

# Guidance on Discrimination in School Discipline

## Summary

The New Jersey Law Against Discrimination (LAD) prohibits discrimination and bias-based harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, disability, gender identity or expression, and other protected characteristics in all schools that are not operated by a religious or sectarian institution.

### Applied to student discipline, these protections:

**Prohibit discrimination** on the basis of race, national origin, religion, gender, disability, and other protected characteristics in the implementation of school discipline policies;

**Safeguard students from discrimination at every stage of the disciplinary process**, from behavior management in the classroom or hallways, to referrals to the principal or any other authority figure outside the classroom, to the imposition of discipline in any form, including detention, suspension, expulsion, alternative school placement, or any other disciplinary measure;

**Apply to anyone whom the school or district authorizes to discipline students**, including teachers, administrators, school staff, security guards, school resource officers or other officers authorized by the school to engage in formal or informal discipline, and other agents; and

**Apply to discipline imposed by the school for conduct in any setting**, including outside of school.

### Under the LAD, there are two legal claims that may apply to discrimination or bias-based harassment in the administration of student discipline:

**Differential Treatment:** This claim applies where a student is disciplined differently because of their race or other protected characteristic, either because a policy explicitly treats students of different races differently or because authority figures apply a policy differently to students of different races or other protected characteristics.

**Disparate Impact:** This claim applies where a neutral practice or policy impacts students of one race or other protected characteristic more severely than it does students of another race, or students with disabilities more severely than students who do not have disabilities.

The LAD holds those in charge of administering student discipline accountable not only for disciplinary decisions that are made with an explicitly discriminatory *intent*, but also if their disciplinary decisions have a discriminatory *impact*. Schools have a responsibility to monitor for and address bias-based disparities in student discipline, and schools that fail to do so can be held accountable under the New Jersey Law Against Discrimination.



For More Information

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.



# Guidance on Discrimination in School Discipline

## Spotlight on Data

2018–2019

New Jersey Department of Education  
public school data show that

**8.9%** OF ALL BLACK

**4.1%** OF ALL LATINX/E  
AND MULTI-RACIAL

**3.5%** OF ALL  
AMERICAN INDIAN

students were suspended in New Jersey,  
compared to 2.7% of white students.

NJ's Black students are suspended at

**3.3x**

the rate of their white peers.

NJ's Latinx/e and multi-racial  
students are suspended at

**1.5x**

the rate of their white peers.

NJ's students with  
disabilities are suspended at

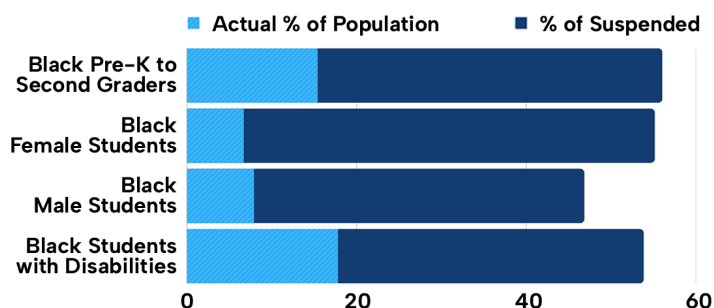
**1.7x**

the rate of their non-disabled peers.

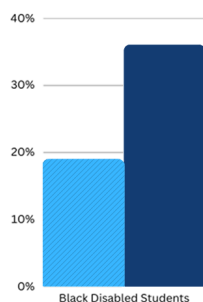
Nationally, LGBTQ+  
students are suspended at

**1.7x**

the rate of their non-LGBT+ peers.



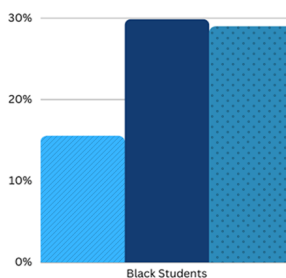
### Restraints



Black students comprised 19% of students with disabilities served by the Individuals with Disabilities Education Act (IDEA), but make up 36% of the students restrained at school through the use of a mechanical device or equipment.

■ Restrained  
■ Total

### Referrals to Law Enforcement



Black students comprised 15.5% of enrolled students, but made up 29.8% of schools' law enforcement referrals and 28.9% of arrests in schools.

■ Enrolled  
■ Law Enforcement Referrals  
■ Arrests

## More than half of law enforcement referrals were non-mandatory

in the 2018–2019 school year, meaning they did not involve guns, dangerous weapons, possession/distribution of controlled substances, bias incidents, threats of violence, sexual assault or criminal sexual contact, assault on a teacher, or child abuse.



**NJ** DIVISION ON  
CIVIL RIGHTS



For Data Sources or More Information

Read DCR's new [Guidance on Discrimination in School Discipline](#).





# Guidance on Discrimination in School Discipline

## *Spotlight on Discriminatory Policies*

Schools violate the LAD when they discipline students differently because of their race, national origin, gender, disability, or other protected characteristic, even if the differential treatment results from unconscious rather than conscious bias on the part of school personnel.

Differential treatment sometimes happens when a policy itself is discriminatory (i.e., the policy itself treats students of one protected class differently, or was enacted with the intent to do so).

### For Example:

A school policy that explicitly authorizes educators to use restraint or seclusion against students with disabilities, but not against their non-disabled peers, would violate the LAD by discriminating based on disability.

A dress code that penalizes students for wearing their hair in twists, braids, cornrows, Afros, locs, Bantu knots, fades, or any other hairstyle that is closely associated with being Black would violate the LAD by discriminating on the basis of race.

A school that revises its dress code to ban clothing with “political” or “inappropriate” phrases or symbols and specifies that “Black Lives Matter” or “Stop Asian Hate” attire is unacceptable, but does not prohibit students from wearing the confederate flag or other white supremacist phrases or symbols, would discriminate based on race.

A school that requires students with disabilities to undergo a psychological evaluation before returning to school after a suspension or expulsion, but does not require students who do not have disabilities to undergo such an evaluation before returning to school after a suspension or expulsion for similar behavior, would discriminate based on disability.



**For More Information**

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.

# Guidance on Discrimination in School Discipline

## *Spotlight on Discriminatory Enforcement*

Schools violate the LAD when school officials' enforcement of discipline policies is discriminatory (i.e., when school officials, teachers, security guards, school-based police officers, or other employees or agents discipline students of one protected class differently than another, even if the policy appears neutral on its face).

Such violations may happen when schools **treat students differently** based on race, national origin, gender, disability, or another protected characteristic **for engaging in the same misconduct**.

For example:

If a Black student and an Asian student got into a fight, and the school suspended the Black student for 5 days but only suspended the Asian student for 2 days, even though it was unclear who started the fight and the students' conduct leading up to and during the fight were similar, that may constitute discrimination based on race.

If a classroom teacher does not refer white students to the principal's office for "disruptive," "disrespectful," or "insubordinate" conduct, or other subjective behaviors, but tends to refer Black or Latinx/e students to the principal's office for the same types of conduct, that would constitute discrimination based on race and/or national origin.

LAD violations also occur when schools choose to **overlook policy violations** by students from one protected class, **while strictly enforcing the same policy against students from another protected class**.

For example:

If a school's staff enforces a prohibition on "tight clothing" against girls wearing tight pants, but not against boys wearing tight pants, or enforces a prohibition on exposing undergarments against a girl whose bra strap is showing but not against a boy whose boxer shorts are visible, that may constitute discrimination based on gender.

If a school's staff consistently disciplines Black and Latinx/e girls for violating the school's dress code, but overlooks white girls wearing similar attire, that may constitute discrimination based on race and/or national origin.

If a school's security guards or hall monitors consistently ask Black students for their hall passes or student IDs, while allowing white students to walk through the halls unquestioned, that may constitute discrimination based on race.



**For More Information**

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.



# Guidance on Discrimination in School Discipline

## *Spotlight on Evidence of Bias by School Officials*

Schools violate the LAD when school officials' enforcement of discipline policies is discriminatory (i.e., when school officials, teachers, security guards, school-based police officers, or other employees or agents discipline students of one protected class differently than another, even if the policy appears neutral on its face).

Such violations may happen when schools' discipline of an individual student is influenced by that student's race, national origin, gender, disability, or other protected characteristic.

In determining whether a school's discipline of an individual student is influenced by that student's race, national origin, gender, disability, or other protected characteristic, DCR may consider **any evidence suggesting bias on the part of school officials** (whether intentional, implicit, or unconscious).

For example:

If a teacher who has failed to address students' use of racial slurs towards their classmates of color during class then imposes discipline on a student of color, that could provide evidence that their discipline of the student may have been influenced by race.

If a school that does not conduct harassment, intimidation, or bullying (HIB) investigations into allegations of race or ethnicity-based bullying or harassment then disciplines a student of color for alleged HIB incidents, that could raise an inference that their discipline of the student may have been influenced by race.

**It is a violation of the LAD for any authority figure involved in the disciplinary process to use a racial or other bias-based slur towards a student at any point from the moment of the student's alleged misbehavior through to the imposition of discipline.**

Not only would such conduct be strong evidence of differential treatment discrimination, but an authority figure's use of a bias-based slur during the disciplinary process would also likely be sufficient to state a separate claim under the LAD for hostile environment harassment.



**For More Information**

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.

# Guidance on Discrimination in School Discipline

## *Spotlight on Discriminatory Processes*

Schools violate the LAD when school officials' process for disciplining students is discriminatory (i.e., when school officials follow a different disciplinary process for students of one protected class than they do another, unless a difference in procedure is required by applicable statutes or regulations).

Such violations can occur when school officials **fail to follow federal or state procedural requirements** when disciplining students of a certain race, national origin, gender, disability, or other protected characteristic, **but follow those requirements when disciplining students of another race, national origin, gender, disability, or other protected characteristic.**

For example:

If school officials typically provide the required written notice and/or manifestation determinations to white students with disabilities, but neglect to provide written notice and/or manifestation determinations to Black students with disabilities, that may constitute discrimination based on race.

If a school typically provides non-Black students with an opportunity to present their version of events prior to deciding whether to impose a suspension, but does not provide such an opportunity to Black students, that may constitute discrimination based on race.

Moreover, a student's protected characteristic cannot factor into the decision as to whether a student's conduct meets an exception to federal or state procedural requirements.

For example:

If a Black student or a student with a disability is denied an informal hearing prior to a suspension on the basis that their presence posed a "continuing danger" or an "ongoing threat of disrupt[ion]," but the objective circumstances do not provide a basis for such a finding, the school's conduct may constitute discrimination based on race or disability.

If a school suspends a Black preschooler for conduct that neither endangered others nor violated the Zero Tolerance for Guns Act, that may constitute discrimination based on race because state law generally prohibits suspensions for preschoolers in those circumstances.



**For More Information**

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.



# Guidance on Discrimination in School Discipline

## *Spotlight on Disparate Impact Analysis*

Under the LAD, schools cannot use a discipline policy that has a **disparate impact** on Black students, other students of color, students with disabilities, LGBTQIA+ students, or students from any other protected class unless the school can show that the practice or policy is **necessary to achieve a substantial, legitimate, nondiscriminatory interest**. Even then, a school's discipline policy may still be prohibited under the LAD if the complainant shows that there is a **less discriminatory, equally effective alternative** means of achieving the substantial, legitimate, nondiscriminatory interest. This is known as **disparate impact** discrimination.

A policy or practice has a **disparate impact** if it actually or predictably results in disproportionately negative effects on members of a protected class (i.e., it impacts students with a protected characteristic more severely than it does other students).

For example:

A significant body of evidence demonstrates that “zero tolerance” school discipline policies consistently lead to unequal rates of suspension and expulsions for Black students and other students of color as compared to their white peers. In light of that evidence, a school's decision to adopt a zero-tolerance policy could itself have a disparate impact.

A school's interest is **substantial** when it is a core interest that has a direct relationship to the function of the school. A school's interest is **legitimate** when it is genuine and not false or pretextual. And a school's interest is **nondiscriminatory** when the justification does not itself discriminate based on a protected characteristic.

For example:

Schools have a substantial, legitimate, non-discriminatory interest in creating a safe learning environment for all students and teachers.

A policy or practice is only **necessary** to achieve a school's interest in creating a safe learning environment for all students and teachers if it effectively carries out the goal of achieving a safe learning environment for all students and teachers. Moreover, a school's justification for a practice or policy that has a disparate impact must be supported by empirical evidence (i.e., evidence that is not hypothetical or speculative).

For example:

If a school asserted that its policy or practice of taking a “zero tolerance” approach to student insubordination was necessary to create a safe learning environment, it would have to point to empirical evidence that a zero tolerance policy effectively creates a safe learning environment for students and teachers.



**For More Information**

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.



# Guidance on Discrimination in School Discipline

## *Spotlight on Policies with a Disparate Impact*

Under the LAD, schools cannot use a discipline policy that has a **disparate impact** on Black students, other students of color, students with disabilities, LGBTQ+ students, or students from any other protected class unless the school can show that the practice or policy is **necessary to achieve a substantial, legitimate, nondiscriminatory interest**. Even then, a school's discipline policy may still be prohibited under the LAD if the complainant shows that there is a **less discriminatory, equally effective alternative** means of achieving the substantial, legitimate, nondiscriminatory interest. This is known as **disparate impact** discrimination.

### A policy may have a disparate impact when:

A school has **already implemented the policy** and its own discipline data reveals disparities, or

The school **adopts a new policy despite evidence** that shows that the policy or practice impacts students of one protected class more severely than another.

The following is a non-exhaustive list of policies or practices that evidence currently demonstrates may have a disparate impact on Black students, other students of color, students with disabilities, LGBTQ+ students, or students from any other protected classes:

- Zero-tolerance policies;
- Discipline policies that permit suspension or expulsion for minor or subjective infractions, such as "insubordination," "disrespect," or "misbehavior";
- A school's use of school resource officers or other law enforcement personnel to impose or enforce discipline, particularly for non-violent and non-drug related student misconduct;
- A school's use of restraint and seclusion, sometimes referred to as the use of "isolation rooms"; and
- A school's practice of making court or law enforcement referrals for students deemed truant without first following the procedures outlined in DOE's regulations, including making an individualized, case-by-case determination regarding the need for a court referral.



For More Information

Read DCR's new [Guidance on Discrimination in School Discipline](#) or access our series of one-pagers.

