



Federal Commission on School Safety Issues Final Report

December 21, 2018

On December 18, 2018, the Federal Commission on School Safety issued its much-anticipated final report. The Commission, led by Education Secretary Betsy DeVos, was created by President Trump following the school shooting in Parkland, Florida. It was tasked with “producing a report of policy recommendations in an effort to help prevent future tragedies.” The report provides recommendations for school districts and other federal, state, and local policymakers on issues such as student mental health, cyberbullying, threat assessments, student discipline, and compliance with the Family Educational Rights and Privacy Act (FERPA). This Legal Update will focus on the Commission’s recommendations regarding student discipline, specifically, the recommendation to rescind the Obama Administration’s 2014 [*Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*](#).

2014 Obama Administration Guidance

The Obama Administration’s Guidance on the Nondiscriminatory Administration of School Discipline (“the Guidance”) provides an overview of data collected by the Office for Civil Rights (OCR), which shows that students of certain racial or ethnic groups tended to be disciplined more than their peers. The Guidance also discusses the increased use of “exclusionary discipline,” such as out-of-school suspensions, expulsions, and referrals to law enforcement, which some argue contributes to the “school to prison pipeline.”

The Guidance clarifies that statistical data alone would not be determinative in an OCR investigation, and it recognizes that disparities in student discipline rates may be caused by a range of factors. However, the Obama Administration believed that “racial discrimination in school discipline is a real problem.”

The Guidance explains that a school’s disciplinary practices may violate Titles IV and VI, which protect students from discrimination based on race, when a school intentionally disciplines students based on race through the selective enforcement of a facially neutral policy, for example. The Guidance goes on to explain that, absent direct evidence of intentional discrimination based on race, the U.S. Department of Education and the U.S. Department of Justice (the Departments) would examine circumstantial evidence to determine whether intentional discrimination occurred, normally using the following analysis:

1. Did the school treat a student or group of students of a particular race differently from a similarly situated student or group of students of another race in the disciplinary process? (The Departments would conclude that students are similarly situated when they are comparable in relevant respects, for example, with regard to the seriousness of the infraction and their disciplinary histories.) If yes, then...
2. Can the school articulate a legitimate, nondiscriminatory reason for the different treatment? If not, then the Departments could find that the school has intentionally discriminated based on race. If yes, then...
3. Is the reason articulated a pretext for discrimination? (Circumstances in which the Departments may find that the school's stated reason is a pretext include where witnesses contradict the school's stated reason for the disparity, where students of other races have received different discipline for similar misbehavior, or where the discipline issued does not conform to the school's discipline policy.) If yes, then the Departments would conclude that the school engaged in discrimination.

The Guidance also states that schools may violate Titles IV and VI when “they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as ‘disparate impact.’ . . . Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspension, expulsion, or citation upon any student who commits a specified offense. . .”

The Guidance concludes with recommendations for school districts, school administrators, teachers, and staff, including recommendations for: safe, inclusive, and positive school climates; training and professional development; the appropriate use of law enforcement; clear and consistent discipline policies; emphasizing positive interventions over disciplinary removals; and data collection and review. The Guidance prefaced its recommendations by stating, “Equipping school officials with an array of tools to support positive student behavior—thereby providing a range of options to prevent and address misconduct—will both promote safety and avoid the use of discipline policies that are discriminatory or inappropriate. The goals of equity and school safety are thus complementary, and together help ensure a safe school free of discrimination.”

The Commission's Recommendation to Rescind the Guidance

Chapter 8 of the Final Report of the Federal Commission on School Safety discusses three main reasons why the Guidance, as written and as implemented, has been criticized:

1. The Guidance “creates a chilling effect on classroom teachers’ and administrators’ use of discipline by improperly imposing, through the threat of investigation and potential loss of federal funding, a forceful federal role in what is inherently a local issue;”

2. "Authorities, including the United States Supreme Court, have questioned the applicability of a disparate impact legal theory to Title VI of the Civil Rights Act of 1964, upon which the Guidance relies, thus calling into question its legal basis in the school discipline context;" and
3. The "threat of investigations by the Office for Civil Rights (OCR) . . . has likely had a strong, negative impact on school discipline and safety. . . . When school leaders focus on aggregate school discipline numbers rather than the specific circumstances and conduct that underlie each matter, schools become less safe."

Accordingly, the Commission recommended the following:

1. "The U.S. Department of Justice (DOJ) and the U.S. Department of Education (ED) should rescind the Guidance and its associated sub-regulatory guidance documents. ED should develop information for schools and school districts that will identify resources and best practices to assist schools in improving school climate and learning outcomes as well as in protecting the rights of students with disabilities during the disciplinary process while maintaining overall student safety.
2. DOJ and ED should continue to vigorously enforce Title VI of the Civil Rights Act of 1964 and provide appropriate information to assist schools and the public in understanding how ED will investigate and resolve cases of intentional discrimination."

The Commission expressed a commitment "to ensuring that educational programs and policies are administered in a fair, equitable, and racially neutral manner that does not result in discrimination," and to "acting swiftly and decisively to investigate and remedy any discrimination" when there is evidence "beyond a mere statistical disparity" that a school's programs and/or policies may discriminate based on race.

Buelow Vetter Analysis and Recommendations

Because Education Secretary Betsy DeVos is a member of the Federal Commission on School Safety, the Department of Education most likely will adopt the Commission's recommendation to rescind the Obama Administration's Guidance. As a result, school districts may see a decrease in OCR investigations into allegations of discrimination based solely on statistical disparities, as well as a decrease in findings of Title IV or VI violations based on disparate impact.

We continue to recommend the following best practices with regard to student discipline:

1. Student discipline policies should be written and implemented in a neutral, equitable and consistent manner, without regard to race, sex, or other categories protected under Section 118.13 of the Wisconsin Statutes or federal law.
2. Student discipline policies and student codes of conduct should include:

- a. Specific definitions and examples of prohibited conduct (e.g., threatening behavior, dangerous behavior, disruptive behavior); and
 - b. A description of what types of conduct may result in disciplinary removals (e.g., removal from class, out-of-school suspension, expulsion) and the procedures for determining the appropriate educational placement of a student who has been removed from the classroom or school.
3. School staff should receive training in the following areas:
 - a. Effective classroom management strategies;
 - b. Trauma-informed approaches to handling student behavior issues;
 - c. The equitable application of student discipline policies and practices; and
 - d. The importance of objectively documenting the specific behavior that led to discipline.
 4. Schools should impose discipline, including out-of-school suspensions and expulsions, and refer matters to law enforcement as appropriate to ensure a safe school environment.

If you have any questions about this Legal Update, or require assistance in reviewing your [school policies](#), please contact Attorney Alana Leffler at 262-364-0267 or aleffler@buelowvetter.com, or your Buelow Vetter attorney.

This Legal Update is intended to provide information only on general compliance issues and should not be construed as legal advice. Please consult an attorney if you have any questions concerning the information discussed in this Legal Update.

In order to comply with Treasury Circular 230, we are required to inform you that any advice we provide in this Legal Update concerning federal tax issues is not intended or written to be used, and cannot be used, to avoid federal tax penalties or to promote, market, or recommend to another person any tax advice addressed herein.

Buelow Vetter Buikema Olson & Vliet, LLC
20855 Watertown Road
Suite 200
Waukesha, WI 53186
Phone: 262-364-0300
Fax: 262-364-0320
Email: info@buelowvetter.com
Website: www.buelowvetter.com