



June 23, 2005

Angela M. Bennett  
 Regional Director  
 Office of Civil Rights  
 United States Department of Education  
 890 Ward Parkway, Suite 2037  
 Kansas City, Missouri 64114

**Re:** Resolution Agreement, Winner School District 59-2  
 Docket Number 07985009

Dear Ms. Bennett,

The National Legal Department of the American Civil Liberties Union and the American Civil Liberties Union of the Dakotas (collectively, ACLU) and the Rosebud Sioux Attorney General write on behalf of 14 Native American families whose children attend the Middle School and the High School in Winner, South Dakota.

In 2000, the Office of Civil Rights of the United States Department of Education (OCR) and the Winner School District (WSD) entered into a Resolution Agreement designed to end, among other things, the racially discriminatory discipline of Native American students enrolled in the Middle and High Schools.<sup>1</sup> In June 2004, based on evidence provided by WSD, OCR announced that WSD had complied with the terms of the Resolution Agreement and closed the case.

We write to report that the information WSD provided to OCR was incomplete, inaccurate, misleading and deceptive. A close review of documents generated by WSD and interviews with parents and students reveal that WSD did not comply with the Resolution Agreement. WSD manipulated its records to present a grossly distorted picture of the disciplinary practices and racial relations in its Middle and High Schools. In a word, OCR was bamboozled.

<sup>1</sup> OCR maintains jurisdiction over this complaint because WSD is a public entity and receives federal funds, thereby subjecting it to the requirements of federal anti-discrimination laws. During the last ten years, a significant percentage of WSD's revenues came from federal funds. Most recently, during the 2003-2004 school year, WSD received \$999,027 in federal funds, representing 15.6% of its total revenues. South Dakota Department of Education, 2003-2004 Profile of Winner School District 59-2, available at <http://www.state.sd.us/deca/Finance/Data/04digest/profiles/Winner.pdf> [hereinafter *S.D. Dept. of Educ. 2003-2004 Profile of Winner School District*].

AMERICAN CIVIL LIBERTIES  
 UNION FOUNDATION  
 LEGAL DEPARTMENT  
 NATIONAL OFFICE  
 125 BROAD STREET, 18TH FL.  
 NEW YORK, NY 10004-2400  
 T/212.549.2500  
 F/212.549.2651  
 WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
 NADINE STROSSEN  
 PRESIDENT

ANTHONY D. ROMERO  
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 ADVISORY COUNCIL

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Our independent investigation reveals that in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964,<sup>2</sup> Title II of the Americans with Disabilities Act,<sup>3</sup> and Section 504 of the Rehabilitation Act,<sup>4</sup> WSD continues to discipline Native American students (including those with disabilities) more harshly than similarly situated Caucasian students. WSD purposefully deprives Native American students of equal access to education benefits and opportunities by maintaining an educational environment hostile to Native Americans. Exhibits 1 through 7 provide examples of discriminatory incidents that demonstrate a broad pattern and practice of discrimination by WSD.

To permit WSD to remain above the law will encourage other school districts to engage in the same illegal activities with the same impunity. It makes the federal government complicit in creating an underclass from which Native Americans may never emerge. The educational disadvantages and discrimination faced by Native Americans around the country are well documented. Less than two-thirds of Native Americans aged 18 to 24 have graduated from high school, and less than one in ten Native Americans over the age of 25 have completed four years of college.<sup>5</sup> Native American school children score lower than any other group in basic levels of reading, math, and history.<sup>6</sup> Native Americans account for 3% of all dropouts nationwide despite accounting for only 1% of students.<sup>7</sup>

For these reasons, among others, we respectfully request that OCR reopen its compliance review and compel WSD to take the steps necessary to remedy the wrongs the Resolution Agreement was designed to address.<sup>8</sup>

## I. BACKGROUND

WSD is located in Tripp County, a rural county bordering the Rosebud Sioux Indian Reservation in south central South Dakota. According to 2003 estimates from the U.S. Census Bureau, Tripp County has a population of 6,177 people, 11.2% of whom are Native American.<sup>9</sup>

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<sup>2</sup> 42 U.S.C. § 2000d; 34 C.F.R. pt. 100.

<sup>3</sup> 42 U.S.C. § 12132; 28 C.F.R. pt. 35.

<sup>4</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.

<sup>5</sup> U.S. Comm'n on Civil Rights, "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country," at 8-9 (July 2003).

<sup>6</sup> Id., at 84.

<sup>7</sup> Id.

<sup>8</sup> "In administering a program regarding which the recipient [of federal funds] has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. § 100.3 (b)(6)(i). "If the efforts required of the applicant or recipient under § 100.6(d) to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation have failed to overcome [the consequences of prior discrimination], it will become necessary... for [the] recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination." 34 C.F.R. § 100.5 (h).

Roughly 70% of Tripp County's school-aged students attend WSD schools.<sup>10</sup> During the 2003-2004 school year, WSD enrolled a total of 1,016 students.<sup>11</sup> Nearly a quarter of these students were Native American.<sup>12</sup>

In a recently decided voting rights case, Bone Shirt v. Hazeltine,<sup>13</sup> the United States District Court for the District of South Dakota found that Native American families have complained for years about racism in the Winner schools. At trial, several witnesses testified that racially motivated name-calling, harassment and bullying are and always have been pervasive.<sup>14</sup> The former director of education for the Rosebud Sioux Tribe testified that "Indian children are being 'pushed out' of school in Tripp County through the discriminatory use of attendance and discipline policies."<sup>15</sup> Relying on these facts and similar evidence, the Court concluded "that there is a long and extensive history of discrimination against Indians" in the region, and that "[t]he effects of this history are ongoing."<sup>16</sup>

## II. OCR'S PRIOR INVOLVEMENT WITH WSD

### A. The Compliance Review

In 1997, OCR initiated a compliance review to examine WSD's policies and practices relating to discipline and racial harassment.<sup>17</sup> Normally, such compliance reviews are not

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<sup>9</sup> U.S. Census Bureau, "South Dakota Quick Facts: Tripp County, South Dakota," available at <http://quickfacts.census.gov/qfd/states/46/46123.html>.

<sup>10</sup> This estimate is based on the 71.9% figure from the 2002-2003 school year, the most recent year for which National Center for Education Statistics (NCES) are available. NCES Common Core of Data, available at [http://www.nces.ed.gov/ccd/districtsearch/district\\_detail.asp?Search=2&details=1&ID2=4679710&DistrictID=4679710](http://www.nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=2&details=1&ID2=4679710&DistrictID=4679710).

<sup>11</sup> Winner School District 59-2, School Year 2003-2004 Enrollment Summary. Another document, the S.D. Dept. of Educ. 2003-2004 Profile of Winner School District 59-2, available at <http://www.state.sd.us/deca/Finance/Data/04digest/profiles/Winner.pdf>, lists the total enrollment figure at 949 students.

<sup>12</sup> During the 2003-2004 school year, Native American students counted for 23.2% of the population of WSD; during the 2002-2003 school year, Native Americans counted for 21.9%, and during the 2001-2002 year, Native Americans counted for 22.4%. Winner School District 59-2, School Years 2003-2004, 2002-2003, and 2001-2002, Enrollment Summaries.

<sup>13</sup> 336 F. Supp.2d 976, 1029-30, 1032 (D.S.D. 2004). This decision, handed down on September 15, 2004, post-dates OCR's withdrawal from Winner School District by three months.

<sup>14</sup> Id. at 1032.

<sup>15</sup> Id. at 1029-30.

<sup>16</sup> Id. at 1034.

<sup>17</sup> Ltr. from Angela M. Bennett, Regional Director for the Office of Civil Rights, to Michael Elsberry, Superintendent of WSD, dated Dec. 3, 1997.

prompted by community complaints.<sup>18</sup> This one, however, was. Prior to the review, OCR had received complaints from parents and community members alleging that:

- Caucasian students called Native American students derogatory names, like “dirty Indian,” and made derogatory statements, like telling them to “go back to the reservation where they belong;”
- Teachers required groups of Native American students in the hallways to disband, but did not require similar groups of Caucasian students to do so;
- Fights frequently broke out between Native American students and Caucasian students because of name-calling by Caucasian students;
- Native American students were disciplined more harshly than Caucasian students;
- Native American students were leaving Winner School District as a result of the discriminatory discipline and racial harassment.<sup>19</sup>

## **B. The Resolution Agreement**

After OCR conducted on-site interviews with school officials, community organizations, parents and students in April of 1998, it proposed a Resolution Agreement in September of 1998 setting forth steps that WSD should take to address these issues.<sup>20</sup> Initially, WSD refused to sign the Agreement, denying the existence of any problems.<sup>21</sup> After repeated pressure from OCR, WSD signed the Agreement on February 1, 2000, promising to take the following steps by July 1, 2000:

- Disciplinary Policies: Review and revise disciplinary policies to ensure that they are not discriminatory; define objective criteria for offense categories; and reduce discretion in the administration of discipline.<sup>22</sup>
- Disciplinary Referral Procedures: Review and revise disciplinary referral procedures to provide “clear procedures for staff to follow” when making such referrals.<sup>23</sup>

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<sup>18</sup> Id.

<sup>19</sup> Id., attaching, “South Dakota: A Statewide Initiative with the South Dakota Department of Education and Cultural Affairs.”

<sup>20</sup> Ltr. from Linda Petry, Attorney for OCR, to Parents, dated Apr. 17, 1998; Ltr. from Jody A. Van Wey, Case Resolution Director for OCR, to Gary Spawn, Superintendent of WSD, dated Sept. 3, 1998.

<sup>21</sup> David Nicholas, Principal of Winner Middle School, OCR Report: Profile Data Request, dated January 30, 1998, at 1, 4-5; Dean Keith, Principal of Winner High School, OCR Report: Profile Data Request, dated January 20, 1998, at 1, 5.

<sup>22</sup> The Resolution Agreement is attached hereto as **Exhibit 8**. See **Exhibit 8**, at Discipline ¶ 1 (a)-(d).

<sup>23</sup> Id. at ¶ 2 (a)-(b).

- Administration of Disciplinary Sanctions: Periodically review disciplinary referrals to identify and report racial disparities and ensure that students are referred and disciplined in a non-discriminatory manner.<sup>24</sup>
- Record Keeping: Review student discipline record-keeping systems to ensure completeness and accuracy.<sup>25</sup>
- Racial Harassment: Develop policies to identify and remedy a racially hostile environment.<sup>26</sup>

OCR made no further visits to WSD after the two entities entered into the Resolution Agreement. By letters dated June 12, 2000, May 21, 2001, August 20, 2002, September 24, 2002, and June 27, 2003, WSD submitted documentation demonstrating its alleged compliance with the Agreement. OCR responded to each letter, sometimes eight or nine months later, noting areas of purported compliance and requesting additional information regarding areas of non-compliance.<sup>27</sup>

### C. Complaint from the Rosebud Sioux Tribal Department of Education

On March 18, 2002, the Rosebud Sioux Tribal Department of Education, on behalf of the Tribal Council, submitted a complaint to OCR alleging that WSD was complying neither with the letter nor the spirit of the Agreement. The letter and the affidavits attached to it described:

- The absence of meaningful policies and practices to punish or deter student-on-student racial harassment;
- Discriminatory referrals of Native American students to law enforcement personnel; and
- Insufficient disciplinary record keeping practices.<sup>28</sup>

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<sup>24</sup> Id. at ¶¶ 3(a)-(e), 4.

<sup>25</sup> Id. at ¶ 5.

<sup>26</sup> Id., Racial Harassment, at ¶ 1.

<sup>27</sup> OCR responded to WSD's June 12, 2000 letter by letter dated April 17, 2001; to WSD's letter dated May 21, 2001, by letter dated February 19, 2002; to WSD's letters dated August 20 and September 24, 2002, by letter dated April 21, 2003, and to WSD's letter dated June 27, 2003, by letter dated June 16, 2004. The letters and their attachments are attached hereto as **Exhibits 9 through 17**.

<sup>28</sup> The letter is attached hereto as **Exhibit 18**. It highlighted several incidents in which the school discriminatorily referred Native American students to the police for minor school misconduct. Native American students were sent to the police for, *inter alia*, slapping a Caucasian student, refusing to sit where the student was told, and for telling a teacher in confidence that he wanted to kill a bully. In all cases, the school assisted in prosecuting the student in the juvenile justice system. See Exhibit 18, at 5, 7-8.

The complaint also identified incidents in which the school refused to punish Caucasian students for similar conduct. The school refused to act when a Caucasian student told a Native American student that he wanted to see

The Tribe requested that OCR investigate the complaint and impose meaningful sanctions against WSD.<sup>29</sup> It offered to provide additional information, and to facilitate an investigation in any way possible.<sup>30</sup> OCR responded by stating that the issues raised by the letter would be addressed by OCR in its monitoring of the Resolution Agreement.<sup>31</sup> By letter dated June 16, 2004, OCR terminated its monitoring over WSD.<sup>32</sup>

#### **D. The ACLU's Investigation**

At the request of the Rosebud Sioux Attorney General and the Tribal Department of Education, the ACLU commenced an investigation into the discriminatory policies and practices at the Winner Middle and High Schools. Between January 2004 and May 2005, ACLU staff members visited Tripp County five times, interviewed more than 40 Native American parents and 15 Native American students, and collected thousands of pages of documents from federal agencies, state agencies and WSD, among other sources.

Our investigation reveals that OCR concluded that WSD successfully implemented the terms of the Resolution Agreement in error. The problems that prompted OCR's initial involvement and that were identified in the Rosebud Sioux complaint letter continue to this day.

### **III. WSD'S FAILURE TO IMPLEMENT THE RESOLUTION AGREEMENT**

WSD did not implement the terms of the Resolution Agreement. Among other things, it did not promulgate the required policies and procedures. It did not establish a meaningful internal review process. It did not ensure that record keeping of disciplinary incidents was complete, accurate or consistent.

#### **A. Failure to Develop Adequate Disciplinary Criteria and Referral Procedures**

To reduce the risk of race-based disciplinary referrals, the Resolution Agreement required WSD to develop policies that: (a) clearly defined the conduct for which students could be punished; (b) reduced administrative discretion in the imposition of discipline; and (c) established clear procedures for disciplinary referrals.<sup>33</sup> As evidence of its compliance, WSD

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all Indians like her dead, or when a Caucasian student repeatedly threatened to shoot a Native American student. Id. at 9-10.

<sup>29</sup> Id., at 17.

<sup>30</sup> Id. at 3, 17. On May 14, 2002, the Tribe provided additional information about the incidents cited in the letter, including the names and contact information for the families described. Ltr. from Dana Hanna, Rosebud Sioux Tribal Court, to Office for Civil Rights, dated May 14, 2002.

<sup>31</sup> OCR's response to the Tribe's letter is attached hereto as **Exhibit 19**.

<sup>32</sup> **Exhibit 17**.

<sup>33</sup> **Exhibit 8**, at Discipline ¶1 b.

sent OCR copies of disciplinary matrices developed in 1998 and included in WSD's Middle and High School Student Handbooks.<sup>34</sup>

These matrices do not comply with the Resolution Agreement requirements. First, although they list certain offenses and corresponding punishments, they do not clearly define those offenses. Among other things, they do not describe how offenses such as "inappropriate language," "disruptive behavior," "insubordination," "student-on-student harassment" or "fighting-verbal" differ even though each offense results in different punishments.<sup>35</sup>

Second, the matrices do not reduce administrative discretion, but invest it almost completely in the principal. The matrices do not list all offenses for which a student might be punished --- only the "most common" ones.<sup>36</sup> Once a teacher has referred a student for disciplinary action, the principal decides whether the student has committed an offense covered by the matrices.<sup>37</sup> If the offense is outside the scope of the matrices, the principal decides what type of punishment to impose.<sup>38</sup>

Third, although the matrices specify the events for which the police should be called, there are no written procedures for how these referrals are to be made or the role of parents in the process. The procedures used by the Middle School, as described by the many families with whom we spoke, raise serious due process concerns.

According to the families, the Middle School principal requires that all Native American students referred to law enforcement write an affidavit confessing to their alleged crimes. The students, some of whom have been as young as 12 and/or have had significant learning disabilities, are neither permitted to confer with their parents nor informed of their right to counsel prior to drafting the affidavits. The affidavits are then turned over to the police and used as admissions in subsequent juvenile court proceedings. In one case, school administrators barred a mother from seeing her son, J.S., while he was being forced to draft an affidavit inside the principal's office. School records show that in another case, after Native American student R.C.H. was in a fight, her father requested that the school not permit her to sign any written statements; the school refused and told him that R.C.H. would be prosecuted for disorderly conduct.

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<sup>34</sup> The disciplinary matrices for each school varied slightly from year to year. The current versions of the student handbooks are attached as **Exhibits 20** and **21** and can be found at <http://www.winner.k12.sd.us/middle-school/handbook03-04.htm> and <http://www.winner.k12.sd.us/high-school/Handbooks/HS-Handbook-04-05.htm> respectively.

<sup>35</sup> See **Exhibit 20**, at 9. Thus, as actually happened during the 2000-2001 school year, one student might receive a single day of in-school suspension (ISS) for swearing if the incident is classified as "inappropriate language," **Exhibit 11(a)**: Log Entry for 4/2/2001, at 4, while another might receive two (2) days of ISS for swearing if the incident is classified as "insubordination." *Id.*, Log Entry for 2/13/2001, at 4.

<sup>36</sup> See, e.g., **Exhibit 16(b)**, at 1.

<sup>37</sup> *Id.* at 1-2.

<sup>38</sup> *Id.*

In apparent violation of South Dakota law, parents generally are not informed of their child's arrest until after the child has been transported to the police office.<sup>39</sup> WSD administrators told one parent that school policy only requires the principal to notify the parents by mail within 36 hours of the arrest.<sup>40</sup> In another case, WSD officials waited three days before informing parents that their child had been transported to a juvenile detention facility. During that three-day period, the school claimed that they did not know where the child was and the family had no knowledge of the child's whereabouts.<sup>41</sup>

**B. Failure to Explain Racial Disparities in Disciplinary Referrals and Deviations from the Disciplinary Matrices**

The Resolution Agreement required WSD to convene committees in both the Middle and High Schools to review disciplinary referrals periodically "to ensure that students are referred for discipline in a nondiscriminatory manner."<sup>42</sup> Among other duties, the review committees were to:

- Review the reasons for disciplinary referrals, the types of offenses for which children were referred, and the teachers making the referrals and the punishments imposed;
- Report on any identified racial differences in referrals and punishments imposed; and
- Identify and explain deviations from official policies and procedures.<sup>43</sup>

Instead of creating new committees for that purpose, WSD added the above responsibilities to the agendas of the pre-existing Middle School and High School Principal Advisory Committees (PACs) that consist entirely of school staff members.<sup>44</sup> The PACs had no community, no parent, and no Native American members, and no members outside of the principal's chain of command.

Each Committee was to review periodically the disciplinary activity recorded by each school in WSD's computerized Power School database.<sup>45</sup> At the end of the academic year, they

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<sup>39</sup> See S.D. codified laws § 26-7A-15 (2005).

<sup>40</sup> The school's 36-hour-notification policy appears to stem from School Board Policy 7.18 in the 2004-2005 Student Handbook for Winner High School, **Exhibit 21**, at 16, describing procedures for disciplining students found with alcohol or drugs on school grounds.

<sup>41</sup> Interview with Sherry Red Owl-Neiss, Director, Department of Education, Rosebud Sioux Tribe, 5/12/05.

<sup>42</sup> **Exhibit 8**, at Discipline ¶¶ 3-4.

<sup>43</sup> Id.

<sup>44</sup> **Exhibit 9**, at 1.

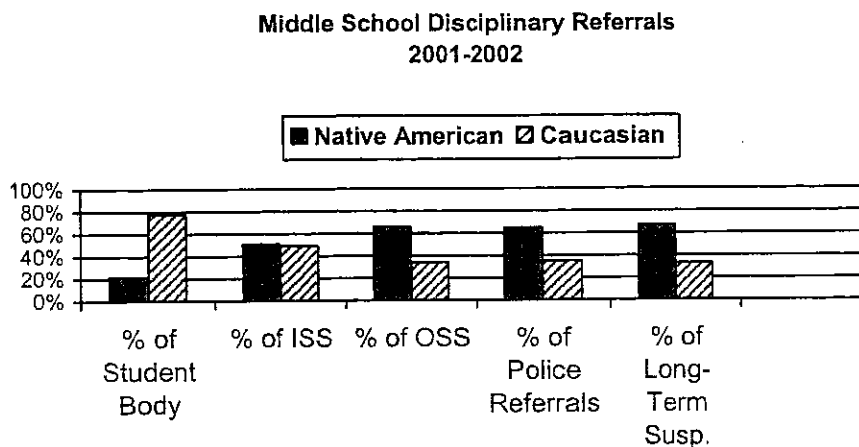
<sup>45</sup> WSD purchased the Power School software system specifically to track all disciplinary sanctions during a given year and enable a review committee to identify racial disparities in the imposition of those sanctions. **Exhibit 9**, at 2; **Exhibit 13**, at 2. See also **Exhibit 8**, at Discipline ¶¶ 3-5. This software has the capacity to identify incidents by date, description, referring staff member, student, discipline imposed, and race of the student. **Exhibit 12**, at 3.

were to prepare written reports setting forth their findings and the data upon which the findings were based, and submit these reports to OCR. Despite explicit requests from OCR, WSD failed to produce a PAC report at the end of the 2000-2001 school year.<sup>46</sup> While it submitted reports for the 2001-2002 and 2002-2003 school years, the reports failed to address the racial disparities in the administration of discipline or deviations from the schools' matrices.

### 1. Failure to Explain Racial Disparities

In their 2001-2002 and 2002-2003 reports, both PACs stated that there were no significant racial disparities in discipline.<sup>47</sup> Yet, the data upon which the PACs apparently based this conclusion reveals significant disparities that the PACs never attempted to explain.<sup>48</sup>

- **Middle School:** During the 2001-2002 school year Native Americans accounted for only 21% of the Middle School population,<sup>49</sup> but received 51% of all ISSs; 66% of all OSSs; 56% of all police referrals; and 67% of all long-term suspensions.<sup>50</sup>



<sup>46</sup> See, **Exhibit 12**, at 2-3; **Exhibit 10**, at 3-5 (criticizing WSD's 2000-2001 submission for failing to include information on PAC reviews); **Exhibit 8**, at Discipline ¶ 3 (requiring these summaries of these reviews).

<sup>47</sup> See **Exhibit 16(a)**, at 6 (stating, "We don't believe there are any racial disproportions" with one minor exception for 5<sup>th</sup> graders); **Exhibit 13(a)** (reporting no racial disparities); **Exhibit 13(b)**; **Exhibit 16(b)**, at 9-10 (stating, "We do not feel any racial disproportions exist in this area," with the minor exception for Saturday School discipline).

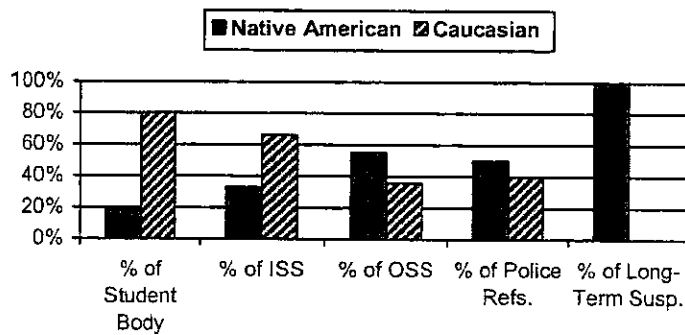
<sup>48</sup> The figures and statistics for the following sections were derived from raw data included in PAC reports. All raw data calculations are attached as **Exhibit 1**.

<sup>49</sup> Winner School District 59-2, School Year 2001-2002 Enrollment Summary.

<sup>50</sup> See **Exhibit 1**; see also **Exhibit 13(a)**.

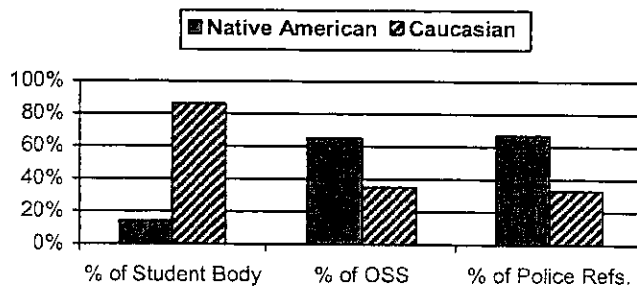
- Middle School:** During the next school year, **2002-2003**, the proportion of Native American students in the Middle School dropped to 18%,<sup>51</sup> but Native American students continued to receive a disproportionate share of disciplinary referrals. They received 33% of all ISSs, 55% of all OSSs, 50% of all police referrals and 100% of all long-term suspensions.<sup>52</sup>

**Middle School Disciplinary Referrals  
2002-2003**



- High School:** During the **2001-2002** year, Native Americans constituted only 14% of the High School student body population,<sup>53</sup> but 65% of all OSSs and 67% of the police referrals for that year. The PAC report states that the High School did not use in-school suspension as a form of punishment except in the case of one Native American student whose parent requested it. Information on long-term suspensions was not provided.<sup>54</sup>

**High School Disciplinary Referrals  
2001-2002**



<sup>51</sup> Winner School District 59-2, School Year 2002-2003, Enrollment Summary.

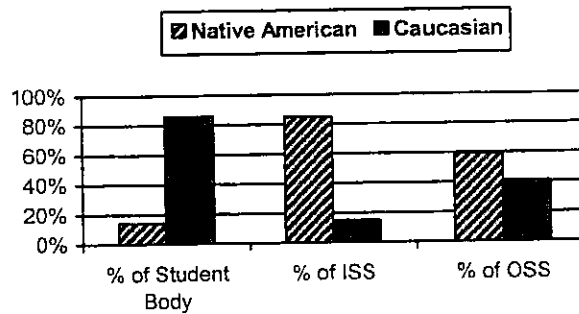
<sup>52</sup> See Exhibit 1; see also, Exhibit 16(a).

<sup>53</sup> Winner School District 59-2, School Year 2001-2002, Enrollment Summary.

<sup>54</sup> See Exhibit 1; see also, Exhibit 13(b).

- **High School:** During the 2002-2003 school year, Native Americans again represented only 14% of the High School student body,<sup>55</sup> but received 85% of all ISSs and 59% of all OSSs.<sup>56</sup> No information about police referrals or long-term suspensions was provided.

**High School Disciplinary Referrals  
2002-2003**



- **Subjectively Imposed Discipline:** Native American students in both the Middle and High Schools were also far more likely than their Caucasian counterparts to be punished for conduct that required a subjective assessment such as “insubordination.”<sup>57</sup> During the 2001-2002 year, 53% of the Middle School students who received ISS and 69% of students who received OSS for insubordination were Native American.<sup>58</sup> During the 2002-2003 year, 50% of the Middle School students who received ISS and 100% of the students who received OSS for insubordination were Native American.<sup>59</sup> Also during the 2002-2003 year, 71% of the High School students who received ISS and 67% of the High School students who received OSS for insubordination were Native American.<sup>60</sup>

<sup>55</sup> Winner School District 59-2, School Year 2002-2003, Enrollment Summary.

<sup>56</sup> See Exhibit 1; see also Exhibit 16(b), at 9-10.

<sup>57</sup> Courts have held schools liable for using subjectively assessed discipline to mask racially discriminatory discipline practices. See *Hawkins v. Coleman*, 376 F. Supp. 1330, 1336 (N.D. Tex. 1974) (relying on research stating that disparate rates of student suspension and corporal punishment are evidence of racial discrimination); *Sherpell v. Humnoke Sch. Dist. No. 5 of Lonoke County*, 619 F. Supp. 670, 677 (E.D. Ark. 1985) (concluding that the subjective elements of a school’s discipline code were pretextual and designed to mask racial bias).

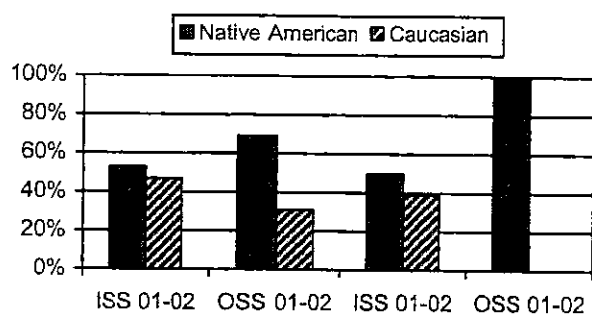
<sup>58</sup> See Exhibit 1; see also Exhibit 13(a).

Because a student may have been punished for insubordination more than once, the number of times WSD punished students for insubordination is not the same as the number of students who were punished for insubordination. The data used here reflects unduplicated counts of the number of students who were punished, rather than the number of incidents that resulted in punishment.

<sup>59</sup> See Exhibit 1; see also Exhibit 16(a).

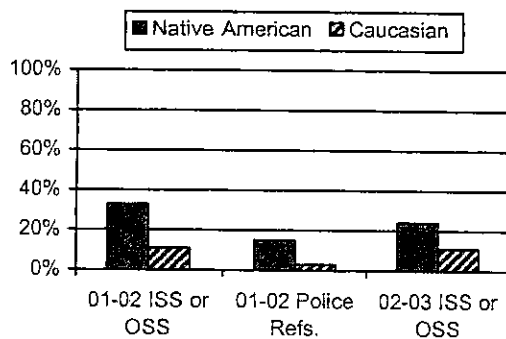
<sup>60</sup> See Exhibit 1; see also Exhibit 16(b).

### Middle School Discipline for "Insubordination"



These disparities are not the result of a small number of chronically misbehaving Native American students. Unduplicated counts of the number of students who were punished show that during the 2001-2002 year, one of every three Native American children enrolled in the Winner Middle School was suspended at some point during the year. In contrast, only one of every 10 Caucasian students was suspended.<sup>61</sup> During the 2002-2003 school year, one of every four Native American Middle School students was suspended. Of those students, nearly half received OSS. In contrast, only one of every 10 Caucasian students was suspended. Of those students, less than a third received OSS.<sup>62</sup>

### Likelihood of Being Punished in Middle School



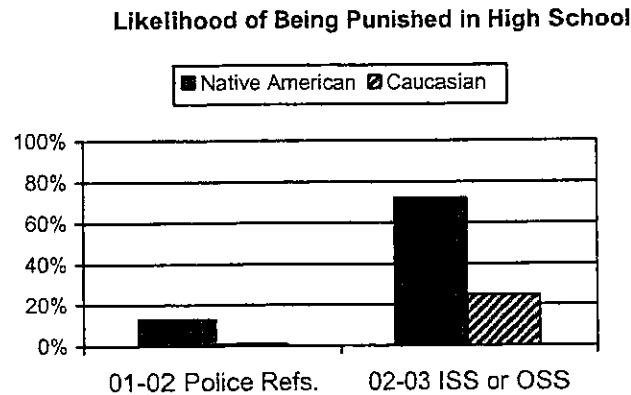
In the High School, unduplicated counts show that, during the 2001-2002 school year, 13% of the 45 Native American students were sent to the police for school misconduct, while only 1% of the 283 Caucasian students were sent.<sup>63</sup> During the following year, data on police referrals were not available, but unduplicated counts show that three-quarters of the 46 Native

<sup>61</sup> See Exhibit 1; see also Exhibit 13(a).

<sup>62</sup> See Exhibit 1; see also Exhibit 16(a).

<sup>63</sup> See Exhibit 1; see also Exhibit 13(b).

American students received ISS or OSS. By comparison, only one-quarter of the 284 Caucasian students did.<sup>64</sup>



## 2. Failure to Account for Departures from the Disciplinary Matrix

The PAC reports claimed that WSD departed from its disciplinary matrices rarely, and that when it did so, the child in question had an Individual Education Plan (IEP),<sup>65</sup> presumably warranting a more lenient punishment. Our investigation, however, suggests that WSD routinely departed from the matrices without explanation.

In March 2001, for example, one Native American Middle School student accused of harassing another student by poking him with a pencil eraser received ISS even though the principal acknowledged that the matrix authorized only a warning.<sup>66</sup> The PAC report offered no explanation for this departure.

On September 10, 2001, a Native American Middle School student received one day of ISS for verbally threatening to beat up another student. Two days later, a Caucasian student received only one-half day of ISS for the same conduct.<sup>67</sup> The PAC report offered no explanation for this disparity.

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<sup>64</sup> See Exhibit 1; see also Exhibit 16(b).

<sup>65</sup> See Exhibit 13(a), at 1 (stating that all departures from the matrix involved IEP students or students who were on medication and that all incidents of departures were documented); Exhibit 13(b) (reporting only one departure from the matrix for an IEP student); Exhibit 16(a), at 5 (reporting departures from the matrix on nine occasions for students on IEP and behavioral plans).

<sup>66</sup> Exhibit 11(a): Log Entry 3/6/2001, at 1.

<sup>67</sup> Exhibit 14(a): Log Entries 9/10/01 and 4/12/2002.

Similarly, during the 2001-2002 school year in the Middle School, four Native American students were disciplined for harassment and received ISS even though the Middle School matrix called for a warning.<sup>68</sup> The PAC report offered no explanation for this departure.

### **C. Failure to Maintain Accurate Records of Discipline**

In addition to failing to promulgate appropriate policies and to account for racial disparities and deviations from its matrices, WSD also failed to maintain complete and accurate records of its disciplinary activities. We found a number of incidents reported in the Power School disciplinary logs that were not mentioned in the PAC reports.

The Middle School PAC report for the 2002-2003 school year, for example, states that Native American student A. C. was disciplined only once during that year, receiving two days of OSS. The school's computerized Power School disciplinary log, however, reveals that A. C. was disciplined on at least nine separate occasions, and that on one of these occasions, he received five days of OSS and was referred to the police.

In addition, WSD failed to enter into the Power School databases significant disciplinary incidents that either appeared in the PAC reports or in individual children's records. For example, while the Middle School PAC report states that Native American student H. F. was suspended for 90 days and referred to the police both while in 7<sup>th</sup> Grade in 2001-2002 and 8<sup>th</sup> Grade in 2002-2003, the Power School printouts make no mention of these incidents.<sup>69</sup>

Similarly, although Native American D. F.'s student file contains 17 letters dated between November 14, 2003 and February 19, 2004 from the High School to his guardian referring to multiple incidents of ISS, the Power School printouts report only one suspension. And, although Native American student D.O.L. and his family report that in April 2004, D.O.L. received 10 days of OSS for alleged gang-related activity, this incident does not appear on the Power School printouts.

The wide unexplained fluctuations in the total number of disciplinary incidents reviewed by the PACs further undermine the reliability of WSD record keeping practices. The High School PAC reviewed 320 disciplinary incidents in 2000-2001,<sup>70</sup> 18 in 2001-2002,<sup>71</sup> and 470 in

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<sup>68</sup> Exhibit 13(a), at 2.

<sup>69</sup> WSD did not submit complete Power School logs to OCR at any time other than for the 2000-2001 school year. To determine whether a given incident was inputted into the Power School log for other years, we relied on record requests for individual students which, according to Superintendent Fisher, included all Power School log entries involving that student from the current year and all preceding years.

<sup>70</sup> The figures for 2000-01 come from printouts of the 2000-01 Power School disciplinary logs submitted to OCR. See Exhibit 12, at 2-3.

<sup>71</sup> Exhibit 13(b).