LEGAL DEPARTMENT

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
LEGAL DEPARTMENT
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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.[1] 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.

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[1] 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*].

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,[2] Title II of the Americans with Disabilities Act,[3] and Section 504 of the Rehabilitation Act,[4] 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.[5] Native American school children score lower than any other group in basic levels of reading, math, and history.[6] Native Americans account for 3% of all dropouts nationwide despite accounting for only 1% of students.[7]

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.[8]

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.[9]

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2 42 U.S.C. § 2000d; 34 C.F.R. pt. 100.

3 42 U.S.C. § 12132; 28 C.F.R. pt. 35.

4 29 U.S.C. § 794; 34 C.F.R. pt. 104.

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

6 Id., at 84.

7 Id.

8 "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.[10] During the 2003-2004 school year, WSD enrolled a total of 1,016 students.[11] Nearly a quarter of these students were Native American.[12]

In a recently decided voting rights case, Bone Shirt v. Hazeltine,[13] 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.[14] 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."[15] 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."[16]

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.[17] Normally, such compliance reviews are not

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

10 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.

11 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.

12 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.

13 336 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.

14 Id. at 1032.

15 Id. at 1029-30.

16 Id. at 1034.

17 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.[18] 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.[19]

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.[20] Initially, WSD refused to sign the Agreement, denying the existence of any problems.[21] 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.[22]

- Disciplinary Referral Procedures: Review and revise disciplinary referral procedures to provide "clear procedures for staff to follow" when making such referrals.[23]

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18 Id.

19 Id., attaching, "South Dakota: A Statewide Initiative with the South Dakota Department of Education and Cultural Affairs."

20 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.

21 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.

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

23 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.[24]

- Record Keeping: Review student discipline record-keeping systems to ensure completeness and accuracy.[25]

- Racial Harassment: Develop policies to identify and remedy a racially hostile environment.[26]

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.[27]

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.[28]

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24 Id. at ¶¶ 3(a)-(e), 4.

25 Id. at ¶ 5.

26 Id., Racial Harassment, at ¶ 1.

27 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.**

28 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.[29] It offered to provide additional information, and to facilitate an investigation in any way possible.[30] OCR responded by stating that the issues raised by the letter would be addressed by OCR in its monitoring of the Resolution Agreement.[31] By letter dated June 16, 2004, OCR terminated its monitoring over WSD.[32]

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.[33] 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.

29 Id., at 17.

30 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.

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

32 **Exhibit 17.**

33 **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.[34]

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.[35]

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.[36] Once a teacher has referred a student for disciplinary action, the principal decides whether the student has committed an offense covered by the matrices.[37] If the offense is outside the scope of the matrices, the principal decides what type of punishment to impose.[38]

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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34 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.

35 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.

36 See, e.g., **Exhibit 16(b)**, at 1.

37 Id. at 1-2.

38 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.[39] WSD administrators told one parent that school policy only requires the principal to notify the parents by mail within 36 hours of the arrest.[40] 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.[41]

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."[42] 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.[43]

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.[44] 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.[45] At the end of the academic year, they

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

40 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.

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

42 **Exhibit 8**, at Discipline ¶¶ 3-4.

43 Id.

44 **Exhibit 9**, at 1.

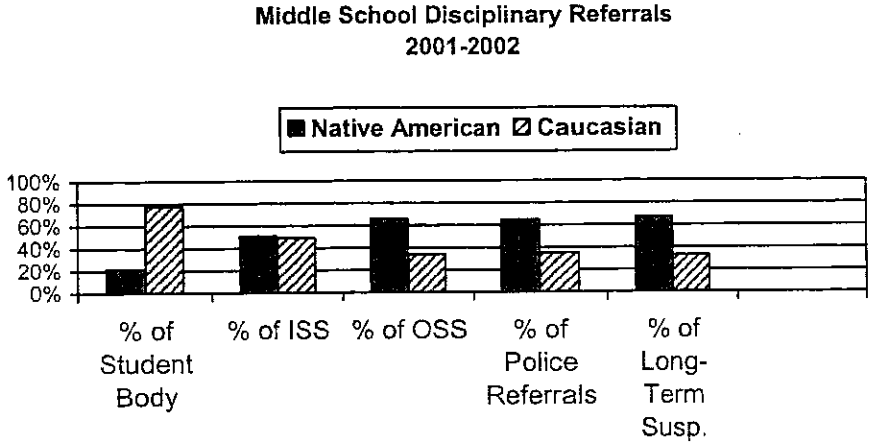
45 WSD purchased the Power School software system specifically to track all disciplinary sanctions during a given year and enable a review committee to identify racial disparities in the imposition of those sanctions. **Exhibit 9**, at 2; **Exhibit 13**, at 2. See also **Exhibit 8**, at Discipline ¶¶ 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.[46] 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.[47] Yet, the data upon which the PACs apparently based this conclusion reveals significant disparities that the PACs never attempted to explain.[48]

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



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[46] 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).

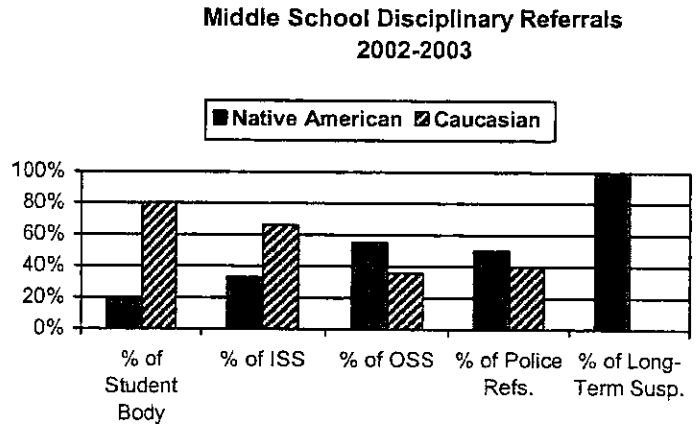
[47] *See* **Exhibit 16(a)**, at 6 (stating, "We don't believe there are any racial disproportions" with one minor exception for 5th graders); **Exhibit 13(a)** (reporting no racial disparities); **Exhibit 13(b)**; **Exhibit 16(b)**, at 9-10 (stating, "We do not feel any racial disproportions exist in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

[48] 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**.

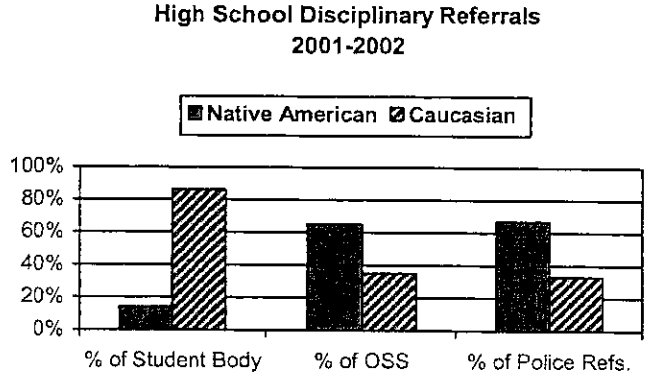
[49] Winner School District 59-2, School Year 2001-2002 Enrollment Summary.

[50] 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%,[51] 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.[52]



- **High School:** During the **2001-2002** year, Native Americans constituted only 14% of the High School student body population,[53] 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.[54]



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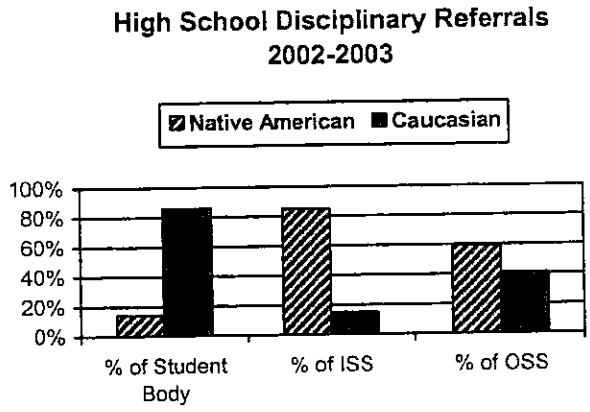
51 Winner School District 59-2, School Year 2002-2003, Enrollment Summary.

52 See **Exhibit 1**; see also, **Exhibit 16(a)**.

53 Winner School District 59-2, School Year 2001-2002, Enrollment Summary.

54 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,[55] but received 85% of all ISSs and 59% of all OSSs.[56] No information about police referrals or long-term suspensions was provided.



- **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."[57] 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.[58] 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.[59] 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.[60]

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55 Winner School District 59-2, School Year 2002-2003, Enrollment Summary.

56 See **Exhibit 1**; see also **Exhibit 16(b)**, at 9-10.

57 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).

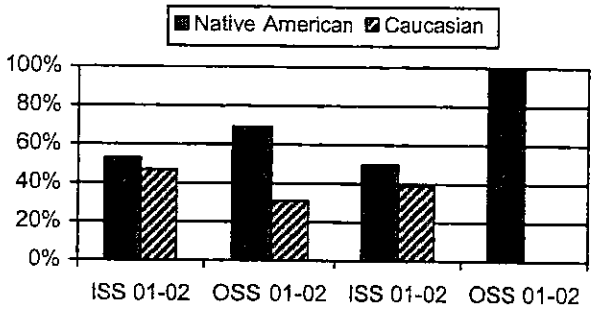
58 See **Exhibit 1**; see also **Exhibit 13(a)**.

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.

59 See **Exhibit 1**; see also **Exhibit 16(a)**.

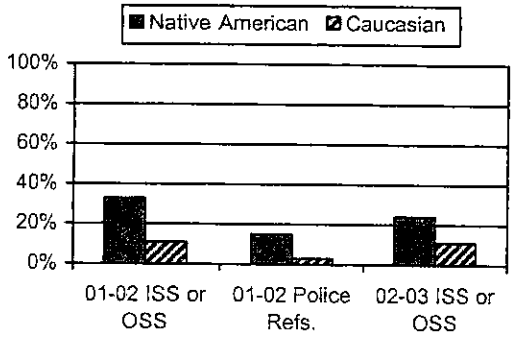
60 See **Exhibit 1**; see also **Exhibit 16(b)**.

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.[61] 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.[62]

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.[63] During the following year, data on police referrals were not available, but unduplicated counts show that three-quarters of the 46 Native

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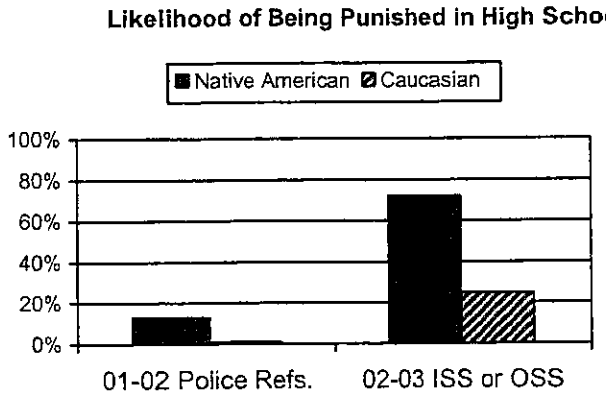
61 See **Exhibit 1**; see also **Exhibit 13(a)**.

62 See **Exhibit 1**; see also **Exhibit 16(a)**.

63 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.[64]



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),[65] 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.[66] 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.[67] The PAC report offered no explanation for this disparity.

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64 See **Exhibit 1**; see also **Exhibit 16(b)**.

65 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).

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

67 **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.[68] 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 7th Grade in 2001-2002 and 8th Grade in 2002-2003, the Power School printouts make no mention of these incidents.[69]

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,[70] 18 in 2001-2002,[71] and 470 in

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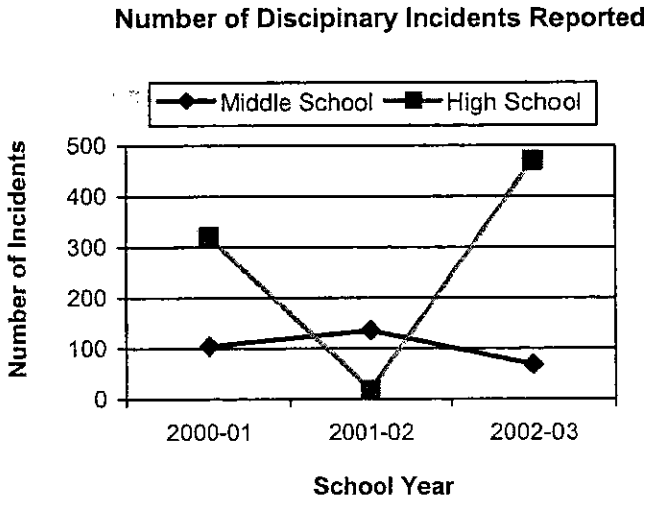
[68] **Exhibit 13(a)**, at 2.

[69] 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.

[70] 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.

[71] **Exhibit 13(b).**

2002-2003.[72] The Middle School PAC reviewed 104 disciplinary incidents in 2000-2001,[73] 135 in 2001-2002,[74] and 68 in 2002-2003.[75]



D. Failure to Report All Incidents of Racial Harassment

Lastly, WSD failed to report all incidents of racial harassment. During the 2002-2003 school year, for example, the Middle School reported to OCR, "We had only three incidents of racial harassment reported."[76] The report listed the log entries for three incidents, each involving racial slurs.

Anecdotal evidence, however, suggests that racial harassment, involving racial slurs as well as physical attacks, occurred far more frequently than the three log entries suggest. For example, WSD did not report to OCR that in the fall of 2002, the mother of Native American student A.P. complained to the Middle School principal that a Caucasian student "bully-twisted" and pinched A.P.'s chest, leaving bruises. WSD also failed to mention that during the 2002-2003 school year, B.K.'s grandmother complained that non-Native American students repeatedly bullied B.K. After six months, B.K.'s grandmother pulled B.K. out of WSD and enrolled him in another school district 10 miles away.

OCR's conclusion that WSD had successfully implemented the Resolution Agreement and its termination of its monitoring efforts in June 2004 were based in large part on incomplete and inaccurate data submitted by WSD.

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72 **Exhibit 16(b).**

73 See supra n.70.

74 **Exhibit 13(a).**

75 **Exhibit 16(a).**

76 Id.

IV. WSD'S CONTINUING DISCRIMINATION AGAINST NATIVE AMERICANS

WSD has not addressed the concerns that gave rise to the Agreement and the Rosebud Sioux complaint letter in 2002 in any meaningful manner. These same wrongs continue today, unabated. Discrimination remains pervasive in the Winner Middle and High Schools, subjecting Native American students to an unlawful racially hostile environment. Known acts of racial harassment go unpunished. Native Americans are punished more severely than Caucasians. Native American students with disabilities are regularly deprived of their rights, subjected to discipline in lieu of the services and protections to which they are entitled. School policies, procedures and practices exclude Native American students and their parents from becoming more involved in school-related activities and exhibit a profound insensitivity to issues facing the Native American community.

A. Tolerance of Racial Harassment[77]

The 2003-2004 and 2004-2005 PAC reports recount only one incident of racial harassment.[78] Native American families and students report, however, that Caucasian students continue to taunt, tease and bully Native American students, and that when such incidents are reported to WSD administrators, the administrators make little effort to stop them. If disciplinary actions are taken against Caucasian students, the victims are not informed, creating and/or reinforcing the impression that these incidents go unpunished. Believing they have no avenue for redress, some Native American children respond by fighting back, and are swiftly punished by school officials. Others drop out or leave the school district. **Exhibit 2** provides recent examples of WSD's tolerance of harassment.

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[77] School districts have been found liable for failing to punish students who racially harass others in the face of a school policy prohibiting racial harassment and for concealing incidents of student harassment. See Payne v. Worthington Schools, 2001 WL 506509, *8 (S.D. Ohio Apr. 25, 2001) (finding liability for disparate treatment and/or discipline where there is a school policy against harassment); Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1248 (10th Cir. 1999) (ruling that school officials were liable for failing to remedy harassment in an effective manner); Vance v. Spencer County Public School Dist., 231 F.3d 253, 261-62 (6th Cir. 2000) (holding that "where a school district had knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior...and [if] it continues to use those same methods to no avail, such district has failed to act reasonably").

[78] The one incident involved a Native American student making a racially antagonistic comment to or about a Caucasian student in the Middle School during the 2003-2004 year. **Exhibits 23,** at 13. See **Exhibits 24-26.**

B. Discriminatory Discipline[79]

Anecdotal information and the 2003-2004 and 2004-2005 PAC reports reveal that Native Americans continue to be punished more frequently and more severely than their Caucasian counterparts. During the 2003-2004 academic year, Native Americans accounted for 17% of the High School student body.[80] Yet, according to the High School's 2003-2004 PAC report, they constituted 50% of all those punished for harassment; 60% of all those punished for insubordination; 42% of all those punished for using profane or vulgar language, and 100% all of those referred by the High School to the police. One of every three Native American High School students was subjected to some type of punishment, while only one of every 10 Caucasian students was punished.[81]

During the 2004-2005 academic year, Native Americans accounted for roughly 20% of the Middle School student body. According to the Middle School's 2004-2005 PAC report, however, they received 43% of all ISSs, 70% of all OSSs, and 79% of all police referrals.[82]

1. Discriminatory Accusations of Gang Activity --- By all accounts, there are no gangs in Winner. Community leaders and families consistently report that there are no gangs, and both the Chief of the Rosebud Tribal Police and the Chief and Assistant Chief of the Winner Police Department confirm this absence.[83] Yet, WSD routinely punishes Native American students, and apparently only Native American students, for being in gangs.

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79 Districts have been found liable for discriminatory discipline when they punish similarly situated students differently on the basis of race. See, e.g., Wheeler v. Aventis Pharmaceuticals, 360 F.3d 853, 857 (8th Cir. 2004) (stating that racial discrimination is established where individuals of one race are treated differently than similarly-situated individuals of another race); Tasby v. Estes, 643 F.2d 1103, 1107 n.1 (5th Cir. 1981) (explaining that racial discrimination is demonstrated where "black students received more severe punishment than white students for the same disciplinary offenses"); Fuller v. Decatur Pub. Sch. Bd., 78 F. Supp.2d 812, 825 (C.D. Ill. 2000) (finding race discrimination where plaintiffs "show that similarly situated individuals of a different race were not subjected to the challenged conduct") (internal quotations omitted); Heller v. Hodgin, 928 F. Supp. 789, 796 (S.D. Ind. 1996) (ruling that race discrimination exists where black and white students receive different punishments for the same offense); Smartt v. Clifton, 1997 WL 1774874, *21 (S.D. Ohio Feb. 10, 1997) (explaining that it is intentional purposeful discrimination for a defendant to recommend different punishments for students of different races who commit the same offense); Payne, 2001 WL 506509 at *6 (finding race discrimination where students "were disciplined more harshly for the same conduct than their non-minority counterparts").

80 Winner School District 59-2, School Year 2003-2004, Enrollment Summary.

81 **Exhibit 24.** The PAC consisted of the principal, a staff member and several student council members. According to the PAC's report, however, the review consisted of the principal explaining the disciplinary system to the other committee members. It is not clear whether the committee members were informed of the race of the students or the underlying facts of each disciplinary incident.

82 **Exhibit 25.**

83 Interview with Daryl Herman, Winner Representative to the Rosebud Sioux Tribal Council, 4/25/05; interview with Charles Long Crow, Chief of Rosebud Sioux Tribal Police, 4/21/05; interview with Chris Jung, Chief of Winner Police, and Doug Lake, Assistant Chief of Winner Police, 7/2/04.

WSD accuses Native American students of being in a gang when they walk, talk, or stand in a group of three or more; Caucasian students who do the same are not subject to such accusations. WSD subjects Native American students to regular locker raids to search for evidence of gang activity. It punishes students for writing "Native Pride" or drawing medicine wheels in their notebooks. It sends children to the police for keeping lyrics to rap songs in their lockers. It suspends Native American students for wearing bandannas after school hours and for carrying bandannas in their pockets. Notably, Caucasian students wear bandannas with impunity; in fact, during a basketball tournament hosted by Winner High School in November of 2004, Caucasian students wore bandannas with the school's explicit consent. These incidents are described more fully in **Exhibit 3**.

Writing "Native Pride," drawing medicine wheels, keeping rap lyrics in lockers and carrying bandannas in pants pockets are not prohibited under WSD's disciplinary matrices. Moreover, they do not fall within the School Board Policy's definition of gang activity, which relates to "the commission, attempted commission or solicitation by any member(s) of a street gang of two or more felony or minor misdemeanor offenses."[84]

2. Departures from Disciplinary Matrices --- WSD also continues to discriminate against Native American students by departing from its own policies and punishing them more harshly than authorized under the disciplinary matrices. **Exhibit 4** describes some of these incidents.

3. Failure to Punish Caucasian Students --- Finally, WSD continues to discriminate against Native American students by punishing them for behavior for which Caucasian students are not disciplined. Typically, a Caucasian student will harass, bully, tease or assault a Native American student. If the Native American student hits back, the Native American is referred to local law enforcement. The Caucasian student is not punished at all, not punished as severely, or punished in a manner that is never disclosed to the Native American student or the Native American community. This creates the impression that Caucasian students are able to violate school rules with impunity if a Native American student is involved. Examples are set forth in **Exhibit 5**.

C. Mistreatment of Native American Students with Disabilities

[84] Winner School District 59-2, Office School Board Policy 7.28, available at http://www.winner.k12.sd.us.

In violation of section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), WSD discriminates against Native American students who WSD knows or should know have disabilities by suspending them and prosecuting them for juvenile delinquency rather than providing them with their legally mandated rights and procedural protections.[85]

After a July 2002 review of WSD's special education program, the South Dakota Office of Special Education found that WSD failed to seek parent input in IEP-planning; failed to review evaluation data as required; failed to conduct functional assessments of students; and failed to produce behavioral assessments and behavioral goals. It further found, "The district, in response to [a student's] behavioral difficulties, changes the placement of the student, rather than seeking to assess her behavior and develop a behavior intervention plan."[86]

WSD has not remedied these deficiencies. WSD continues to violate its obligation to identify and evaluate students who it should know have disabilities. In addition, it fails to conduct manifestation reviews or provide procedural due process protections prior to disciplining children or filing juvenile delinquency petitions against them, and it denies them functional

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[85] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, prohibit discrimination on the basis of disability. These statutes 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. Supp. 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 hearing 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. See South Dakota Department of Education and Cultural Affairs Office of Special Education Report on WSD, dated July 16, 2002, at 3, stating that suspensions are counted cumulatively. The report also states, "In-school suspension was found to be a change of placement for students with special needs." Id., at 4. In addition, referral to the juvenile justice system triggers 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).

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.

See generally Eileen L. Ordover, *Disciplinary Exclusion of Students With Disabilities*, Clearinghouse Rev., May-Jun. 2000, at 50.

[86] A copy of that report is attached as **Exhibit 22.**

behavior assessments afterward. When children are suspended for lengthy periods of time, the school does not provide them with any educational services and sometimes refuses to provide the family with the child's homework assignments. These violations are demonstrated by the examples listed in **Exhibit 6.**

D. WSD Policies, Procedures and Practices

Other WSD practices exclude Native Americans from the school community. WSD's staffing patterns, curricula and athletic programs do not reflect the fact that 25% of the children enrolled in WSD schools are Native American. WSD's transportation policies make it difficult for Native American students to attend school, and its administration of the Johnson O'Malley Board and efforts to intimidate parents discourage Native American parental involvement.

1. **Staffing** --- Only 3% of WSD's staff is Native American. During the last four years, WSD has employed no Native American administrators or school service specialists and only one Native American teacher.[87]

WSD claims to provide staff with in-service training on cultural diversity, disciplinary policies, and racial harassment policies.[88] Yet, Native American families recounted numerous incidents in which a Middle School or High School staff member acted inappropriately toward their race or culture. Examples of such inappropriate behavior are set forth in **Exhibit 7**. When parents complain, staff members try to intimidate or humiliate them.

2. **Transportation Policies** --- In August 2002, WSD discontinued bus service to federal Indian housing, 1.5 miles outside the town of Winner, where the majority of Native American students live.[89] It did so after having been informed by the federal government that it had been improperly using federal funds for this purpose. According to the federal government, if WSD wished to continue to provide busing, it would have to use local funds.[90] WSD refused to make local funds available for a bus.[91] Because many Native American families do not own cars, this lack of transportation contributes to tardiness and truancy, which, in turn, results in disciplinary sanctions.

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87 During the 2004-05 academic year, WSD employed the following Native American staff members: Kindergarten Aide Sylvia Bear, Special Education Aide Becky Roubideaux Sitting Bear, JOM Liaison Marilyn Herman, and 5th grade Teacher Jessica Ewing, who is part-Native American.

88 **Exhibit 15**, at 3-4.

89 Busing to and from the Native American community of Ideal, 16 miles from Winner, remains intact.

90 Ltr. from David Beaulieu, Director of the Office of Indian Education, to Mary Fisher, Superintendent of WSD, undated; Local Indian Education Board Minutes, Oct. 4, 2001.

91 Apparently, WSD pays for two Elementary School students to ride to school on Winner Transit, but does not make this service available to any other families. Another Native American student, who is physically disabled, rides to school in an in-town taxi service; again, this service is not available to any other families. There does not appear to be any rationale for why these three families, and not any other families, have been selected for these services.

3. **Curriculum** --- WSD does not provide a culturally appropriate curriculum. The U.S. Commission on Civil Rights states that for Native American students, the importance of "environments that support their cultural identities" "cannot be overstated."[92] Consistent with these findings, the Resolution Agreement required WSD to "explore and consider implementing programs or strategies to improve race relations and increase cultural understanding between students."[93] However, the High School offers only one elective on Native American culture every other year.[94] The Middle School offers no classes on Native American culture, traditions, heritage, or language.[95]

4. **School-Sponsored Athletics** --- Although WSD claimed in a June 2000 letter to OCR that it sought to improve Native American participation in sports,[96] few if any Native American students participate in school athletics. Native American students report that they do not feel welcome on sports teams.

During the 2003-2004 school year, only two Native American girls and three Native American boys participated in High School sports.[97] Of the 28 girls who played high school volleyball that year, not one was Native American. Similarly, there were no Native American girls among the 28 girls who played basketball that year, and only two Native Americans on the 28-person girls' track team.[98] Of the 52 boys who played high school football that year, only one was Native American. There were only two Native American boys on the 35-person basketball team; none on the 20-person wrestling team; none on the 17-person golf team; one on the 13-person cross-country team; and only one on the 29-person track team.[99] In the Middle School that same year, only three Native American boys and three Native American girls participated in school sports.[100]

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92 A Quiet Crisis, supra n.5, at 85.

93 **Exhibit 8**, at 7

94 Interview with Mary Fisher, Superintendent of WSD, 4/26/05; Winner High School Curriculum Guide, available at http://www.winner.k12.sd.us/high-school/Guide/curriculum.htm.

95 Winner Middle School Curriculum Guide, available at http://www.winner.k12.sd.us/middle-school/curriculum.htm.

96 **Exhibit 9**, at 4. WSD, acknowledging the high attrition rate of Native American students in Winner, stated, "We feel if we can keep kids involved in extra-curricular activities we will retain more students at the high school level. We have pushed to get more Native American students to participate in athletic programs at the middle school in the hopes that these students will have a sense of pride and desire to stay in the various programs on into the high school." Id.

97 Winner School District, Girls Athletics: Winner High School 2003-2004; Winner School District: Boys Athletics: Winner High School 2003-2004.

98 Winner School District, Girls Athletics: Winner High School 2003-2004.

99 Winner School District: Boys Athletics: Winner High School 2003-2004.

100 Winner School District, Girls Winner Middle School Sports 2003-2004; Winner School District, Boys Winner Middle School Sports 2003-2004.

5. Johnson O'Malley Board --- Further evidence of WSD's hostility to Native Americans can be found in its interaction with the Johnson O'Malley (JOM) Board. Consistent with the recognition that the "[s]uccess [of an educational program] demands that Native Americans have an active voice in the education of their children,"[101] WSD's annual receipt of funds under the Johnson O'Malley (JOM) grant program for Native American pupils[102] is conditioned on the establishment and maintenance of a board of community-elected Native American parents.[103] Federal regulations require that this board, alternatively called the JOM Board or the Local Indian Education Board, participate in the planning, development, and implementation of all programs using JOM federal funds, recommend curricula, evaluate school staff, hear grievances, meet regularly with school administrators and assess the Native American community's learning needs.[104] WSD appears to manipulate the JOM Board to stifle complaints from the Native American community.

In the spring of 2002, WSD's superintendent informed the Chair of the JOM Board that the Board was being dissolved. During that school year, the Board had requested that district funds be used to pay for the bus to Indian Housing after federal funds were no longer available[105] and represented the interests of Native American families whose children were punished in meetings with the school.

School administrators subsequently convened a new JOM Board without giving notice to all former Board members or the community. Although federal regulations require that the Board be elected by majority vote of Indian parents,[106] we have been unable to locate any record of a community vote for the 2002-2003 school year or subsequent years. In fact, many members of the Native American community, including members of the former Board, were not aware of the new Board's existence.

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101 A Quiet Crisis, supra n.5, at 83.

102 In the most recent year for which data is available, the 2003-2004 school year, WSD received $17,281 in JOM funds.

103 25 C.F.R. § 273.15.

104 25 C.F.R. § 273.16.

105 Ltr. from David Beaulieu, Director of the Office of Indian Education, to Mary Fisher, Superintendent of WSD, undated; Local Indian Education Board Minutes, Oct. 4, 2001.

106 25 C.F.R. § 273.15.

V. HARM SUFFERED BY NATIVE AMERICAN STUDENTS AS A RESULT OF WSD'S ACTIONS AND INACTIONS[107]

Native American students suffer great harm as a result of the racial hostility in Winner schools. The negative effects on these children and the overall Native American community cannot be overemphasized.

At the most immediate level, WSD's treatment of Native American students affects their performance in school. Children who cannot get above a C average in WSD have graduated from schools in less hostile districts with honors.

Native American children in WSD also suffer emotionally. They may express their anguish by acting out, talking back in frustration, or failing to attend classes, all of which lead to additional disciplinary measures. Just this past year, two Native American students were placed on homebound status by their doctors as a result of the stress from the constant harassment at school.

Many Native American children are criminally prosecuted for relatively minor disciplinary infractions. Once adjudicated delinquent, they may end up at juvenile correctional facilities, either directly or subsequently for probation violations like failing to return to school.

Native American parents, frustrated with the discriminatory treatment, often respond by pulling their children out of WSD to attend other schools.[108] Sometimes, this involves uprooting the entire family to move to another district. Other times, the child is separated from his family and sent to live with a relative so that he or she can attend another school. Because the area is

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[107] Courts have held schools liable for maintaining an unlawfully hostile environment when that environment negatively affects minority students' participation in school activities. See, e.g., Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 634, 654 (1999) (holding that a cause of action against a school board exists where harassment "had a concrete, negative effect on [petitioner's] ability to receive and education"); Vance, 231 F.3d at 259 (relying on testimony that plaintiff's grades dropped as a result of harassment); Murrell, 186 F.3d at 1248–49 (finding liability against school district where harassment "totally deprived [plaintiff] of educational benefits").

[108] Native American parents believe that WSD may intentionally push Native American students out, in part because of the federal No Child Left Behind Act (NCLBA). In South Dakota, the NCLBA holds schools accountable for the standardized-test scores of every "major" racial subgroup that contains more than ten students. South Dakota Department of Education, Consolidated State Application Accountability Workbook, Aug. 23, 2004, available at http://www.ed.gov/admins/lead/account/stateplans03/sdcsa.pdf, at 20. By pushing enough Native Americans out, a school can avoid being held accountable for this subgroup's performance.

In 2002, the Winner Middle School was placed on "Alert" status, largely as a result of the test scores of its Native American students, which counted as a "major" subgroup. South Dakota Department of Education No Child Left Behind 2003 Report Card available at, https://sis.ddncampus.net:8081/nclb/portal/portal.xsl?&extractID=1. In 2004, Native American students were the only subgroup that did not meet AYP goals in reading and as a result, the Middle School failed to make AYP in that area. South Dakota Department of Education No Child Left Behind 2004 Report Card available at, https://sis.ddncampus.net:8081/nclb/portal/portal.xsl?&extractID=5 . The High School, in contrast, has too few Native American students to qualify as a major subgroup; as a result, the High School is not separately held accountable for Native American students' performance. Id.

rural, alternative school districts are far away. Native American student C.K., for example, transferred to Pierre, 90 miles away, in response to the harassment in Winner schools.

Older children simply drop out of school altogether. The U.S. Commission on Civil Rights notes: "Dropout rates among Native American students are high because, among other reasons, their civil rights and cultural identities are often at risk in the educational environment. Research shows that Native American students experience difficulty in maintaining rapports with teachers and establishing relationships with other students; feelings of isolation; racist threats; and frequent suspension."[109]

Only five of the 12 Native American students who were enrolled in 11th grade in WSD during the 2002-2003 school year continued to the 12th grade the following year.[110] During the 2001-2002 school year, the most recent year for which NCES data are available, only two Native American students graduated from WSD with a high school diploma.[111]

The statistics on Native American enrollment rates in WSD confirm that Native American children leave WSD at alarming rates. During the 2003-2004 year, Native Americans represented 32% of the student body in Winner Elementary School, 21% of the student body in Winner Middle School, and only 17% of the student body in Winner High School.[112]

VI. CONCLUSION

We collected voluminous facts, including statistical evidence, school records, and anecdotes, showing that, WSD continues to invidiously discriminate against Native American students. To this day, WSD remains deliberately indifferent to the racially hostile environment it has created and maintained, discriminatorily punishes Native Americans, and mistreats Native American students with disabilities by punishing them rather than providing them with their legally mandated rights and benefits. On the basis of distorted, incomplete, and erroneous information, OCR prematurely closed its file on this case. Consequently, we request that OCR intervene immediately to ensure that WSD change its policies to comply with federal anti-discrimination laws.

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109 A Quiet Crisis, supra n.5, at 84.

110 Compare Winner School District 59-2, School Year 2003-2004 Enrollment Summary, to Winner School District 59-2, School Year 2002-2003 Enrollment Summary.

111 NCES Common Core of Data, available at http://nces.ed.gov/ccd/bat/result.asp?saved=2209&view=District&census=&ar=:1119:1121:1137:1149:1576:1579:1578:1580.

112 Winner School District 59-2, School Year 2003-2004, Enrollment Summary.

Specifically, we request that OCR reopens its compliance review and that OCR involve Native American families in its investigation not only to identify the extent of the harm, but also to fashion an appropriate remedy and monitor its implementation.

Yours truly,

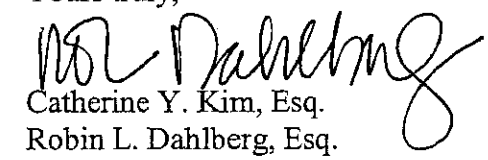

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EXHIBIT 1

Exhibit 1
Raw Data and Calculations of Punishment by Race[113]

Winner Middle School 2001-2002					
	Total Number	**Native American**	**Caucasian**	**Percentage NA**	**Percentage Caucasian**
Number of Students Enrolled	320	68	248	21.25%	77.50%
Number of Incidents Resulting in In-School Suspension (ISS)	74	38	36	51%	49%
Unduplicated Counts of Students Who Received ISS	47	20	27	43%	57%
Number of Incidents Resulting in Out-of-School Suspension (OSS)	35	23	12	67%	34%
Unduplicated Counts of Students who Received OSS	18	12	6	67%	33%
Unduplicated Counts of Students Who Received ISS or OSS	51	23	28	45%	55%
Number of Incidents Resulting in Police Referrals	23	15	8	65%	35%
Unduplicated Counts of Students Referred to the Police	18	10	8	55%	45%
Number of Incidents Resulting in Long-Term Suspension	3	2	1	67%	33%
Unduplicated Counts of Students Who Received Long Term Suspension	3	2	1	67%	33%
Number of Incidents Resulting in ISS for "Insubordination"	N/A	N/A	N/A	N/A	N/A
Unduplicated Counts of Students Who Received ISS for "Insubordination"	17	9	8	53%	47%
Number of Incidents Resulting in OSS for "Insubordination"	N/A	N/A	N/A	N/A	N/A

[113] These data are drawn from Winner's PAC reports submitted to OCR during the 2001-2002 and 2002-2003 school years. Due to inconsistencies in WSD's reporting, many data fields are not available; these entries are marked as "N/A".

Winner Middle School 2002-2003					
	Total Number	**Native American**	**Caucasian**	**Percentage NA**	**Percentage Caucasian**
Number of Students Enrolled	300	54	240	18%	80%
Number of Incidents Resulting in ISS	46	15	28	33%	61%
Unduplicated Counts of Students Who Received ISS	38	11	25	29%	66%
Number of Incidents Resulting in OSS	22	12	8	55%	36%
Unduplicated Counts of Students Who Received OSS	15	6	8	40%	53%
Unduplicated Counts of Students Who Received ISS or OSS	42	13	27	31%	64%
Number of Incidents Resulting in Police Referrals	10	5	4	50%	40%
Unduplicated Counts of Students Referred to the Police	9	3	4	33%	44%
Number of Incidents Resulting in Long Term Suspensions	2	2	0	100%	0%
Unduplicated Counts of Students Receiving Long Term Suspension	2	2	0	100%	0%
Number of Incidents Resulting in ISS for "Insubordination"	18	9	7	50%	39%
Unduplicated Counts of Students Who Received ISS for "Insubordination"	14	7	6	50%	39%
Number of Incidents Resulting in OSS for "Insubordination"	5	5	0	100%	0%
Unduplicated Counts of Students Who Received OSS for "Insubordination"	3	3	0	100%	0%

Winner High School 2001-2002					
	Total Number	**Native American**	**Caucasian**	**Percentage NA**	**Percentage Caucasian**
Number of Students Enrolled	329	45	283	14%	86%
Number of Incidents Resulting in ISS	1	1	0	100%	0%
Unduplicated Counts of Students Who Received ISS	1	1	0	100%	0%
Number of Incidents Resulting in OSS	17	11	6	65%	33%
Unduplicated Counts of Students Who Received OSS	10	5	5	50%	50%
Unduplicated Counts of Students Who Received ISS or OSS	11	6	5	55%	45%
Number of Incidents Resulting in Police Referrals	6	4	2	67%	33%
Unduplicated Counts of Students Referred to the Police	10	6	4	60%	40%
Number of Incidents Resulting in Long Term Suspensions	N/A	N/A	N/A	N/A	N/A
Unduplicated Counts of Students Who Received Long Term Suspensions	N/A	N/A	N/A	N/A	N/A
Number of Incidents Resulting in ISS for "Insubordination"	N/A	N/A	N/A	N/A	N/A
Unduplicated Counts of Students Who Received ISS for "Insubordination"	N/A	N/A	N/A	N/A	N/A
Number of Incidents Resulting in OSS for "Insubordination"	2	1	1	50%	50%
Unduplicated Counts of Students Who Received OSS for "Insubordination"	2	1	1	50%	50%

Winner High School 2002-2003					
	Total Number	**Native American**	**Caucasian**	**Percentage NA**	**Percentage Caucasian**
Number of Students Enrolled	331	46	284	14%	86%
Number of Incidents Resulting in ISS	81	69	12	85%	15%
Unduplicated Counts of Students Who Received ISS	20	14	6	70%	30%
Number of Incidents Resulting in OSS	34	20	14	59%	41%
Unduplicated Counts of Students Who Received OSS	30	16	14	53%	47%
Unduplicated Counts of Students Who Received ISS or OSS	103	33	70	32%	68%
Number of Incidents Resulting in Police Referrals	N/A	N/A	N/A	N/A	N/A
Unduplicated Counts of Students Referred to the Police	N/A	N/A	N/A	N/A	N/A
Number of Incidents Resulting in Long Term Suspensions	N/A	N/A	N/A	N/A	N/A
Unduplicated Counts of Students Who Received Long Term Suspensions	N/A	N/A	N/A	N/A	N/A
Number of Incidents Resulting in Saturday School	355	169	186	48%	52%
Unduplicated Counts of Students Who Received Saturday School	95	30	65	32%	68%
Number of Incidents Resulting in ISS for "Insubordination"	8	6	2	75%	25%
Unduplicated Counts of Students Who Received ISS for "Insubordination"	7	5	2	71%	29%
Number of Incidents Resulting in OSS for "Insubordination"	3	2	1	67%	33%
Unduplicated Count of Students Who Received OSS for "Insubordination"	3	2	1	67%	33%
Unduplicated Count of Students Who Received Sat. Sch. for "Insubord."	31	13	18	42%	58%

EXHIBIT 2

Exhibit 2
Racial Harassment Incidents

Racial harassment continues to pervade WSD. Although Native American students and families report these incidents to WSD staff, WSD does not respond.

- According to community members, during the 2003-2004 school year, a group of Caucasian kids taunted a group of Native American girls and called them names. The Native American girls told a teacher who simply said, "Go on and play."

- Native American Middle School student I.B. reported that in March 2004, a Caucasian student called him "black boy" during lunch. I.B. responded by calling the Caucasian student a "white f---r." According to I.B., I.B. was disciplined but the Caucasian student was not even though I.B. told the principal that the Caucasian student had initiated the incident.

- One family reported that during the 2004-05 school year, a Caucasian student constantly harassed Native American 7th grade student C.K. Although C.K. complained to the principal, the principal took no action. Only after C.K.'s grandmother spoke to the WSD superintendent did a school official speak with the offending student. The harassment, however, continued and C.K. eventually transferred to another school district.

- Native American High School student R.C.H. reported that, during the 2004-05 school year, Caucasian students harassed her, calling her names like "Indian bitch." Although she and her family informed school officials, they did nothing. Ultimately, R.C.H. got into a physical fight with one of the Caucasian students on school grounds. She was arrested and prosecuted. Because of the taunts and the resulting stress, R.C.H. was diagnosed with clinical depression and placed on "homebound" schooling. She returned to school toward the end of the school year but only attended in the mornings.

- Police records indicate that, in April 2005, one Caucasian and two Native American Middle School students were involved in a physical fight. Among other things, the Caucasian girl scratched one of the Native American girls and called her a name. The Native American girls were arrested, but the Caucasian girl was not.

- School records show that on January 26, 2005, a teacher reported that during P.E. class, a student said, "I guess it is time to throw rocks at greasy Indians." In response, Native American student Z.E.H. called the boy a "stupid b---" and possibly also "white boy." The boy admitted to then calling Z.E.H. "dirty Indian," "f—ing crackhead," and "dirty raunchy Indian." Z.E.H. was suspended for harassment as a result; there is no indication that the Caucasian student was punished.

EXHIBIT 3

Exhibit 3
Discriminatory and False Accusations of Gang Activity

Although community members and the police confirm that there are no gangs in Winner, WSD continues to discriminatorily accuse and punish Native American children for alleged gang activity. Neither WSD's disciplinary matrices nor policies prohibit the conduct for which Native American children are punished. Moreover, Caucasian students who engage in the same behavior are not accused of gang activity or punished.

- Middle School records show that in March 2004, when he was 13 years old, Native American student A.C. was referred for discipline for wearing a white bandanna after school hours while waiting in front of the school for his aunt to pick him up. School officials contended that wearing a white bandanna after school hours was a "gang-related" activity.

  School records show that on another occasion, in September 2004, the school called the court services officer and suspended A.C. for 5 days because he had drawings, allegedly gang-related, in his notebook. Then, in October 2004, the school had the sheriff come to arrest A.C. for similar drawings.

- D.O.L. reported that in February or March 2004, he received 10 days of OSS after school officials found photographs of him and his family wearing bandannas in his school locker or the locker of a friend. Middle School officials claimed that the photographs were evidence of "gang-related" activities. There is no record of this suspension in school files, but the records do indicate that in March 2004, the school had the police come to interrogate D.O.L., and two other Native American Middle School students, Z.E.H. and A.C., for gang activity.

- School records show that 14-year old A.P. was suspended for 5 days, then 10 days, and then 90 days during the 2004-2005 school year for drawings, allegedly gang related, and rap lyrics in his notebook.

EXHIBIT 4

Exhibit 4
Unexplained Deviations from Disciplinary Matrix

WSD continues to depart from its own policies, and impose ***harsher*** *punishments on Native American students than are authorized under its disciplinary matrices. WSD provides no explanation for these departures, and this practice runs contrary to WSD's claim that it departs from its matrices only when a student has an IEP.*

- Native American Middle School student H.F. was suspended for 90 days when he was in the 7th grade for fighting with a Caucasian student after school. H.F. apparently struck the student in response to the student's taunting him for being overweight. The fight occurred inside a school building. School records confirm that the school recommended a 90-day suspension for H.F., but do not provide any description of the incident that led to this recommendation. The maximum punishment permitted under the 2001-02 Middle School disciplinary matrix for a physical fight was a 10-day OSS. School records contain no explanation for this departure from the matrix. H.F. did not have an IEP.

- In October 2002, the year before the school suspended Native American student A.P. and then expelled him for drawings in his notebook, the school suspended him for 90 days for disruptive behavior in computer class. The matrix does not authorize a 90-day suspension for disruptive behavior.

- School records indicate that during the 2002-2003 school year, Native American 8th grader T.A. received a 90-day OSS for insubordination even though the maximum punishment authorized under the Middle School Disciplinary Matrix was a 5-day OSS. The same records contain no explanation for the departure. [114]

- School records indicate that on March 10, 2004, Native American student D.O.L. received two days of ISS for walking through an alley rather than using the crosswalk to get to class. Failing to use a crosswalk is not a punishable offense under the Middle School's Disciplinary Matrix.

- School records show that on February 2004, Native American student J.T. was suspended for 2 days for refusing to spit out her gum. The High School Handbook states that chewing gum "will be left to the discretion of the teacher in the classroom."[115] Gum chewing is not listed on the disciplinary matrix as a punishable offense.

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114 **Exhibit 16(a)**, at 5.

115 **Exhibit 21**, at 4.

EXHIBIT 5

Exhibit 5
Discriminatory Punishment

Families continue to report that WSD discriminatorily punishes Native American children when both Caucasian and Native American children are involved in a fight. Typically, the Caucasian student initiates the fight, and when the Native American child fights back, the Native American child is punished. WSD either declines to punish the Caucasian student at all, or refuses to inform the Native American community of the punishment, reinforcing the impression that Caucasian students can engage in fights with impunity.

- The family of Native American student C.F. reported that a Caucasian student hit C.F., in the face with a belt. When C.F. struck the child back, WSD called the police. C.F. was prosecuted and ultimately sentenced to three months probation. According to the family, WSD did not punish the Caucasian student. School records confirm that in March 2003, C.F. was punished for hitting a student in P.E., but do not describe the facts underlying the incident or indicate whether the other student was punished. C.F. dropped out of school in January 2005.

- One family stated that during the 2002-03 school year, Native American student A.P., his grandmother and his mother repeatedly reported to the Middle School principal that Caucasian students were bullying A.P. by jabbing him with pens. According to the family, the principal refused to punish the offending students because they would not admit to the bullying.

- Court records indicate that in April 2004, a Middle School Caucasian boy pushed a Native American boy twice during recess. The Native American boy punched the Caucasian boy in response. The school had the Native American boy arrested. He was prosecuted and sentenced to a diversionary program. There is no indication that the Caucasian boy was punished.

- The family of Middle School Native American student J.S. stated that in January 2005, a Caucasian student was harassing J.S., who has a learning disability, in science class. Ultimately, the student hit J.S. with a ruler, leaving a mark, and J.S. hit the student back. The school sent J.S. to the police and suspended him for 2 days, but did nothing to the other student. J.S.'s mother stated that she told the school that she wanted to press criminal charges against the Caucasian student as well, but that school administrators told her that the police would just laugh at her. After J.S.'s mother complained several times that the Caucasian boy had not been punished at all, he received a one-day ISS.

- School records confirm that WSD officials referred Native American student Z.E.H. to local law enforcement and gave him a total of 17 days of OSS for fighting with other students. Z.E.H.'s family stated that, although Caucasian students had initiated the fights, none were arrested. According to the family, Z.E.H. was only charged in connection with one of the fights and placed on probation. As a condition of his probation, Z.E.H. was required to attend school on a regular basis. Not wanting to engage with the same

Caucasian students who previously beat him, Z.E.H. did not go to school regularly. Z.E.H.'s family stated that, as a result, in February 2005, the juvenile court revoked his probation and sent him to a juvenile detention facility.

- Native American Middle School student J.M. reported that in April 2005, he got into a fight with a Caucasian student who constantly harassed him. Although the fight occurred off campus and after school hours, school records show that J.M. was suspended for two days for the incident. There is no indication that the other child was punished.

- Police records indicate that, on April 19, 2005, two Native American students hit a Caucasian student after she called one of the Native Americans a "bitch" and scratched her face. The two Native American girls were referred to law enforcement. According to the family of one of the girls, the Caucasian child was not.

- In May 2005, a Native American mother saw a group of Native American boys fooling around in front of the Middle School. She then saw the Middle School principal threaten to call the police and have the boys charged with disturbing the peace. The next day, the mother saw Caucasian students engaging in the same conduct, also in front of the school. Although the principal witnessed the behavior, he reportedly did nothing.

EXHIBIT 6

Exhibit 6
Mistreatment of Native American Students with Disabilities

WSD routinely violates the rights of Native American students with disabilities under Section 504 of the federal Rehabilitation Act and Title II of the Americans with Disabilities Act. WSD fails to evaluate and identify students who may have disabilities. Rather than providing children with recognized disabilities with the special assistance and services to which they are entitled, WSD punishes them with suspensions and referrals to the juvenile justice system, without affording them of their due process rights.

- The family of Native American Z.E.H. reported that he had been classified as a special education student and had an IEP prior to moving to Winner in 2003. According to his mother, she informed WSD officials of this fact when he first enrolled in the Middle School, but WSD never evaluated Z.E.H. to determine whether he needed special educational services. When Z.E.H. got into altercations with Caucasian students, WSD never conducted a manifestation review to determine whether Z.E.H.'s behavior was a result of his disabilities. Instead, they suspended him and referred him to local law enforcement.

- Native American student A.C. has emotional and behavioral problems that adversely affected his ability to participate in the classroom. His family states that he expresses his anger through drawings with traditional Native American symbols. Although WSD officials were aware of his problems, the Middle School principal claimed that his drawings were "gang-related," suspended A.C. for more than a total of 10 days and referred him to local law enforcement. At no time did WSD conduct a manifestation review to determine whether A.C.'s allegedly wrongful behavior was a result of his disabilities.

- Native American Middle School student J.S. began acting withdrawn after his uncle died in October 2004. Although J.S. had an IEP, the Middle School principal changed his class schedule, banning him from choir class, without notifying his family or holding an IEP team meeting to ratify the change. When J.S.'s mother confronted the principal after she found out about the change eight weeks later, he claimed that he was under no obligation to inform J.S.'s family. After several complaints by J.S.'s mother, the school finally admitted that it had violated J.S.'s IEP.

- The file of Native American student A.T. indicates that she qualified for special educational services but never received them. On two occasions, once in March 2004 and again in December 2004, WSD referred A.T. to local law enforcement for allegedly misbehaving in school. Prior to those referrals, WSD never conducted a manifestation review to determine whether A.T.'s behavior was related to her educational difficulties.

- Native American 6th grader M.F. has learning difficulties and an IEP. In April 2005, M.F. was arrested and received a 2-day OSS for hitting a Caucasian student. The school did not notify M.F.'s guardian of the arrest, did not call an IEP team meeting and did not

conduct a review to determine whether M.F.'s allegedly wrongful behavior was a manifestation of her learning difficulties.

- Native American 7th grader J.M. is deaf in the right ear. His mother complained to school officials several times that J.M. needs to be seated in the front of the class on a certain side so that he can hear. The school has refused to accommodate these requests. J.M. also complained that the school does not give him enough time to complete his work. WSD has not evaluated J.M. to determine whether he needs individualized special assistance.

- During the last academic year, K.I.H. was in the 5th grade and had an IEP. Middle School staff punishes him by embarrassing him with "smuts" (a flick of the thumb and forefinger on the forehead) and by suspending him. The school has never conducted a manifestation review to determine whether K.I.H.'s conduct is related to his learning difficulties.

EXHIBIT 7

Exhibit 7
Inappropriate Behavior by WSD Staff

- One community member stated that in March 2004, High School administrators sent a Native American student to the police after a guidance counselor noted a "hickey" on the neck of his Caucasian girlfriend.

- The grandmother of Native American 5th grader K.I.H. reported that on two occasions in February 2005, a Middle School teacher gave K.I.H a "smut" or a snap on the forehead with her thumb, to discipline him. When K.I.H.'s grandmother complained to school administrators, the principal gave her a smut, presumably to demonstrate that it was not violent or painful.

- According to the mother of student J.S., when the family moved to Winner from Indiana in 2003, WSD Superintendent Fisher told her that the family should pack their bags and move back to Indiana. When the mother confronted the Superintendent about this statement in January 2005, the Superintendent stated that she made these statements to all new parents in the community because of the lack of jobs in the area.

- A community member reported that the Middle School principal tried to intimidate a group of Native American students by telling them, "when you guys get to the high school, you're going to get punked out," or presumably beaten.

- A Native American grandmother reported that while at the Middle School, she saw her grandson lean against the wall in a school room, accidentally turning off the light switch. The boy immediately turned the lights back on and apologized. The teacher, unaware that the grandmother was present, began to yell at the boy, insisted that he had done it on purpose, and threatened to punish him. When the teacher noticed that the grandmother was present, however, the teacher backed down and did not punish the student.

- School records show that the mother of Native American student J.S. complained after the principal said to J.S., who has a learning disability, "What the hell is your problem?"

- The mother of Native American student J.M. reported that in May 2004, J.M. received a 2-day OSS after mumbling under his breath a "racist mother fucker" while sitting next to the Middle School P.E. teacher on a bus. Immediately prior to the incident, the P.E. teacher had tried to humiliate J.M. for running slowly during class. Although J.M. explained to the teacher that he was trying to help a friend with an injured leg, the P.E. teacher called J.M. a "no good quitter" and made other disparaging remarks.