



National School Boards Association
1680 Duke St. FL2, Alexandria, VA 22314-3493
Phone: (703) 838.6722 • Fax: (703) 683.7590
www.nsba.org

NSBA Comments on Department of Education Request for Information

Via Online Submission July 23, 2021:

www.regulations.gov

Re: Request for Information Regarding the Nondiscriminatory Administration of School Discipline, Docket ID: ED-2021-OCR-0068

The National School Boards Association (NSBA) represents through our state association members approximately 13,800 school boards nationwide. As the national voice for school boards, NSBA offers the following comments to the notice, ED-2021-OCR-0068, issued by the Office for Civil Rights (OCR), Department of Education (Department). NSBA appreciates the opportunity to offer comments and information regarding the administration of school discipline in schools serving K-12 students.

Below, NSBA provides responses on a variety of topics on which the Department requested information.

1. Usefulness of current and previous guidance OCR and CRT have issued on school discipline.

NSBA believes the guidance currently in effect is useful primarily as a big-picture roadmap for school districts to approach a comprehensive school safety and behavioral support (discipline) framework. The guidance identifies key themes and areas of concern applicable to all schools in these areas. It uses common language and removes ambiguity from a variety of components designed to foster safer schools and disciplinary practices focusing on positive intervention and support. The guidance also effectively addresses the necessity to examine zero tolerance discipline policies and acknowledges disparities in current disciplinary practices, especially as they relate to race and other special designations.

Current guidance such as the [Final Report of the Federal Commission on School Safety](#) and National Threat Assessment Center's [Averting Targeted School Violence: A U.S. Secret Service Analysis of Plots Against Schools](#) provide comprehensive data driven outlines and guidance to assist schools and districts to develop and improve their preparation and response. The combination of research around violent incidents as well as research-based best practices are thoughtfully laid out and address important areas on which schools and districts should focus. NSBA recommends the Department ensure that as set forth below, guidance related to school shootings be aligned with recommendations for equitable disciplinary policies.


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Additionally, the launch of [SchoolSafety.gov](https://www.schoolsafety.gov) has been a valuable resource. Building off the information from previous guidance, this site has provided useful and timely information in easily digestible language. The combination of assessment tools and learning modules and resources are easy to navigate and to use by stakeholders, regardless of the school safety planning role they play. The [State Search Tool](#) also has been useful to district leaders in finding additional state specific resources. Often a state-level resource can be a more accessible starting point than sorting through the plethora of information available at the national level.

We urge the Department to consider an intentional shift in its framing of the information in the current guidance and safety resources. While the current resources emphasize that school climate, mental health support, equitable approaches to discipline, and safety preparedness are paramount to creating and fostering safer schools, in almost all cases the conversation is framed around active shooter scenarios and violence prevention as a first priority. The Department's guidance would provide additional benefit to stakeholders by addressing school climate, including alignment with equitable disciplinary policies as a primary goal, and active shooter and violence prevention as a result of effective implementation of those efforts.

When school districts design and implement school safety and discipline programs, they take into account community dynamics, student population needs, staff concerns, and many other contexts unique to each district and school. For this reason, we urge the Department to consider how its guidance could articulate specific best practices that could be adapted to meet the needs and resources of different school communities, rather than a "one-size-fits-all" approach. Additionally, current guidance presents school climate and culture, social and emotional learning, and programs such as Positive Behavioral Interventions and Supports (PBIS) as discreet issues. In future guidance, the Department should stress and clarify the interconnectedness of these themes within the context of trauma, discipline, crisis and emergency preparedness, target hardening, and school safety plans. The Department could provide resources to assist schools in understanding the role that cultural responsiveness and fluency can play in addressing school safety and discipline.

If the Department plans to update and reinstate the guidance document on student discipline it issued jointly with the Department of Justice in 2014,¹ best practice guidance to inform school districts understanding and efforts to identify and address disciplinary practices with disparate impact on students of color would be helpful, particularly if such guidance retains existing legal frameworks. While the 2014 guidance provided helpful examples, it seemed to suggest that school districts were at risk of monetary liability under the disparate impact analysis, which created confusion.² Such suggestions may lead to confusion about legal standards. When legal or administrative enforcement standards are clouded, judicial and economic efficiency for all parties is needlessly adversely impacted with parents, schools, and attorneys spending limited resources in avoidable litigation. The Department can be helpful by ensuring consistency between legal and administrative enforcement standards, technical assistance, examples, and a best practices clearinghouse.

¹ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

² Under *Alexander v. Sandoval*, 532 U.S. 275 (2001), there is no private right of action in money damages to enforce disparate-impact regulations promulgated under Title VI.

NSBA encourages school districts to explore the use of support and intervention approaches such as PBIS and encourages districts to move away from traditional disciplinary practices such as out of school suspension and expulsions, which disproportionately affect students of color and students with disabilities. NSBA urges the Department to engage with education stakeholders to develop best practices and resources in support of transparent, equitable student conduct and support policies, with a particular emphasis on an examination of preschool and first grade suspension and expulsion policies.

2. Ongoing or emerging school discipline policies/practices that raise concerns about potentially discriminatory implementation or effects on student access to education based on protected category.

Subjective definitions in school discipline policies may create confusion. The enforcement of narrowly defined, culturally indifferent dress codes and subjective disciplinary terminology such as “engaging in reckless behavior,” and “insubordination,” is shown through data to disproportionately impact students of color and students with differing abilities. The Department can be helpful by providing examples of elements that could be contained in nondiscriminatory dress code policies and by suggesting concrete behavioral terminology which can be applied uniformly and fairly to all students.

3. Promising practices for administration of nondiscriminatory school discipline or creating positive school climates.

Best practices on engaging local school communities in developing, supporting, and maintaining nondiscriminatory positive school climates and effective local centric systems are of value to school districts. The Department should consider the provision of resources on utilizing historical research and root cause analysis to identify and examine student disciplinary trends, to assist schools in understanding how such quantitative data, aligned to suspension by multiple student designations, may provide a more accurate picture of student views and opinions of their schools. For instance, districts could benefit from an analysis and description of: (1) proven disciplinary approaches and tools to eliminate the disproportionate impact upon students of color, and (2) specific strategies that create a strong sense of community.

4. Views on specific disciplinary policies/practices.

Discipline of students in pre-K through third grade, including in-school and out-of-school suspensions.

NSBA recognizes that often very young students exhibiting serious behaviors are likely to be experiencing serious challenges, either in the school or home environments. Except for specific, defined, egregious circumstances, the suspension of students at this young age is of great concern. NSBA urges the Department to provide districts with resources on best practices to address pre-K through third grade student behavioral challenges.

Use of exclusionary disciplinary penalties, such as suspensions or expulsions, for minor, non-violent, or subjectively defined types of infractions, such as defiance or disrespect of authority.

NSBA supports the use of restorative justice practices, and encourages the Department to provide guidance, resources, and best practices on how to utilize and implement alternatives to suspension or expulsion in addressing infractions such as defiance or disrespect.

Discipline issues relating to dress and grooming codes (including restrictions on hairstyles).

The Department can support school district approaches to sustaining equitable climates by providing resources and examples regarding best practices in the area of student dress and culturally sensitive dress code policies, while respecting non-discriminatory local policies that reflect community values and local educational concerns.

Referrals to and the resulting interactions with school police, school resource officers, or other law enforcement.

The Department can assist schools and law enforcement by providing guidance and best practices in the development of memoranda of understanding addressing the respective roles and responsibilities of school resource officers and law enforcement, specifically regarding student discipline, including law enforcement training in areas pertaining to school climate and culture, discipline, and safety.

Referrals to alternative schools and programs.

The Department can assist schools by providing guidance on best practices for the administration of alternative schools or programs offered for students in ways that ensure such programs do not disproportionately serve students solely as a result of disciplinary measures, but instead serve as interventions to support continued learning opportunities for students who may have difficulty adjusting in the traditional school environment.

Threat assessment practices.

The Department should provide resources and best practices on administering threat assessment training with a foundation of trauma-informed practices, helping schools prepare for and minimize the unintended adverse impact that some practices such as realistic active shooter drills in traumatizing or re-traumatizing students.

Students bringing weapons or using them at school.

With regard to regulations and surveys such as the Civil Rights Data Collection, the Department should ensure that definitions for weapons are clearly defined across all, taking into consideration that definitions under state law may not carry identical meaning in other jurisdictions. The Department should standardize definitions to ensure the integrity of data

collected as well as the value and accuracy of conclusions or recommendations drawn from that data.

School policies or practices addressing teacher and staff training related to discipline, the role teachers play in referrals of students for discipline, and the role of implicit bias in disciplinary decisions.

The Department can assist school districts by providing guidance and resources identifying best practices to help schools recognize and address biases in disciplinary decisions, including instances of disparate impact on students of color.

Discipline related to attendance and time management.

The Department can assist school districts by providing guidance and resources identifying best practices in the use of discipline in instances involving student attendance and time management, focusing on the benefits that social emotional learning awareness can impart in building and developing trusting relationships with students.

Discipline of victims of race, color, or national origin harassment, sex harassment, or disability harassment for misconduct that arises as a result of such harassment.

The Department can assist school districts by providing guidance and resources to support efforts to identify and ensure that schools are free from harassment. The Department should identify best practices for schools to address the adverse impact of harassment, including support to victims to minimize misconduct precipitated by the original harassment.³

Discipline issues relating to activities off school campus or in virtual school settings, such as bullying through social media usage.

Given the Supreme Court's ruling in *B.L. v. Mahanoy*, that upheld a school district's ability to address some off-campus speech, the Department can assist school districts by identifying best practices relating to disciplinary issues arising from off-campus activities or in virtual school settings. Districts would benefit from guidance that examines the factors to be weighed in determining the impact to the educational environment or to the infringement on rights of others when determining if they should intervene in off campus issues.

5. Types of guidance and technical assistance from OCR that will best help SEAs and LEAs create positive, inclusive, safe, supportive school climates and identify, address, and remedy discriminatory student disciplinary policies and practices.

NSBA encourages the Department to review the recommendations above regarding specific guidance and best practices. Schools should have the funding to train their employees, including

³ Beliefs and Policies of NSBA, Art. IV, § 2.12: NSBA believes that school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders.

administrators, teachers, and other staff. Anyone working in an educational community has the potential to impact the students they serve and has responsibility in contributing to a safe climate and culture. Trainings should focus on these big picture themes, allowing for the importance of community input, values, and decision-making, so that schools have the tools to address concerns in their specific communities. NSBA urges the Department to refrain from one-size-fits-all approaches, opting instead for sharing tools and practices that local communities and schools can utilize to develop and implement policies and procedures that work best for their students.

6. Promising practices that have reduced discipline or disparities between different groups of students.

NSBA urges the Department, in any resource it issues, to respect unique school environments and local school board decision-making as the representatives of their communities, while encouraging stakeholder participation in developing practices to address disparities in disciplinary practices. We suggest drawing attention to the following as possible recommendation for schools to consider:

- Revise and redefine student codes of conduct to include supports, interventions, and community-based resources;
- Parent academies, parent learning centers, parent engagement specialists;
- SEL training;
- Trauma-informed practices;
- Restorative justice practices;
- Peer mediation; and
- In-school supports.

7. School discipline policies.

An analysis of National Assessment of Educational Progress (NAEP) scores showed that eighth graders who were absent three or more days in the past month were significantly outscored by their classmates who were present every day: 60 percent of students with absences scored at the basic level or better compared to 78 percent of those with none.⁴ Absenteeism has many causes, but discipline policies that stress out-of-school suspensions can place students at risk of academic failure. In addition, students with multiple suspensions have a higher likelihood of dropping out and can even lead to worse outcomes – substance abuse and delinquency in the community.⁵ Such policies can produce a harmful school climate for students overall, but they can also have a disproportionate effect on students of color and students with disabilities.⁶

⁴ NSBA, Center for Public Education, *Education Equity, What does it mean? How do we know when we reach it?* (2016) citing: NCES, Status and Trends in the Education of Racial and Ethnic Groups, 2009, Indicator 16 – Absences, US Department of Education, <https://www.nsba.org/-/media/NSBA/File/cpe-educational-equity-research-brief-january-2016.pdf>.

⁵ NSBA, Center for Public Education, *Education Equity, What does it mean? How do we know when we reach it?* (2016) citing: Losen, Danial, Hodson, Keith, Morrison & Belway, *Are we closing the school discipline gap?* 2015, The Center for Civil Rights Remedies, University of California, Los Angeles, <https://www.nsba.org/-/media/NSBA/File/cpe-educational-equity-research-brief-january-2016.pdf>.

⁶ “African American, Latino and Native American students, in particular, are far more likely to be suspended, expelled, and arrested than their white peers, even when accused of similar behavior.” NSBA, *Addressing the Out-of-School*

8. Whether and how hiring and professional development practices can be designed and aligned to ensure staff are adequately prepared to manage classrooms and work with students in a fair and equitable manner.

A significant body of research has demonstrated the positive correlation between a diverse teaching force and improvements in student achievement, especially for students of color. Teachers of color tend to have higher expectations for students of color, which can impact student performance.⁷ Teachers of color also tend to have more positive perceptions of students of color and are less likely than white teachers to perceive African American students' behavior as disruptive. These teachers serve as more relatable role models and can often bridge cultural divides between home and school for students of color and their families.⁸

Therefore, NSBA urges the Department to develop resources and best practices for districts on creating diverse teaching forces that reflect their student populations and communities.

All teachers, no matter their racial background, should be skilled in ways of engaging students in learning that leverage the diverse knowledge and experiences of all students to make learning more relevant and impactful. This approach is not only important for students of color, but it also helps educators to address the needs of students with special learning needs and those who are differently abled.⁹

9. Data collection, analysis, or record-keeping practices helpful in identifying and addressing disparities in discipline; conversely, any barriers or limitations in these areas, and ideas on how to overcome them.

With regard to regulations and surveys such as the Civil Rights Data Collection (CRDC), the Department should ensure that definitions for weapons are clearly defined across all, taking into consideration that definitions under state law may not carry identical meaning in other jurisdictions. The Department should standardize definitions to ensure the integrity of data collected as well as the value and accuracy of conclusions or recommendations drawn from that data. Last month, NSBA submitted a letter to OCR responding to CRDC rules and definitions.¹⁰ The letter expresses NSBA's concerns about consistency in the definitions of key terms from one

Suspension Crisis: A policy guide for school board members (2013) <https://cdn-files.nsba.org/s3fs-public/0413NSBA-Out-Of-School-Suspension-School-Board-Policy-Guide.pdf?mXctTtx3nmKnZ9TKWSY1upU7FBBiS2jN>. An in-depth study of discipline in Texas schools examined referral rates of students by race between seventh and twelfth grades. The researchers discovered that black students were far more likely than their white or Hispanic classmates to be given an out-of-school suspension for a first disciplinary referral.

⁷ NSBA, Center for Safe Schools, *Reimagining School Board Leadership: Actions for Equity* (2021) <https://www.nsba.org/-/media/NSBA/File/center-for-safe-schools-reimagining-school-board-leadership-guide-2021.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ See, NSBA's Letter to OCR providing insight, input, and examples from school districts on a number of issues at the forefront of schools' civil rights effort including the new Title IX regulations, the Civil Rights Data Collection, district-wide compliance reviews, and transgender student rights, (June 9, 2021) <https://www.nsba.org/-/media/NSBA/File/nsba-ed-civil-rights-letter-6921.pdf?la=en&hash=FD1198191D674C051FEC8FB0EA5F1110FDEABE1C>.

collection to the next, increased burdens for schools who must dedicate staff time to respond to questions, and technical assistance for school staff completing the collection.

Although NSBA appreciates the time savings that may result by the Department's decision to drop certain elements from the CRDC, NSBA cautions that adding and subtracting elements from collection to collection inherently creates inconsistency and inefficiencies. At the same time the Department dropped elements including financial data and number of documented incidents involving firearms or explosives, it added elements (optional in this collection, but likely mandatory in the next) involving allegations of sexual offenses by staff and bullying of students based on religion. Changes like these often create time-consuming challenges for non-legal school officials as they struggle to understand and respond to the shifts.

Conclusion

NSBA appreciates the opportunity to provide insight on the Request for Information Regarding the Nondiscriminatory Administration of School Discipline. We continue to be available to OCR and the Department of Education for consultation to provide the perspective of school boards, their counsel and our state associations of school boards that collectively represent over 90,000 school board members in districts enrolling over 50 million students across the country. NSBA stands ready to work in partnership with OCR and the Department on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

Francisco M. Negrón, Jr.
Chief Legal Officer
National School Boards Association