as the Assistant Secretary and Legal Counsel in the Office of the Secretary of Education of California where I advised the Secretary of Education and the Governor's Office on legal and policy issues related to elementary, secondary and higher education, including school discipline. Furthermore, I have served as in-house counsel for the San Diego Unified School District where I represented the Superintendent, Board and senior staff on education matters. All of these experiences have given me a hands-on perspective on the difficulties encountered when administering fair student discipline and I am excited to be working for OCR as we work towards finding solutions to this complicated issue.

**I. Overview of OCR**

Let me first provide an overview of my office and the work that we do. OCR's mission is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights. OCR enforces civil rights laws that prohibit discrimination on the basis of race, color, national origin, sex, age, and disability. Most relevant to today's briefing is OCR's enforcement of Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin. Title VI's protections extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums that receive federal funding from the U.S. Department of Education.

As you know, a critical part of OCR's job is to investigate and resolve discrimination complaints. These complaints may be filed by anyone, on behalf of an individual or group that may have faced discrimination in education. Additionally, agency-initiated investigations - typically called compliance reviews- permit OCR to concentrate our efforts and resources on problems that are particularly acute or widespread. OCR also issues policy guidance and provides technical assistance to help schools, universities, parents, and community members understand their rights and responsibilities, and to promote voluntary compliance with the civil rights laws that we enforce.

OCR has a headquarters office and twelve regional offices around the country, with more than 600 attorneys, investigators and other staff working on investigating complaints, conducting compliance reviews, developing policy guidance, and providing technical assistance. As I have learned since joining OCR, our attorneys and investigators have a great deal of experience investigating and resolving Title VI complaints and compliance reviews involving allegations of discrimination in the administration of student discipline. In March of 2010, Secretary Duncan delivered remarks commemorating the 45<sup>th</sup> anniversary of "Bloody Sunday" — a pivotal moment in civil rights history — while highlighting key civil rights issues facing the nation today. In that speech, he announced a reinvigorated OCR that will "strive to make Dr. King's dream of a colorblind society a reality."

**II. Discipline Disparities**

Let me now turn to our work on issues relating to student discipline. From data gathered through the Department's Civil Rights Data Collection, OCR estimates that in the 2005-2006 school year, almost 250,000 more students nationwide received out-of-school suspensions than just four years earlier, and that the number of students who were expelled increased by fifteen percent. (Compare the Department's Civil Rights Data Collection for 2002 and 2006). OCR is concerned by the rising discipline rates and by the deep disparities in discipline in our nation's schools. Both - have been linked to increased likelihood of dropping out of school; decreased academic achievement; increased involvement with the juvenile-justice system; and impairment of future college and employment opportunities. And those are just a few of the harms to students. OCR is also concerned that significant disparities in the application of discipline policies, practices, and procedures nationwide may suggest that

discrimination is occurring that violates the federal anti-discrimination laws enforced by OCR. As Secretary Duncan said, "civil rights laws require vigorous enforcement not just because they are the law of the land, but because the data paint a stark picture of educational inequality."

### **III. Legal Theories**

To maintain the integrity of our enforcement activities, OCR has a long-standing policy against releasing information about pending investigations. So today I will not be discussing open cases. But I will explain the legal theories that govern our enforcement efforts based on statutes, regulations, and case law that OCR would employ, when the facts and circumstances suggest they would be appropriate, to determine whether a school has violated Title VI. Although my remarks will focus on discrimination based on race in the administration of student discipline, when the facts and circumstances suggest they would be appropriate, OCR would apply the same legal theories in our investigations of possible race, color, or national origin discrimination in educational contexts.

Title VI requires that a school's disciplinary policies, practices and procedures must be applied consistently to similarly situated students, regardless of their race. The Department's Title VI regulations prohibit discrimination, therefore, both when it is the product of different treatment - intentional discrimination based on race, color, or national origin- and when it results from facially race-neutral policies, practices, or procedures that have a disparate impact on the basis of race, color or national origin. OCR's Title VI regulations can be found at 34 C.F.R. § 100.

Unlike cases involving different treatment, cases involving disparate-impact theory do not require that a school had the intent to discriminate. Rather, under the disparate-impact theory, the pertinent inquiry is whether the evidence establishes that a facially neutral discipline policy, practice, or procedure causes a significant disproportionate racial impact and lacks a substantial, legitimate educational justification. Even if there is a substantial, legitimate educational justification, a violation may still be established under disparate impact if the evidence establishes that there are equally effective alternative policies, practices, or procedures that would achieve the school's educational goals while having a less significant, adverse racial impact.

Statistical disproportionality in the administration of student discipline by race, color, or national origin, standing alone, will not generally establish a Title VI violation. Although data and statistical information are important indicators for OCR's work, they are but one category of evidence that OCR collects in its investigative process. OCR attorneys and investigators conduct interviews and collect a variety of information concerning a school's written and unwritten disciplinary policies, practices, and procedures. As stated above, schools can provide an educational justification for any data that suggests a statistical disproportionality.

Disparate-impact discrimination has been prohibited by the Title VI regulations since the Title VI regulations were written in 1964. These regulations have been used for decades by

all federal agencies, including OCR, that enforce Title VI in federally assisted programs. As President Kennedy said when he first proposed the legislation that ultimately became Title VI, "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in a fashion which encourages, subsidizes, or results in racial discrimination." "Indirect discrimination," President Kennedy said, was "just as invidious" as direct discrimination.

The Department brought administrative proceedings, *In the Matter of Dillon County School District No. 1*, Docket No. 84-VI-16 and *In the Matter of Maywood School District #89*, Docket No. S-125, which were ultimately resolved in 1987 and 1990, respectively, under the Title VI disparate-impact theory.

In 1994, on the 30<sup>th</sup> Anniversary of the passage of Title VI, the Attorney General of the United States reminded federal agencies that, "administrative regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect." (1994 Letter from the Attorney General on the Use of Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964.) The Attorney General instructed all federal agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs."

Seven years later, in a 2001 memorandum following the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Department of Justice instructed federal agencies that while *Sandoval* held that there is no private right of action to enforce Title VI's disparate-impact regulations, the Supreme Court did not address the validity of Title VI regulations themselves or call into question the government's authority and obligation to enforce them. (2001 Memorandum from the Assistant Attorney General on Executive Order 13166). The following year, the Department of Justice issued guidance and made clear that through this memorandum, the Assistant Attorney General had clarified that, "*Sandoval* did not invalidate any Title VI regulations that proscribe conduct that has a disparate impact on covered groups—the types of regulations that form the legal basis for the part of Executive Order 13166 that applies to Federally assisted programs and activities--the Executive Order remains in force." As you may recall, Executive Order 13166 requires federal agencies to examine the services they provide and develop and implement a system by which Limited English Proficient persons can meaningfully access those services. Additionally, the 2002 guidance stated that *Sandoval* did not "otherwise limit the authority and responsibility of Federal grant agencies to enforce their own implementing regulations." (2002 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons).

Most recently, in a 2009 memorandum on the 45<sup>th</sup> anniversary of the passage of Title VI, the Department of Justice, urged federal agencies "to remember that [we] serve an especially critical role in enforcing Title VI disparate impact regulations ... [Because] [v]ictims can only turn to the administrative complaint process, ... agencies must be particularly vigilant in ensuring strong enforcement in this area." (2009 Memorandum from the Acting Assistant

Attorney General on Strengthening of Enforcement of Title VI of the Civil Rights Act of 1964).

Thus, the disparate-impact theory has been and remains a critical enforcement tool for OCR. Where OCR finds a violation of Title VI in the administration of student discipline, we will seek the school's voluntary agreement to take specific measures to remedy that violation. And indeed, wherever OCR finds evidence of a civil rights violation, most schools enter into voluntary resolution agreements which set forth what actions the school must take to remedy the situation and prevent future discrimination. These agreements, which OCR monitors closely, have resulted in significant changes benefitting students in schools throughout the nation.

#### **IV. Case Example**

Now, I would like to provide an example of a case where OCR found a violation of Title VI in the administration of student discipline. Because the case remains in the monitoring phase, I cannot provide identifying details. In this case, the complaint, filed by a teacher, alleged that a district discriminated against seventh- and eighth-grade African-American students by disciplining those students more harshly (*i.e.* differently) than white students. An analysis revealed that a statistically significant difference among the races existed in the school's application of its discipline policy, with African-American students receiving greater disciplinary sanctions for all four categories of misconduct examined. The District was unable to provide a legitimate, nondiscriminatory, non-pretextual explanation for this difference in treatment based on race. Through interviews and extensive document reviews, OCR confirmed that African-American students were punished more harshly than their white counterparts for the same or similar conduct. For example, OCR's review of teacher slips referring students for disciplinary actions revealed that the slips on white students also included positive teacher comments such as "wonderful student;" while no similar comments were included for African-American students. OCR also learned that most white students were allowed to exhaust informal and less harsh disciplinary sanctions before being referred for formal discipline, whereas similarly situated African-American students were not allowed to exhaust informal disciplinary sanctions.

Under such circumstances, an OCR agreement would normally include remedies such as: revising existing disciplinary policies and procedures to ensure uniform application of disciplinary consequences; training staff on the application of disciplinary policies and procedures; and prospective monitoring of disciplinary sanctions.

#### **Conclusion:**

The answer to unequal, unfair, or ineffective student discipline, of course, is not to abandon discipline policies, practices, and procedures. For many parents and teachers, disruptive and disorderly schools are serious problems because children cannot learn in classrooms that are not well managed. And, the Department of Education recognizes that disciplinary policies, practices, and procedures differ from school to school. There is no universal, one-size-fits-all approach to discipline that will be right for every school or all students. However, each

school has a responsibility not only to create a safe and orderly learning environment, but also to ensure that its disciplinary policies, practices, and procedures are administered in a nondiscriminatory manner. To help support schools in meeting the challenge to adopt effective and appropriate disciplinary policies, practices, and procedures that do not violate a student's civil rights, OCR is using all the tools at our disposal.

As I explained earlier, these include not just enforcement through complaint resolution and compliance reviews, but also policy guidance and technical assistance to schools on the administration of student discipline. For example, OCR, in partnership with Civil Rights Division of the Department of Justice, convened conferences last fall in Washington, DC and San Francisco on "Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunity." Through these conferences, OCR, the Department of Justice, and education experts shared their knowledge about effective partnerships and best practices in the administration of student discipline. As I noted at the first conference, OCR is developing guidance, in the form of a Dear Colleague Letter, that will inform states and districts about their responsibilities in avoiding discrimination based on race in the administration of student discipline.

OCR also recognizes that we needed better data on disparate discipline, because better data will both help community members understand the problem and improve OCR's enforcement efforts. We have therefore begun collecting more detailed and accurate data to identify districts that are really struggling with discipline. In particular, OCR has expanded this year's Civil Rights Data Collection to cover more than 7,000 school districts, including all districts with more than 3,000 students. In its revised collection, OCR is collecting data on school discipline that includes data on corporal punishment, suspensions, tracking in-school and multiple suspensions, referrals to law enforcement, school-related arrests, and zero tolerance policies.

Thank you again for the opportunity to share OCR's work in this important area with the Commission. Secretary Duncan has repeatedly stated that education is the civil rights issue of our time. OCR is deeply committed to ensuring that every child receives the best education possible. Increasingly, the number of students losing educational instructional time due to disciplinary sanctions, such as out-of-school suspensions, expulsions, or referrals to law enforcement authorities, and alternative educational placements, has dramatically increased. All too often such consequences for student misconduct, especially from more subjective disciplinary offenses where judgments are inherently more discretionary, are not imposed in a fair and equitable manner. Moving forward, OCR is committed to using all the tools at our disposal to address this critical issue. I am happy to answer any questions the Commissioners have.

\*\*\*

## Hardy Murphy

Hardy Murphy, Ph.D.  
Evanston/Skokie CC School District 65

### *Comments for the U.S. briefing on school discipline and disparate impact*

Evanston/Skokie School District 65 is a K-8 school district located just north of the City of Chicago in Illinois. The district serves 7,000 students from a variety of economic and ethnic backgrounds (42% White, 27% Black, 20% Hispanic, 5% Asian, 6% Multi-Racial; 40% eligible for free or reduced lunch). Our schools offer families a high-quality educational experience and we provide many supports and services that enhance the academic environment.

Like other districts across the country, District 65 grapples with disparate outcomes in the application of discipline. Our data confirm a disproportionate representation of students of color, and we are continuing to address this disproportionality. A districtwide behavior-management system, a program to help keep students in school, parent engagement and education, and sensitivity training for faculty and staff are strategies we are using to address this disparity.

Having our educational professionals develop an understanding about our students' out-of-school experiences helps create an appreciation for their culture and background. Students, in turn, see these understandings as an affirmation of who they are and where they come from and an acknowledgement of their potential. As a result the children are more inclined to see their classroom experiences as supportive and meaningful. This helps them "buy-in" to the larger system of values that public education represents.

The goal for our students is for them to understand and internalize behavioral expectations that make for more successful school and life experiences. The goal for our teachers is to see their students as having unlimited potential for academic success and productive citizenship. The goal for our parents is to see our schools as institutions that embrace them and their concerns in a more responsive environment.

Our discipline policies are equitable across racial, gender, disability, and sexual orientation classifications. They comply with state, federal and local legislation and they reflect community values. We have written behavioral expectations for activities in classrooms and hallways, on the school bus, for walking to and from school, and for the acceptable use of online resources. And, our consequences vary by category across a range of severity by infraction.

One objective of the disciplinary policies and procedures is to create a culture highly supportive of teaching and learning. We use the Positive Behavior Interventions and Supports (PBIS) as the districtwide behavior management system to reinforce positive behaviors and sustain instructional environments with reduced disruption or behavioral



concerns. Our educational professionals are trained with PBIS strategies to use at school - from the classroom to the lunchroom, from the playground to the gym. Each school has a PBIS team that includes teachers, the principal, and the school social worker. Together they review data entered into an online reporting system (SWIS) that gives easy access to information they can use, for example, to identify specific behavioral expectations that need re-teaching. The data also may be used to identify students most at risk and who need additional supports or a behavioral intervention plan.

Many District 65 schools have been recognized by the state for our implementation of PBIS. Several schools were identified as model sites for official state and national visitors. And, one of our schools was selected a few years ago to host a visit from the Assistant Secretary of the Office of Special Education and Rehabilitation Services from the U.S. Department of Education. The Assistant Secretary met with staff, students and families, and took back to Washington DC what he learned.

We understand the important role that parents have in successful school experiences. Our district participates in the John Hopkins parent involvement model to create more supportive home-school relationships. We also involve parents in the alternative to suspensions (ATS) program that provides services and supports to reduce or prevent out-of-school suspensions. If a student and a parent commit to participate in counseling services, the child's suspension is held in abeyance. A school social worker holds counseling sessions and gives the students and their family a chance to discuss things that might be causing behaviors that result in disciplinary action and to identify strategies to avoid these behaviors in the future. A copy of the ATS program materials is available on the District 65 website (<http://www.district65.net/parentsandstudents/handbook/> )

Another way we are attempting to address the disparate impact of discipline is through sensitivity awareness training for staff. This year faculty and staff will participate in the "Mosaic Experience: A Thoughtful Conversation about Cultural Diversity in the Classroom." Mosaic Experience is a local organization that helps other organizations find a culture of team-building and collaborative approach to creatively problem-solve and address challenges.

The District 65 board of education takes an active role in reviewing suspension data for students. They, like Secretary Duncan, have raised concern about a disproportionate number of African American students facing disciplinary action in public education. District policies are designed to equitably address school expectations. I have included an appendix with a list of current policies related to disciplinary matters. These policies are available on the District 65 website ([http://district65.net/boardofed/goals\\_policy](http://district65.net/boardofed/goals_policy)). District's programs are intended to help students understand their role in creating a climate and culture where learning is not impeded by behaviors that interfere with a positive and productive learning environment.

\*\*\*

Hardy Murphy, Ph.D., Statement (continued)

**Appendix A**

**Evanston/Skokie District 65 Student Discipline Policies**

|   |                     |
|---|---------------------|
| Academic dishonesty .....                   | 7:190               |
| Bus conduct.....                            | 7:220               |
| Community service .....                     | 7:190               |
| Electronic devices .....                    | 7:190               |
| Expulsion procedures.....                   | 7:190, 7:210        |
| Extracurricular .....                       | 7:240               |
| General.....                                | 7:190               |
| Maintaining student discipline.....         | 5:230               |
| No pass, no play.....                       | 6:190, 7:300        |
| Off-campus misconduct.....                  | 7:190               |
| Police interviews.....                      | 7:150               |
| Search and seizure.....                     | 7:140               |
| Student with disabilities.....              | 7:230               |
| Student appearance .....                    | 7:160               |
| Student rights and responsibilities         | 7:130               |
| Suspension procedures                       | 7:190, 7:200, 7:230 |
| Truancy .....                               | 7:70                |
| Truant programs.....                        | 6:110               |
| Vandalism .....                             | 7:170               |
| Video recording and live video transmission | 7:190               |



**Rochester Public Schools**

Independent School District #535  
615 7<sup>th</sup> Street SW  
Rochester, Minnesota 55902-2052

---

Office of the Superintendent • Telephone (507) 328-4256 • FAX (507) 328-4121

**Hertica Martin, Ph.D.**

**Presentation to the Commission on Civil Rights**

February 11, 2011

Washington, DC

The new initiative the Department of Education is undertaking to study the racially disparate impact of discipline policies on students is a critical step to alert school district personnel across the nation of their civil rights and responsibilities in disciplining students fairly without regard to skin color.

Our district has been under reform for the last four years when the Superintendent commissioned the work of Education Development Center (EDC) to conduct an educational audit in the district. This report indicated a need for Rochester Public Schools to ensure that all students experience a sense of belonging in their school community; assure that all students benefit from high expectations and fair treatment; and create an open and welcoming culture for all families. This report, on pages 26-29, further revealed the following:

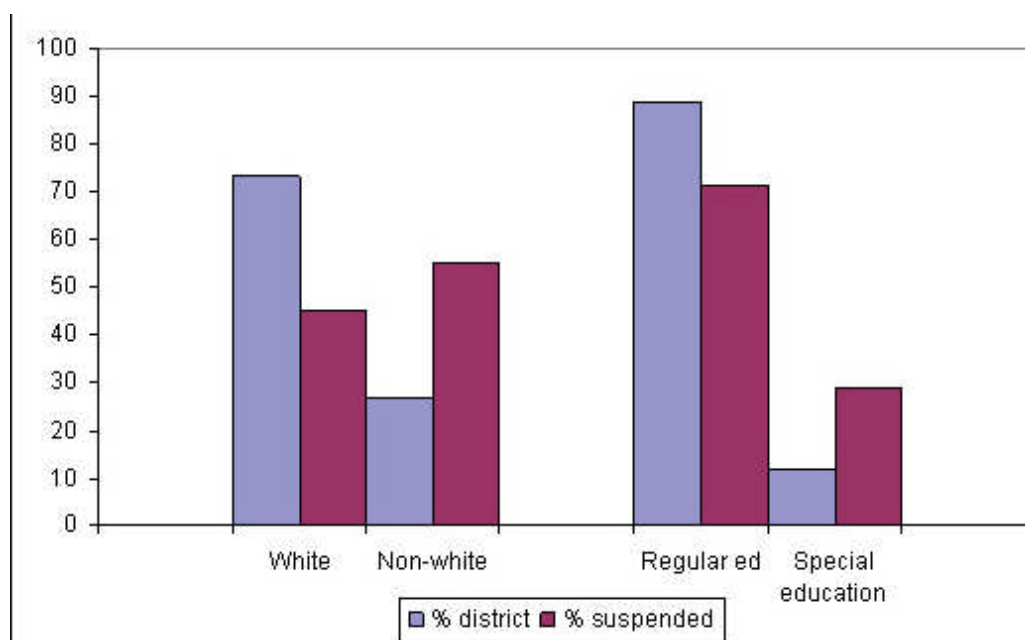
“The data revealed that there is an overrepresentation of African-American males who are expelled from school. Parents of color raised the issue of inconsistent implementation of discipline as well as the impact of some disciplinary measures on learning. Students also spoke to the issue of the unfair application of school rules.”

“Data affirmed the accuracy of parents’ and students’ perceptions. Figure 24 in the report showed that suspension rates are disproportionate to the overall student population, both by race and by disability status. While students of color make up 29 percent of the population, they make up more than 50 percent of all those students suspended. In contrast, White students make up more than 70 percent of the population, but are only 45 percent of those who are suspended. Similarly, students with disabilities make up 12.4 percent of all students, but almost 30 percent of all suspensions. Given that students with disabilities are disproportionately Black (especially in the Developmental Cognitive Disabilities - Mild/Moderate (DCD-MM), Developmental Cognitive Disabilities - Severe/Profound (DCD-SP) and Emotional/Behavioral Disorders (EBD) categories, which are also the categories with the highest suspension rates), this group of Black students deserves greater attention from a number of angles, such as identification

processes, discipline issues, least restrictive setting, and access to grade-level curriculum.”

“Suspension rate data for 2007–2008 showed that for this year, through November, 82 of 288 out-of-school suspensions have been students with disabilities (29 percent), and of those, 44 are Emotional/Behavioral Disorder (15 percent of all suspensions) and 22 are students with learning disabilities (8 percent). These percentages are almost identical to those for 2006–07.”

Figure 24 from the EDC Report. Suspension Rates by Race/Ethnicity and Special Education Status, 2006–2007 (n = 734)



“A lack of fairness of treatment in areas other than discipline was also mentioned by students. As noted earlier, while all students interviewed were able to speak of important adults in their school who made a difference for them, they also recognized that “some teachers relate to ‘different’ students but the majority don’t.” One student suggested that “more connections between students and teachers” would help more students succeed. A bi-racial student suggested that her school needed help to “be more open to diversity,” perhaps through greater adult diversity and student diversity within challenging courses.”

“While efforts have been undertaken since the 1990s to address the changing face of Rochester, there is still an underlying feeling today, as voiced in the September stakeholders meeting, that “hostility to diversity is present” and that there is a tendency among district members “to blame children and their families.” White parents, parents of color, and newcomer parents expressed the belief that there are

“some deep-seated prejudices and hostilities within the community but that, for the most part, people know what the appropriate ‘politically correct’ responses are and so do not present these in public.””

“Students and families have markedly different experiences in the RPS culture. Across many stakeholder groups—community, business, parents, and students—we identified the shared perception that RPS has been struggling with the changes in the make-up of its students for some time and still has important, deeply-rooted issues of diversity and equity to resolve in its policies, procedures, and culture. Many serious concerns and questions were raised about whether and how RPS responds to the needs of students and families from culturally and linguistically diverse populations, and from families with low incomes. At the same time, there appeared to be some renewed hope that this will be the time when “action will be taken and not just talk.” There is a growing appreciation that the district has made it a priority to deal with the systemic inequities that compromise the quality of life and educational experiences of many RPS students. To address this priority successfully, it will be imperative to engage all adults in the system (administrators, teaching staffs, and all support staff) in mindfully working together to create a culture of diversity that is pervasive across the district.”

From the educational audit outlined in the EDC report, a 5-Year Strategic Plan was developed and implemented to close the opportunity gap and to bring all students to proficiency. This Five-Year Plan led to the identification of our District’s five focused initiatives for the year. These five strategies below are researched-based, deeply rooted in the 5-Year Plan and drove the development and refinement of the District in Need of Improvement Plan (DINI). This plan addresses the inequities in the system and the disproportionality in achievement and discipline.

- **Equity**: Equity is defined as “Raising the achievement of all students while narrowing the gaps between the highest and lowest performing students and eliminating the disproportional number and racial predictability of the student groups that occupy the highest and lowest achievement categories (Singleton, 1997). The District is continuing its commitment to district-wide, systemic equity training. The district equity leadership team (DELT) is developing plans for the district to promote and embed equity training, plans, and cultural competency for the District’s educators. Site equity leadership teams (SELT) are in the process of learning more about developing site equity plans and embedding processes to develop equity-focused goals to support the development of their site integrated improvement plans.
- **Efficacy**: The belief that all children can learn is fundamental to the success of all students. It is also critical that all staff use a common data analysis system. District Efficacy Coaches provide embedded staff development and on-site support for these two major Efficacy concepts. It is expected that all staff use the Self Directed Improvement System™ in the work setting by 2011. Grade level, subject area teams are expected to develop Essential Outcomes and Common Formative Assessments and analyze such data using the Data/Feedback/Strategy Method, a central component

- of the SDIS. The proficiency level at which administrators and teacher teams currently operate using the Data/Feedback/Strategy Method from the SDIS varies from site to site. In 2010-2011, Efficacy Coaches will work more closely with building administrators and site based coaches to ensure that instructional staff members are proficient in using the Data/Feedback/Strategy Method to analyze reading and math data for the purpose of informing instruction.
- **Strengthening the Core:** The purpose of Strengthen the Core is to improve student achievement by systematically focusing on curriculum, instruction, assessment, and student engagement. This will be accomplished by articulating and documenting standards and benchmarks being taught; ensuring that curriculum, instruction, assessment, and student engagement are equity-focused; aligning curricular outcomes and expectations with balanced assessments; utilizing research-based instructional practices to ensure student proficiency and understanding; using effective research-based student engagement strategies; participating in collaborative planning both vertically and horizontally; and engaging in critical reflection about individual and collaborative planning and instruction. RPS is committed to ensuring that systems are in place to ensure that the core curriculum is implemented in a manner in which all students will succeed.
  - **Positive Behavior Intervention Supports:** PBIS is a systems approach to preventing and responding to classroom and school discipline problems. PBIS develops school-wide systems that support staff to teach and promote positive, appropriate behavior in all students. Schools are using this systems approach to improve student behavior and decrease behavior incidents, including suspensions and expulsions, while eliminating the disproportional number and racial predictability of the student groups that occupy the highest and lowest achievement categories. Training of all site teams in the PBIS framework will be completed by the end of the current school year. All sites have received the foundational training necessary to begin PBIS at their site. In addition, many of the site teams completed a booster session this past August to further their depth of knowledge regarding implementation and sustainability of PBIS. All sites have received training in the use of School-Wide Information System (SWIS), a detailed discipline tracking system to assist with analyzing data related to referrals.
  - **Interventions:** The District has identified and invested in research-based interventions in the area of reading and math to meet the needs of learners who have not reached proficiency. Read 180, Language!, System 44, Project Read, Mathletics, Voyager, Pinpoint and iSucceed provide support to students across the District. Additional sites and grade levels have been added this year to expand the number of students who are receiving intervention support. The District is carefully analyzing achievement data to determine appropriate student placements in specific intervention programs, as well as continuing to provide implementation support to staff. At the high school level, a new math intervention, I CAN Learn, is being implemented for students who receive special education services. The District remains committed to providing intensive, research-based, high-quality instructional programs to accelerate the learning of our students who are not yet meeting proficiency.