THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

June 20, 2023

The Honorable Stephanie Klick
Chair, House Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. JS-0003

Re: Authority of school districts or educators to choose what disciplinary action to impose on a student because of race, ethnicity, sex, or gender of the student (RQ-0492-KP)

Dear Representative Klick:

You ask us to renew a previously closed opinion request, RQ-0435-KP, in which your colleague asked whether certain provisions of state law permit a school district or educator to "choose what disciplinary action to impose on any student or alter any student-disciplinary decision or action" because of the race, ethnicity, sex, or gender of the student and whether certain circumstances change the answer.[1]

The Texas Equal Rights Amendment of the Texas Constitution provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."

Your colleague referred us to the Texas Equal Rights Amendment of the Texas Constitution, which provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[2] TEX. CONST. art. I, § 3a; Attachment at 2. The Texas Supreme Court applies a three-part test when considering alleged violations of this provision. *In*

[1]*See* Letter and Attachment from Honorable Stephanie Klick, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Dec. 19, 2022), https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0492KP.pdf ("Request Letter" and "Attachment," respectively); Letter from Honorable James White, Chair, House Comm. on Homeland Sec. & Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Oct. 8, 2021), https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0435KP.pdf.

[2]Your colleague also referred us to subsection 1.002(a) of the Education Code, which provides that "[a]n educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institution shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries . . . ." TEX. EDUC. CODE § 1.002(a); Attachment at 2. No Texas court has construed this provision, nor has any state regulatory agency considered it in the context of school discipline. We refrain from speculating as to its application here and instead focus on the Texas Equal Rights Amendment.

re Dean, 393 S.W.3d 741, 749 (Tex. 2012). It asks first whether equality has been denied. *Id*. If it has, a court determines whether the denial was "*because of* a person's membership in a protected class." *Id.* If so, "the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest." *Id.* (quoting *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 257–64 (Tex. 2002)). Thus, in the context of the question asked, a disciplinary decision that denies equality and that is made on the basis of a student's sex, race, color, creed, or national origin cannot stand unless it is narrowly tailored to serve a compelling interest of the school district.[3]

The Federal Office of Civil Rights issues guidance to assist schools with their obligation to avoid discrimination in school discipline, but such guidance may not contravene federal law.

Your colleague asked whether this analysis changes in light of certain guidance issued to schools by the Office for Civil Rights ("OCR") of the U.S. Department of Education ("DOE"). *See* Attachment at 1–2. The OCR enforces a number of civil rights laws and regulations that prohibit discrimination in programs or activities that receive funding from the DOE, among them Title VI of the Civil Rights Act of 1964.[4] *See* 42 U.S.C. §§ 2000d–2000d-7; 34 C.F.R. pt. 100. Title VI prohibits discrimination based on "race, color, or national origin" by recipients of federal financial assistance. 42 U.S.C. § 2000d. In schools, "Title VI protects students throughout the disciplinary process, including behavior management in the classroom; referral to an authority outside the classroom because of misconduct; the school's response to student misconduct, which may or may not include exclusionary discipline for the student; and any administrative reviews of disciplinary decisions."[5] The OCR is tasked with "provid[ing] assistance and guidance to recipients to help them comply voluntarily with" the regulatory provisions that implement Title VI. 34 C.F.R. § 100.6(a); *see also id.* § 100.1 (stating that the purpose of Title 34, part 100 of the Code of Federal Regulations is to implement Title VI). The OCR issues this guidance in the form of "Dear Colleague" letters and related documents that summarize schools' obligations with respect to avoiding discrimination in school discipline and explain the legal framework within which the OCR considers allegations of racially discriminatory student discipline practices.[6] In

[3]Section 37.001 of the Education Code authorizes a school district board to adopt a student code of conduct, which, among other things, must provide grade-level appropriate methods and options for disciplining students. *See* TEX. EDUC. CODE § 37.001(a)(8)(B). For each decision about certain disciplinary actions, such as suspension and expulsion, the district must consider particular factors regarding a student. *See id.* § 37.001(a)(4) (requiring the consideration of intent, disciplinary history, any disability that impairs judgment of right and wrong, self-defense and whether the student is in the conservatorship of the Department of Family and Protective Services or is homeless). The race, ethnicity, sex, or gender of a student is not among the factors the Legislature imposed for consideration when making these discipline decisions. *See id.*

[4]At the same time, the U.S. Department of Justice's Civil Rights Division ("DOJ") enforces Title IV of the Civil Rights Act of 1964, which prohibits discrimination in public elementary and secondary schools based on race, color, or national origin, among other bases. *See* 42 U.S.C. §§ 2000c–2000c-9.

[5]*Questions & Answers on Racial Discrimination & School Discipline*, U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS at 1 (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf.

[6]*See, e.g.*, Dear Colleague Letter on Nondiscriminatory Administration of School Discipline, Kenneth L. Marcus, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., and Eric S. Dreiband, Assistant Att'y Gen., U.S. Dep't of Justice (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

providing such guidance, the OCR is restrained from issuing guidance that conflicts with federal law. *See* 5 U.S.C. § 706(2)(B)–(D) (providing generally that reviewing courts must "hold unlawful and set aside agency action" found to exceed constitutional or statutory authorization or that does not follow required procedure).

Any race-based student disciplinary decision by an educator or school district, whether motivated by guidance from the OCR or otherwise, will not withstand constitutional review under state law unless it is narrowly tailored to serve a compelling governmental interest.

As previously explained, under the Texas Equal Rights Amendment, a student disciplinary decision made on the basis of a student's sex, race, color, creed, or national origin is impermissible unless it is narrowly tailored to serve a compelling interest of the school district. *See In re Dean*, 393 S.W.3d at 749. To use an example from your colleague's letter, if a Texas educator makes a student disciplinary decision "in order to produce or maintain statistical parity in the allocation of disciplinary actions between groups of students" of different races, such action, because it is based on a protected class—race, must be narrowly tailored to further a compelling interest of the school district in order to satisfy the Texas Constitution.[7] Attachment at 1. With regard to any OCR-issued guidance, a court would consider whether a decision made under that guidance serves as a compelling governmental interest, which in turn will depend on the guidance's compliance with Title VI and court precedent interpreting it.

A court would likely conclude that avoiding a disparate impact cannot serve as a compelling governmental interest that justifies making a race-based student disciplinary decision under the Texas Equal Rights Amendment.

Title VI's prohibition on discrimination based on race, color, or national origin by recipients of federal financial assistance comes from section 601 of that title, and courts have recognized that private individuals may sue to enforce Title VI through section 601. *See* 42 U.S.C. § 2000d; *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). Section 602 of Title VI authorizes federal agencies to promulgate regulations "to effectuate the provisions of section [601] . . . ." 42 U.S.C. § 2000d-1. The United States Supreme Court has held that section 601 affords no private right of action to enforce disparate impact regulations because that section "prohibits only intentional discrimination." *Sandoval*, 532 U.S. at 280. As to the validity of disparate impact regulations themselves, the Court in *Sandoval* stated that "no opinion of this Court has held that" regulations promulgated under section 602 "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under [section] 601." *Id.* at 281. Indeed, the Court noted that individual justices' statements expressing this view of the law, as well as certain dictum of the Court, "are in considerable tension with the rule of *Bakke* and *Guardians* that [section] 601 forbids only intentional discrimination[.]" *Id.* at 282 (referring to

[7]The example in the letter references maintaining "statistical parity in the allocation of disciplinary actions between groups of students in various racial, ethnic, sex, gender, or disability classifications[.]" Attachment at 1. But because the questions are asked in the context of Title VI, which prohibits discrimination based on "race, color, or national origin," and the OCR guidance documents, which address only race-based discrimination, we focus our analysis accordingly. 42 U.S.C. § 2000d.

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) and *Guardians Ass'n. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 610–11 (1983)).[8]

But irrespective of whether the motivation for an educator's actions stems from a federal guidance document, a court's analysis of an educator's or a school district's responsibility under Texas law remains the same: because race is a protected class under the Texas Equal Rights Amendment, any race-based student disciplinary decision cannot stand under that law unless it is narrowly tailored to serve a compelling interest of the school district. A court would likely conclude that under the Texas Equal Rights Amendment, avoiding a disparate impact cannot serve as a compelling governmental interest that justifies making a race-based student disciplinary decision.

[8]*See also Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty, Tex.*, 6 F.4th 633, 643 n.6 (5th Cir. 2021) (observing that the *Sandoval* court "questioned whether Title VI authorizes disparate-impact regulations").

S U M M A R Y

Texas Equal Rights Amendment of the Texas Constitution provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." In applying this provision, the Texas Supreme Court will not uphold a state action based on sex, race, color, creed, or national origin unless it is narrowly tailored to serve a compelling governmental interest. Thus, any race-based student disciplinary decision by an educator or school district, whether motivated by guidance from the Office for Civil Rights of the U.S. Department of Education or otherwise, violates state law unless it meets this standard. A court would likely conclude that avoiding a disparate impact cannot serve as a compelling governmental interest that justifies making a race-based student disciplinary decision.

Very truly yours,

JOHN SCOTT
Provisional Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AUSTIN KINGHORN
Chair, Opinion Committee

BECKY P. CASARES
Assistant Attorney General, Opinion Committee