

May 20, 2011

U.S. Department of Education  
Office for Civil Rights  
The Wanamaker Building,  
100 Penn Square East  
Suite 515  
Philadelphia, PA 19107

Re: Complaint of discrimination against the Jefferson County Kentucky Public Schools under Title VI of the Civil Rights Act of 1964,<sup>1</sup> Title II of the Americans with Disabilities Act,<sup>2</sup> and Section 504 of the Rehabilitation Act.<sup>3</sup>

## **I. INTRODUCTION**

1. This complaint is being filed on behalf of six families (hereinafter “Complainants”), and all similarly situated families, whose children attend the Middle and High Schools in the Jefferson County Public Schools (hereinafter, “JCPS”) and who have been suspended or expelled from school, placed in an Alternative Education Program, or referred to the juvenile justice system by the school district within the last one hundred and eighty days alleging systemic violations of Title VI of the Civil Rights Act of 1964 (hereinafter, “Title VI”), Title II of the Americans with Disabilities Act (hereinafter, “ADA”), and Section 504 of the Rehabilitation Act (hereinafter, “Section 504”).

## **II. CLAIMS OF DISCRIMINATION**

### **A. UNLAWFUL DISCRIMINATION UNDER TITLE VI**

2. JCPS accepts grants of financial assistance from the United States Department of Education and is therefore subject to the provisions of Title VI. Section 601 of that Title provides that no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits

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<sup>1</sup> 42 U.S.C. § 2000d; 34 C.F.R. pt. 100.

<sup>2</sup> 42 U.S.C. § 12132; 28 C.F.R. pt. 35.

<sup>3</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.

of, or be subjected to discrimination under any program or activity” covered by Title VI. *See* 42 U.S.C. § 2000d.

3. Section 602 authorizes federal agencies “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability”. *See* 42 U.S.C. § 2000d-1.

4. It is permissible for these regulations to proscribe actions that the statute itself does not prohibit. *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985).

5. The Department of Education's rules under Title VI bar not only intentional discrimination, but also unintentional disparate-impact discrimination. 34 C.F.R. § 100.3 (b)(2) (Recipients of federal financial assistance may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . .”).

6. JCPS through its implementation of zero tolerance policies and vague and ambiguous discipline procedures, disciplines African American students more harshly and more frequently than Caucasian students. These harsh punishments include school suspensions, juvenile court referrals, and involuntary placement in highly restrictive alternative programs.

7. JCPS, through its implementation of zero tolerance policies and vague and ambiguous discipline procedures, also disciplines African American students with disabilities more harshly and more frequently than Caucasian students with disabilities. These harsh punishments also include school suspensions, juvenile court referrals, and involuntary placement in highly restrictive alternative programs.

8. By implementing zero tolerance policies and vague and ambiguous discipline procedures, JCPS maintains an educational environment hostile to African American students and deprives those students of equal access to education benefits and opportunities.

9. JCPS knows, or should know, that its implementation of zero tolerance policies and vague and ambiguous discipline procedures is ineffective in remedying behavioral problems in schools and increases the likelihood that

African American students and students with disabilities will be suspended from school, referred to juvenile court, or placed in overly restrictive programs.

10. JCPS knows, or should know, that there are alternative research-based methods, such as Positive Behavior Interventions and Supports (PBIS) and Restorative Justice, that will improve student behavior, create a safe and productive school climate, and substantially reduce punitive discipline measures, such as suspensions, office referrals, juvenile justice referrals, and placement in alternative schools.

11. The actions and inactions of JCPS as described in this complaint, disparately impact African American students, including African American students with disabilities, in violation of the regulations promulgated pursuant to Title VI.

12. The actions and inactions of JCPS as described in this complaint, discriminate against African American students, including African American students with disabilities, in violation of Title VI.

**B. UNLAWFUL DISCRMINATION UNDER SECTION 504 AND THE ADA**

13. JCPS' receipt of financial assistance from the United States Department of Education also subjects it to the requirements of Section 504, which provides that: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See* 29 U.S.C. § 794(a) (2006).

14. JCPS is also a public entity subject to the requirements of the ADA, which prohibits discrimination on the basis of disability by state and local governments. 42 USC § 12131 (defining "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority"). Title II provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC § 12132.

15. As with the Title VI regulations, the ADA and Section 504 prohibit unintentional “disparate impact discrimination.” *Alexander v Choate*, 469 US 287, 295 (1985) (construing Section 504 to include discrimination caused by “thoughtlessness and benign neglect”). *See also Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-52 (2003) (recognizing that disparate impact claims are cognizable under the ADA).

16. JCPS, through its implementation of zero tolerance policies and vague and ambiguous discipline procedures, disciplines students with disabilities more harshly and more frequently than students without disabilities. These harsh punishments include school suspensions, juvenile court referrals, and involuntary placement and retention in highly restrictive alternative programs.

17. Complainants incorporate by reference the allegations contained in Paragraphs 9 and 10, *supra*.

18. By implementing zero tolerance policies and vague and ambiguous discipline procedures, JCPS maintains an educational environment hostile to students with disabilities and deprives them of equal access to education benefits and opportunities in the district.

19. The actions and inactions of JCPS as described in this complaint, disparately impact students with disabilities on the basis of their disability in violation of Section 504 and the ADA.

20. JCPS, in implementing its zero tolerance policies and otherwise disciplining students with disabilities, fails or refuses to comply with the regulations promulgated pursuant to Section 504, including those regulations requiring JCPS to implement its education programs in the least restrictive environment, to identify and evaluate students with disabilities, and to develop and implement procedural safeguards.<sup>4</sup>

21. The actions and inactions of JCPS as described in this complaint, discriminate against students with disabilities on the basis of their disability in violation of Section 504 and the ADA.

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<sup>4</sup> 34 C.F.R. §§ 104. 31 et seq.

### III. JCPS DISCIPLINE POLICIES

22. The Kentucky Department of Education has promulgated regulations governing school discipline, including the use of suspensions and expulsions.<sup>5</sup>

23. JCPS has adopted these policies.<sup>6</sup> In addition JCPS has adopted a Code of Acceptable Behavior and Discipline and the Student Bill of Rights (hereinafter, “Code of Conduct”) which is the primary vehicle for implementing school discipline policies in the school system.<sup>7</sup>

24. The Code of Conduct places primary responsibility for implementing discipline policies with classroom teachers<sup>8</sup>. Under the Code of Conduct, when the teacher believes that in-class measures are not correcting the behavior, the teacher or other staff may submit a written discipline referral to the appropriate administrator.<sup>9</sup>

25. Under the Code of Conduct, JCPS principals, assistant principals, and head teachers must use the Behavior Violations and Consequences Chart (hereinafter, “the Chart”) in implementing disciplinary measures.<sup>10</sup> The Chart contains a list of offenses and a range of corresponding punishments.

26. In accordance with the Code of Conduct and the Chart, school administrators may suspend students for up to 20 days per incident.<sup>11</sup>

27. If the student commits “serious misbehavior or if previous measures have failed to correct behavior problems,” students may be assigned to an alternative school by a Central Office Administrator.<sup>12</sup>

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<sup>5</sup> KRS 158.150.

<sup>6</sup> Exhibit 1 - JCPS Policy, BBA School Board Powers and Duties

<sup>7</sup> The Code of Conduct accompanies this complaint and is marked as Exhibit 3.

<sup>8</sup> Code of Conduct, p. 10.

<sup>9</sup> Code of Conduct, p. 10.

<sup>10</sup> Code of Conduct, pgs. 11, 18, and 19.

<sup>11</sup> Code of Conduct, p. 12-13.

<sup>12</sup> Code of Conduct, p. 10.

28. The Code of Conduct also provides that school principals may recommend students for expulsion, but only the school board may actually expel the student.<sup>13</sup>

29. For certain offenses, school administrators (school principals, assistant principals, and head teachers) have broad discretion in determining which student or which behavior of a student will lead to that student's suspension.<sup>14</sup>

30. JCPS has adopted a "Zero Tolerance" as part of its Code of Conduct.<sup>15</sup> Thus, for certain offenses, school suspension is the minimum punishment to be imposed.

31. JCPS policies and Code of Conduct result in the imposition of disciplinary measures that disparately impact students with disabilities and African-American students. As a result of these policies and practices:

- a. Students with disabilities are disciplined at significantly higher rates than students without disabilities;
- b. African American students with disabilities are disciplined at significantly higher rates than Caucasian students with disabilities; and
- c. African American students are disciplined at significantly higher rates than all Caucasian students.

32. JCPS policies and procedures implementing the Code of Conduct lend themselves to these disparities for a number of reasons.

33. First, the potential for suspension or removal from school pervades the Code of Conduct. For middle and high school students, all but one of the twenty-one listed offenses carries the potential for suspension as one of the

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<sup>13</sup> Id.

<sup>14</sup> Code of Conduct, p. 12, 20.

<sup>15</sup> Code of Conduct, p. 15-17.

punishments.<sup>16</sup> In addition, although truancy is not an offense for which suspension is listed as a possible violation,<sup>17</sup> it is an offense for which a JCPS student may be “referred to family court . . . and may be subject to legal action”.<sup>18</sup>

34. Second, although the Code of Conduct lists offenses and corresponding punishments, they do not clearly define or distinguish among those offenses. For example, the Code of Conduct defines “disruption” and “disorderly conduct” (a criminal offense), in a manner that makes them indistinguishable from one another,<sup>19</sup> even though deliberate disruption may only result, at most, in a five day suspension, and disorderly conduct may result in placement in a long-term suspension, placement in an alternative school, or expulsion.<sup>20</sup> Similarly, it is possible for a student that is charged with refusing or failing to follow a teacher’s rules or directives to be faced with, at most, a short-term suspension, or a criminal charge of “Abuse of a Teacher,”<sup>21</sup> which would require under JCPS Zero Tolerance policies, that the student incur long-term suspension, involuntary placement in an alternative school, or expulsion.<sup>22</sup>

35. Third, the Chart does not reduce administrative discretion in a manner that prevents or reduces disparate treatment of African American students or students with disabilities. School staff may use an alternative disciplinary action

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<sup>16</sup> Code of Conduct, p. 29.

<sup>17</sup> Under Kentucky law, a student is deemed to be habitually truant if they have three or more unexcused absences on two or more occasions. KRS 159.150; Code of Conduct, pg. 21. JCPS also brings truancy charges against students that have been suspended in excess of the statutory number of days constituting habitual truancy since suspensions are considered unexcused absences.

<sup>18</sup> Code of Conduct, p. 21.

<sup>19</sup> Code of Conduct, p. 30.

<sup>20</sup> Code of Conduct, p. 19.

<sup>21</sup> **KRS 161.190 Abuse of teacher prohibited.**

Whenever a teacher or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school..

<sup>22</sup> Code of Conduct, p. 3, 19, and 21.

than the one prescribed in the Code of Conduct if written justification is provided. Once a teacher has referred a student for disciplinary action, a “school administrator”, usually either the assistant principal or the principal, decides whether the student has committed an offense covered by the Chart, which offense the student should be charged with, and what punishment should be meted out.<sup>23</sup> Indeed, administrators frequently utilize criteria in meting out discipline that are not referenced in the Chart. For example, the intake instructions at Breckenridge Metropolitan High School (hereinafter, “Breckenridge”), one of the district’s alternative schools, state that “[a]ttitude, behavior and cooperation cannot adequately be defined in an intake packet and may not be contained in any literature published by Breckenridge or JCPS. The administration reserves the right to determine whether or not a student is appropriately following the rules and regulations of this school.”<sup>24</sup>

36. Fourth, although the Code of Conduct invests school administrators with broad discretion in administering punishments, JCPS does not have adequate procedures for ensuring uniformity in the application of punishments or in preventing discriminatory and disparate application of its discipline policies. The Code of Conduct represents “a partial list of disciplinary measures that are available for the classroom, school, Central Office, and the Board of Education.”<sup>25</sup> It provides that school administrators, in the exercise of discretion, may send middle and high school students who have violated JCPS rules of acceptable behavior on more than one occasion to an alternative program.<sup>26</sup>

37. Fifth, the Code of Conduct provides that “Students may be charged with criminal violations of local, state, or federal ordinances/statutes/laws if violations of the Code fall under the appropriate jurisdiction.”<sup>27</sup> The Code further provides that “prosecution and adjudication of criminal violations shall occur separately from the administration of school procedures.”<sup>28</sup> However, the Code

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<sup>23</sup> Code of Conduct, p. 10.

<sup>24</sup> Breckenridge Admission policy is attached as Exhibit 4.

<sup>25</sup> Code of Conduct, p. 10.

<sup>26</sup> Id.

<sup>27</sup> Code of Conduct, p. 18.

<sup>28</sup> Code of Conduct, p. 18.

does not specify the events for which the police should be called, and there are no written procedures for how these referrals are to be made or the role of parents in the process to ensure that referrals will not be discriminatory or have an unnecessary disparate impact on African American students or students with disabilities.

#### **IV. JCPS PRACTICES AND PROCEDURES REGARDING STUDENTS WITH DISABILITIES.**

38. In addition to JCPS policies and procedures implementing the Code of Conduct, there are a number of other factors that cause students with disabilities to be disproportionately suspended from school, referred to the juvenile courts, and involuntarily placed in highly restrictive alternative programs.

39. Rather than complying with the procedures established under Section 504, and properly evaluating students that have not been identified as having a disability when there is ample reason to believe that the student may have a disability, JCPS regularly suspends or seeks prosecution of such students for juvenile delinquency.<sup>29</sup>

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<sup>29</sup> Section 504 and the ADA and their regulations prohibit schools from punishing students for conduct that is a manifestation of their disability. 29 U.S.C. § 794; 34 C.F.R. §§ 104.3(j), 104.4(b), 104.33, 104.35; 42 U.S.C. § 12132; 28 C.F.R. § 38.130 (a), (b). See also *Thomas v. Davidson Acad.*, 846 F. Sapp. 611 (M.D. Tenn. 1994) (holding that section 504 and the ADA require modifications of school discipline policies to avoid discrimination against children with disabilities). Section 504 explicitly requires schools to conduct a comprehensive evaluation and manifestation bearing to determine whether a student's misconduct is related to her disability prior to a "significant change in placement." 34 C.F.R. §§ 104.35, 104.36. The evaluation must be comprehensive and conducted by appropriate, qualified personnel. It must include a determination of whether there is a connection between the behavior for which discipline is to be imposed and the student's disability. The parents must be given notice of the school district actions, an opportunity to examine the relevant records, and an impartial hearing and review process. 34 C.F.R. §§104.35, 104.36.

Suspensions for more than 10 days, consecutive or cumulative, constitute a "change in placement" triggering these requirements. In-school suspension may also be a change of placement for students with special needs. In addition, referral to the juvenile justice system may trigger these requirements. *Morgan v. Chris L.*, 106 F.3d 401 (6th Cir. 1997) (unpublished decision finding that a school's filing of a juvenile delinquency petition constitutes a change in placement for the purpose of federal disabilities law).

40. JCPS regularly fails in its obligation to identify and evaluate students who it knows, or should know, have disabilities.

41. In subjecting students with disabilities to its Code of Conduct or juvenile court petitions, JCPS regularly fails to timely review evaluation data, fails to conduct appropriate manifestation determination reviews (hereinafter, “MDR”), fails to conduct appropriate functional behavior assessments (hereinafter, “FBA”) of students, and fails to develop or implement behavioral intervention plans (hereinafter, “BIP”) and behavioral goals.<sup>30</sup>

42. While the Code of Conduct appears to provide students with disabilities with somewhat greater protections than federal law,<sup>31</sup> JCPS regularly fails to follow its own policies regarding scheduling and holding meeting that provide parents with a meaningful opportunity to participate in decisions conducting appropriate FBAs or MDRs, and developing meaningful BIPs.

43. In response to students’ behavioral difficulties, JCPS regularly changes the student’s placement to restrictive alternative programs and pursues juvenile justice referrals, rather than seeking to properly assess the student’s behavior and develop appropriate BIPs..

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Under section 504, a school cannot circumvent these requirements by failing to identify or evaluate children for disabilities. Schools have an affirmative obligation to identify and evaluate children who may have disabilities. 34 C.F.R. §§ 104.32, 104.35.

<sup>30</sup> Under Section 504, education programs receiving federal financial assistance must "establish and implement" procedural protections regarding the provision of a free appropriate public education to students with disabilities, including the identification, evaluation, and placement of such students. See 34 CFR § 104.36. The regulations also point out, that compliance with the procedural safeguards of the IDEA Section 615 is one way to comply with the procedural safeguard requirement of Section 504. Section 615 of the IDEA, among other things, establishes requirements regarding the provision of behavioral intervention plans (hereinafter, "BIP"), functional behavioral assessments (hereinafter, "FBA"), and manifestation determination reviews (hereinafter, "MDR"). See 34 CFR § 300.530 (d)(ii).

<sup>31</sup> To JCPS’ credit, its policies require school personnel to convene a meeting “within ten school days” whenever there is a proposal to suspend a student for more than five days to determine whether a FBA and BIP is needed, whether the student’s IEP and placement are appropriate, and whether the behavior is a manifestation of the students disability. Code of Conduct, p. 12. The IDEA merely requires that such a meeting be convened whenever there is a proposal to suspend a student for more than ten days.

44. The failure to comply with the procedures required by Section 504 and the ADA substantially contributes to students with disabilities being disparately impacted, as compared to students without disabilities, by suspensions from school, juvenile courts referrals, and placement in highly restrictive alternative programs.

45. The failure to comply with the procedures required by Section 504 and the ADA (as well as those required by the IDEA) discriminates against students with disabilities on basis of their disability.

## **V. JCPS' ALTERNATIVE EDUCATION PROGRAMS**

46. Students with disabilities, as compared to students without disabilities, are disproportionately placed in JCPS' punitive alternative programs, Breckenridge Metropolitan High School (hereinafter, "Breckenridge"), Buechel Metropolitan High School (hereinafter, "Buechel"), or Kennedy Metropolitan Middle School (hereinafter, "Kennedy").<sup>32</sup>

47. African American students, as compared to Caucasian students, are also disproportionally placed at Breckenridge, Buechel, and Kennedy.

48. The education provided at alternative schools is substantially inferior to the education provided in regular JCPS educational programs.

49. For students with disabilities placed at alternative schools, their Individual Education Programs (IEPs) are often not implemented; related services such as counseling, social work services, and tutoring are generally not provided; behavioral intervention plans are ignored; and there is a lack of stimulation in the classroom in violation of 34 C.F.R. § 104.33.

50. Middle or high school students placed in the Breckenridge, Buechel and Kennedy alternative programs are denied equal access to non-academic services, such as athletics and other extracurricular activities since these schools

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<sup>32</sup> Riverview is an alternative program within an alternative program since it is located in Breckenridge and shares security guards. For purposes of this complaint, the allegation pertaining to Breckenridge apply to Riverview, except where they facilities are discussed separately.

have no such programs and students are not permitted to participate in the non-academic programs located in other middle or high schools.

51. At Breckenridge, Buechel, and Kennedy alternative programs, students are pervasively and persistently teased by teachers and staff, physically restrained, confined in closet-like rooms, euphemistically called Behavior Centers or time-out rooms, and exposed to other forms of violence.

52. Students with disabilities placed in Breckenridge, Buechel and Kennedy alternative programs, particularly students with emotional disabilities, are frequently subject to harassment in order to provoke a response from the student.

53. Students at Breckenridge, Buechel, and Kennedy are frequently and disproportionately charged with assaults due to the fact that hall monitors, security, or other JCPS employees or surrogates often provoke altercations or otherwise cause tensions to be heightened.

54. Students placed in Breckenridge, Buechel, and Kennedy are not permitted to return to regular high school or regular middle school until they have “completed the program” without any guidance in school or district policy as to what that entails or any consideration of providing supplementary aids and services as means of returning the students to a regular high school.

55. Many students have been attending alternative programs for years because they have not been provided with the education or services they need and to which they are entitled to help them develop the skills necessary to “complete the program.”

56. Many students with disabilities placed in Breckenridge, Buechel, and Kennedy are not permitted to return to regular high school or regular middle school even though their education could be achieved satisfactorily with the use of supplementary aids and services.

## **VI. DATA SHOWING DISPARATE IMPACT**

57. JCPS suspends African American students at significantly higher rate than most other school districts in Kentucky.

58. According to a study completed by Dr. Brea Perry, Ph.D., Professor of Sociology at the University of Kentucky, using data obtained from the Kentucky

Department of Education (KDE), African American students comprised 40% of student enrollment in JCPS during the 2008-2009 school year,<sup>33</sup> but represent 64% of all JCPS suspensions, a discrepancy of 24%.<sup>34</sup>

59. Data from JCPS' own website shows an even greater disparity: only 35% of the JCPS high school population is African American, but they comprise 63% of all suspensions during the 2008-2009 school year, a discrepancy of 28%.<sup>35</sup> Similarly, for middle schools students, African American students comprise 36% of the total middle school population but 60% of the middle school suspensions while Caucasian students make up 54% of the population, but only 33% of the total suspensions.<sup>36</sup>

60. Students with identified disabilities comprise 16% of the total JCPS student population, according to KDE data, yet they represent 38% of the total suspensions.<sup>37</sup> African American students with disabilities fared even worse, comprising 44% of the disabled student population, but 71% of the disabled student suspensions.

61. The above suspension data does not tell the whole story of suspensions in JCPS schools. For example, Breckenridge engages in a number of exclusionary practices that are not captured in suspension data, such as not counting forced early dismissals from school as suspensions. In addition, staff at Breckenridge do not allow students to enter the school if they do not pass the security screen upon arrival at school. Thus, even if the student only has a minor dress code violation, which could be easily remedied, the student is not allowed to enter the school. In such circumstances, the student is not counted as having been

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<sup>33</sup> The Report of Dr. Brea Perry, Ph.D., (hereinafter, "Brea Report") p. 4. A copy of her report is attached as Exhibit 5.

<sup>34</sup> Id.

<sup>35</sup> Exhibit 6 taken from 2008-2009 and 2009-2010 Data Books at <http://www.jefferson.k12.ky.us/departments/acctresplan/databook/index.html>. Data from 2009-2010 shows similar patterns and are included.

<sup>36</sup> Exhibit 7 taken from same website above for Middle School data.

<sup>37</sup> Exhibit 4, Perry Report, p. 4. According to JCPS website data, high school students with disabilities comprised only 9.7% of the total high school population in 2008-2009. This number does not include any high school students found at the Brown School or Moore. See Exhibit 8; 2009-2010 and 2008-2009 Data Books for high school at <http://www.jefferson.12.ky.us/departments/acctresplan/databook/index.html>

suspended. According to Breckenridge practices, if a student does not “come into” the school, even if school staff has refused to allow the student to enter, it is not treated as a suspension.

62. According to data kept by the Kentucky Center for School Safety, African American students in the JCPS school district are suspended nearly twice as often as their Caucasian peers for law violations. The rate for African American students was 2.50 per 100 students for law violations at school during the 2009-2010 school year as compared to 1.26 per 100 Caucasian students enrolled.<sup>38</sup>

63. African American students are suspended for Code of Conduct violations four times as often as Caucasian students. African American students are suspended at a rate of 28.52 students per 100 as compared to Caucasian students at a rate of 9.54.

64. Breckenridge and Buechel have become JCPS’ new segregated schools. For the first three months of the 2010-2011 school year, African American students comprised 36% of JCPS total enrollment, but 57% of the Breckenridge enrollment and 81% of the Buechel enrollment.<sup>39</sup>

65. The pattern of disproportionality described in the preceding paragraphs has existed for many years. For example, for the 2008-2009 school year, African American students comprised 35% of JCPS total enrollment, but 70% of the Breckenridge enrollment and 76% of the Buechel enrollment.<sup>40</sup> During the first semester of the 2006-2007 school year, 150, or 71%, of the 211 students placed by JCPS at Breckenridge were African American. At Buechel, 276, or 73%, of the 352 students placed by JCPS were African American.<sup>41</sup>

66. For Kennedy, the numbers are similar. During first three months of the 2010-2011 school year, 214 students attended Kennedy with 108 (50%) being African American, as compared to 37% for the district as a whole.<sup>42</sup> During the 2006-2007 school year, 128(69%) of the students placed by JCPS were African American.<sup>43</sup> Data from the 2004-2005 school year shows that, of the 394 students

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<sup>38</sup> Exhibit 9 found at <http://www.kysafeschools.org/data10.html>

<sup>39</sup> Exhibit 10. The data on this chart came from responses by JCPS to open records requests. Also see enclosed data from web search regarding racial composition of schools.

<sup>40</sup> Exhibit 10.

<sup>41</sup> Exhibit 11

<sup>42</sup> Exhibit 12

<sup>43</sup> See Exhibit 11

whom JCPS placed at Kennedy during that school year, 275 (70%) were African American.<sup>44</sup>

67. Over the years, JCPS has placed students with disabilities in the alternative schools at a far higher rate than students without disabilities. During the first three months of the 2010-2011 school year, 92 (44%) of the students at Breckenridge were in special education and 125 (31%) of the students at Buechel were in special education.<sup>45</sup> During the 2008-2009 school year, 45% of the students placed by JCPS at Breckenridge were in special education with an additional 7% having been in special education previously. At Buechel, 29% of the student population was in special education with an additional 8% no longer active in special education.<sup>46</sup> During the first semester of 2006-2007 a similar pattern emerges. Of the 211 students placed by JCPS at Breckenridge during that semester, 116(55%) were in special education. At Buechel, the numbers show 157 out of 352 students (45%) were in special education.<sup>47</sup>

68. At Kennedy, during the first three months of the 2010-2011 school year, 45 students out of 214 (21%) were in special education.<sup>48</sup> In the first semester of the 2006-2007 school year, 74 out of 185 students (40%) of the students placed by JCPS at Kennedy were receiving special education.<sup>49</sup> During the 2004-2005 school year, only 90 out of 394 (23%) students placed by JCPS were receiving special education. However, an additional 58 students had received special education prior to attending Kennedy. Eleven had been receiving services for emotional/behavioral disabilities and another seven had received services for a specific learning disability.<sup>50</sup>

69. Kennedy, while being an alternative middle school, has classrooms for fourth and fifth grade students. Fourth and fifth grade students placed by JCPS at Kennedy have significant academic and behavior problems, but, in most likelihood, have not been evaluated or identified as having disabilities, even though

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<sup>44</sup> Exhibit 13

<sup>45</sup> See Exhibits 10.

<sup>46</sup> See Exhibit 10.

<sup>47</sup> See Exhibits 11.

<sup>48</sup> See Exhibits 12.

<sup>49</sup> See Exhibit 11

<sup>50</sup> See Exhibit 13.

their school records strongly indicate that evaluations or identification are necessary.<sup>51</sup>

70. JCPS has an alternative school for kindergarten to eighth grade students with severe emotional disturbance, the Waller-Williams Environmental School (hereinafter, “Waller-Williams”). All of the students placed in Waller-Williams by JCPS have been identified as having a disability.

71. JCPS regularly files court charges against students. During the 2008-2009 school year, a total of 501 JCPS students were charged with 738 offenses. Of the charges filed by JCPS, 343 (69%) of the students charged were African American while only 153 (31%) were Caucasian.<sup>52</sup>

72. The data on criminal charges is underinclusive, since it does not include charges filed from incidents at Breckenridge, Buechel, Kennedy, or Waller-Williams unless the students were charged with a misdemeanor as explained below. Breckenridge, Buechel, and Kennedy hire off-duty police officers to provide security and the charges they file do not show up in district records. Also, arrests at Waller-Williams are handled by the local police who are called when needed. The data from these arrests also is not included in district records.

73. Upon information and belief, there have been a significant number of felony charges filed by personnel at Breckenridge, Buechel, Kennedy, or Waller-Williams against students with disabilities and African American students.

74. Safe Place Shelter House has a contract with the Louisville Metro Youth Detention Center (LMYDC), to take students who have been charged with a misdemeanor offense at school. From August 9, 2005 to February 4, 2008, 870 youth were taken to Shelter House for misdemeanor offenses. Of that number, 625 (72%) were African American while only 196 were Caucasian (23%).<sup>53</sup>

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<sup>51</sup> While, by definition, a middle school in Kentucky can include the fifth through eighth grade, all JCPS Middle Schools, except Kennedy, contain grades six to eight.

<sup>52</sup> Exhibit 14

<sup>53</sup> Exhibit 15

75. Upon information and belief, the disparities described in this complaint continued to exist throughout the 2009-2010 and 2010-2011 school years.

## **VII. COMPLAINTS' STATEMENT OF FACTS**

76. As the data which accompanies this Complaint clearly indicates, there are hundreds of African American students and students with disabilities in the JCPS public schools that have been suspended from school for significant periods of time, who have been placed in restrictive, alternative education programs, or referred to court for reasons that in other times would have been dealt with by a call to the parents or detention.

77. The questions of law (Title VI, Section 504, and the ADA) and fact (the disparate use of exclusionary disciplinary practices) are common to both the named Complainants and these hundreds of students.

78. As detailed below, the claims of the named Complainants are typical of the claims of the hundreds of students who are not specifically referenced in this Complaint.

79. JCPS has engaged in ongoing and systematic pattern of violating Complainants' rights and subjecting them to discrimination in violation of the Title VI, Section 504, and the ADA. For these reasons, the investigation of this complaint must include and go beyond the facts of individuals set forth in this Complaint and any determination and remedy must be designed to address the systemic nature of the actions and inactions described in the complaint.

## **VIII. ALTERNATIVES TO JCPS SCHOOL DISCIPLINE POLICIES**

208. JCPS school discipline policies have, at best, a tenuous relationship to toward promoting school safety and learning.

209. Numerous studies that have shown that zero tolerance policies and school suspensions are ineffective at curbing violence and ensuring safety.<sup>54</sup>

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<sup>54</sup> In reviewing research on school discipline, the American Psychological Association found no evidence that schools are safer or more orderly because of zero tolerance discipline

210. Even if JCPS school discipline process has some relationship to promoting school safety and learning, there are less discriminatory and more effective methods of achieving the school's goals.

211. JCPS has acted with deliberate indifference in failing to adequately implement discipline policies that are less discriminatory, and more effective methods of achieving school safety and learning.

212. As an alternative, the school district should adopt district-wide Positive Behavior Interventions and Supports (PBIS)<sup>55</sup> and other alternatives to zero tolerance policies and Codes of Conduct to reduce heavy reliance on school suspensions for addressing discipline.

213. Approximately 7,100 schools across the country are using PBIS.<sup>56</sup> IDEA regulations and the U.S. Department of Education's Office of Special Education Programs specifically encourage its use.<sup>57</sup> JCPS will argue that it uses a PBIS program, CHAMPS, throughout its schools. Yet the data shows that the students most in need of its inclusive design are being ignored.

214. On a state level, PBIS is recommended or required by statute in three states and is the subject of statewide initiatives or school-university partnerships in every state. PBIS has shown positive effects in reducing disciplinary referrals in

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policies. Russell Skiba, et al, "Are Zero Tolerance Policies Effective in the Schools?" American Psychological Association Task Force at 49 (2006) Instead, there is compelling evidence suggesting that school suspensions and expulsions have a serious detrimental impact on individual students and, by extension, their communities. See Alicia C. Insley, Comment, Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies, 50 Am. U. L. Rev. 1039, 1061-63 (2001).

<sup>55</sup> PBIS is a trademark term. PBS is the generic name. For all practical purposes, these terms can be used interchangeably.

<sup>56</sup> Glen Dunlap, Keynote Address at the 5<sup>th</sup> International Conference on Positive Behavior Support: *Positive Behavioral Support: Roots, Ruts, and Recipes*, (Mar. 27, 2008).

<sup>57</sup> See 34 C.F.R § 300.324(a)(2) (2006) ("In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior"); OSEP's National Technical Assistance Center on PBIS, [www.pbis.org](http://www.pbis.org).

elementary, middle and high schools, and has proven to be effective with at-risk students.<sup>58</sup>

215. In addition, there are a host of alternative disciplinary practices that could achieve school goals without disproportionately burdening minority students.<sup>59</sup> Indeed, there are programs currently available in Kentucky that promote and provide training for implementing policies and practices, such as PBIS, Foundations, CHAMPS, Social Emotional Learning and Restorative Justice,<sup>60</sup> which are viable alternatives to zero tolerance policies and Codes of Conduct that rely heavily on school suspensions for addressing discipline.

## **IX. REQUESTS FOR RELIEF**

Complainants respectfully request that OCR provide them with the following relief:

A. Thoroughly investigate the complaint and find, within the timelines provided by regulation, that the actions and inactions of JCPS as described in this complaint, disparately impact African American students in violation of the regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964, discriminate against African American students in violation of Title VI of the Civil Rights Act of 1964, disparately impact students with disabilities on the basis of their disability in violation of Section 504 and the ADA, and discriminate against students with disabilities on the basis of their disability in violation of Section 504 and the ADA,.

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<sup>58</sup> Stephen R. Lassen et al., *The Relationship of School-Wide Positive Behavior Support to Academic Achievement in an Urban High School*, 43 *Psychology in the Schools* 701, 712 (2006).

<sup>59</sup> Susan Sandler et al., Justice Matters Institute, *Turning to Each Other Not on Each Other: How School Communities Prevent Racial Bias in School Discipline: A Preliminary Report* (2000); The Advancement Project, *supra*, at 31-39; *Id.* at app. VII; Gwendolyn Cartledge et al., *Professional Ethics Within the Context of Student Discipline and Diversity*, 24 *Teacher Educ. & Special Educ.* 25 (2001); Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 *Exceptional Children* 381 (2000); Junious Williams, *Reducing the Disproportionately High Frequency of Disciplinary Actions Against Minority Students: An Assessment-Based Policy Approach*, 24 *Equity & Excellence* 31 (1989).

<sup>60</sup> Mr. Maurice Reisner, retired Executive Director of Safe Schools and Student Relations with JCPS, pledged to CLOUT (Citizens of Louisville Organized & United Together) to try restorative discipline in the JCPS elementary and middle schools.

B. Determine whether JCPS compliance can be secured by voluntary means as provided by 42 U.S.C. § 2000d-1.

C. If voluntary compliance cannot be secured, compel compliance by either

1. The termination of or refusal to grant or to continue assistance as provided for 42 U.S.C. § 2000d-1.

2. Pursuing “any other means authorized by law.” 42 U.S.C. § 2000d-1, including referring the violation to the Department of Justice to initiate court proceedings regarding the Section 504 and ADA claims raised in the complaint. Case Resolution Manual at Secs. 304, 606(c).

D. Require, as a condition of voluntary or involuntary compliance, that JCPS Develop and implement a plan, within 30 days, that contains strategies, objectives, and timelines to accomplish the following within three months:

1. Comply with the requirements of Title VI of the Civil Rights Act of 1964, in order to ensure that its school discipline practices do not result in the disparate treatment of or otherwise discriminate against students by race, color, or national origin.

2. Comply with the requirements of the Americans with Disabilities Act and Section 504 of The Rehabilitation Act of 1973, in order to ensure that its school discipline practices do not result in the disparate treatment of or other discriminate against students on the basis of disability.

3. Comply with IDEA and Section 504 directives related to the development of functional behavioral assessments (FBAs), the development and implementation of effective behavior intervention plans (BIPs), and the process for conducting appropriate manifestation determination reviews (MDRs) for students with disabilities whose behavior impedes the child’s learning or that of others.

4. Comply with the IDEA and Section 504 directives to identify, fully evaluate, and provide a free appropriate public education to children who are suspected or, due to their behavior or poor academic performance, should be suspected of having a disability.

5. Significantly increase the access of the students placed in alternative schools to regular education class settings and extracurricular activities, including measurable benchmarks and outcomes for determining the successful implementation of these strategies, objectives, and timelines.

6. Disseminate to all school building administrators, including assistant principals and disciplinarians, a directive requiring strict compliance with state and federal discipline requirements for students with disabilities, including the requirements for conducting MDRs, providing IEP services beginning with the 11 cumulative day of out-of-school removals, and the development and review of appropriate FBAs and BIPs, as well as specifically prohibiting undocumented removals of students with disabilities for disciplinary reasons via "cooling off," "parent pick-up," security checks, or other undocumented methods of removals for disciplinary reasons.

7. Provide any student who has been suspended from school more than 10 days in the last year or any student in an alternative school setting access to individual or small group intensive reading and math remediation opportunities during the school day if such student is determined to be more than two years behind his or her chronological grade level based upon grades, standardized test scores or curriculum-based assessments.

8. Implement evidence based practices that will substantially reduce disparities in school suspensions and expulsions, referrals to Buechel, Breckenridge and Kennedy alternative schools, and court referrals by contracting with an independent consultant who meets with the approval of JCPS, OCR, and counsel for the complainants. The consultant must have expertise in evidence based practices, including PBIS, designed to transform individual schools, classrooms and engagement with individual students and have the following responsibilities:

a) Work with the Superintendent or his designee to establish and train a district-wide Leadership Team in PBIS as well as other evidence based alternatives to Zero Tolerance policies;

b) Oversee, with the assistance of the Leadership Team and with access to all JCPS schools, the implementation of evidence based practices, including PBIS, designed to reduce suspension and reduce identified disparities;

- c) Determine a reasonable amount by which disciplinary disparities should be reduced each quarter, over the course of four (4) years. Specifically, the Committee shall set reduction goals relating to the disparities in suspensions, expulsions, placements at Buechel, Breckenridge, or Kennedy and court referrals:
- Between the identified African American and Caucasian students,
  - Between the identified African American with disabilities and Caucasian students with disabilities, and
  - Between students with disabilities and students without disabilities;
- d) Determine whether discipline standards:
- Are consistently applied within and among schools,
  - Are resulting in a disproportionate number of minority – especially African-American – students being suspended, expelled, placed and retained at Buechel, Breckenridge or Kennedy or referred to court, or
  - Are resulting in a disproportionate number of students with IEPs being suspended, expelled, placed at Buechel, Breckenridge or Kennedy not permitted to return to their schools of origin or referred to court;
- e) Analyze all available data to determine the following:
- The number of suspensions, expulsions, placements to Buechel, Breckenridge and Kennedy and court referrals by race, disability status, school, and reason;
  - Steps that the district has taken to reduce the number of African-American students who have been suspended, expelled, placed at Buechel, Breckenridge, or Kennedy or referred to court;
  - Steps that the district has taken to reduce the number of students with IEPs who have been suspended, expelled, placed at Buechel, Breckenridge, or Kennedy or referred to court;

- Implementation of PBIS and other evidence based alternatives and other alternatives to zero tolerance policies and Codes of Conduct that rely heavily on school suspensions for addressing discipline; and
  - The disciplinary practices of any schools whose data shows positive outcomes, so that those practices may be shared with other schools;
- f) Revise, in consultation with JCPS, the district's Code of Conduct to be consistent with a PBIS Discipline protocol and the development and implementation of district and school-wide PBIS or other evidence based alternatives to zero tolerance. The revised code of conduct for all students shall also include the following elements:
- i. A section detailing IDEA's disciplinary protections and procedures for students with disabilities;
  - ii. Reasonable alternatives to suspension and expulsion, when applicable, including the use of equitable consequences that are consistent with the law;
  - iii. The use of suspension and expulsion, when applicable, only as a last resort and for the most egregious behavior;
  - iv. The use of multi-disciplinary teams to evaluate and recommend solutions to behavior problems;
  - v. Collaboration and partnerships with after-school programs, when appropriate; and
  - vi. For a student engaged in on-going misconduct, despite appropriate interventions, the requirement that a collaborative team be convened with appropriate staff and the parent or caregiver(s) to address the escalated behaviors and design and implement an effective individualized behavior support plan that may include but is not limited to:
    - a. Intensive behavioral supports and strategies;
    - b. Adapted curriculum and instruction; and

- c. Communication strategies.
- vii. Language that is clear, precise, and easy to apply consistently and which will:
- a. Reduce the number of offenses for which students may be suspended;
  - b. Clearly define and distinguish between offenses that may appear, on the surface, to consist of the same elements. For instance, "Profanity or vulgarity," "disruptive behavior," "Defiance/interference with staff," "Harassment" and "Menacing" are examples of terms that should be clearly defined so it is clear in each individual case which one (and thus, which corresponding punishment) shall apply;
  - c. Oversee the implementation of discipline policies to ensure uniformity in implementation;
  - d. Develop an evidence based intervention plan for each child transferred to the district's alternative program that specifies when the child's progress will be reviewed in order to determine if the child is ready to return to the regularly assigned school in the district;
  - e. Specify the events for which the police should be called, making it clear that police should be called when there is a clear violation of the law and then only as a last resort and for the most egregious behavior;
  - f. Develop written procedures for how referrals to law enforcement are to be made, the due process to which each student is entitled prior to receiving a criminal charge, and the role and rights of parents in the process; and
  - g. Issue, on at least an annual basis, a written report to be made publically available, which shall include information about the districts progress in reducing disparities and suggestions to the district by non-district representatives, to the

JCPS Board on changes to policies, practices and procedures that are needed to ensure adequate implementation.

9. Collect and provide to the Consultant and counsel for the complainants on at least a quarterly basis all data and tracking information relevant to the issues Complainants have alleged in their OCR Complaint and other data that the Consultant may require. The data required includes but is not limited to data and tracking information regarding removals (suspensions and expulsions), truancies, 45-day placements, court referrals and placement in alternative programs for students in the district, disaggregated by race, disability and sex of the students.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 2011,

Children One, Two, Three, Four, Five  
and Six

By and through their attorneys

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