

Wisconsin

October 7, 2019

VIA ELECTRONIC MAIL ONLY

Re: Protecting Wisconsin students from discrimination

Dear School Official,

The ACLU of Wisconsin (“ACLU-WI”) writes because of concerns about persistent reports of racial and sexual harassment in school districts across the state of Wisconsin. We believe it is important for all districts, whether they have had reported incidents of such harassment or not, to consider their obligations under the law, especially during the month of October as anti-bullying and anti-harassment month.

In recent years, ACLU-WI has received reports of far too many instances of harassment in various parts of the state, and we’ve represented several families with children of color who were being bullied and harassed by peers in non-diverse school districts. Unfortunately, some school officials ignore behaviors like the use of racial slurs—including the use of the “N word”—or other forms of harassment. Others take action that is simply inadequate to resolve the problem, which means that children are repeatedly subject to harassment.

Schools must be held accountable for turning a blind eye to harassment and discrimination. Students have a right to an education, and Wisconsin schools have a responsibility to ensure that a hostile environment does not interfere with that right, whether in urban, suburban, or rural communities.

Anti-harassment

Over the past several years we have received complaints and seen reports of harassing behavior in many Wisconsin school districts. These concerns include the use of racial epithets, inappropriate comments about sex and gender, and policies and practices that place vulnerable students at a significant disadvantage, and appear to have escalated at an alarming rate over the past few years. This highlights increasingly hostile environments in schools across our state. In fact, despite repeated complaints from parents and students, ACLU-WI has continued to receive reports that schools are not taking complaints seriously, nor are schools taking action to implement meaningful and adequate measures to ensure these problems do not recur. It is critical that school districts begin to implement significant changes to address persistent harassment.

As recipients of federal funding, Wisconsin public schools are subject to the non-discrimination requirements of Title VI of the Civil Rights Act¹, which prohibits discrimination on the basis of race, color, or national origin. Title VI prohibits not only intentional discrimination but also actions that have

¹ 42 U.S.C. § 2000d *et seq.* (hereinafter “Title VI”).

a discriminatory effect². They are also subject to the non-discrimination requirements of Title IX of the Education Amendments of 1972³, which prohibits sex discrimination—including sexual harassment—in education programs that receive federal funds.

As with Title VI, the U.S. Department of Education policy is that under Title IX, a school district is liable if one of its staff aided in the harassment of students through his or her position of authority at the school. In addition, schools that are recipients of federal funding may be liable for subjecting students to discrimination where the school is deliberately indifferent to known acts of student-on-student harassment and the harasser is under the school's disciplinary authority. Title VI and Title IX not only protect students from discrimination but also shield students from being excluded from participation in or denied the benefits of any education program or activity that receives federal funding. Furthermore, Title VI and Title IX's discrimination extends to claims of discriminatory bullying or harassment based on a student's race or sex, including allegations of both opposite-sex and same-sex bullying, or harassment based on a student's gender identity or failure to conform to traditional sex stereotypes.

Both Title VI and Title IX require a funding recipient to appoint at least one employee to coordinate its efforts to comply with nondiscrimination policies, follow procedures providing for prompt and equitable resolution of complaints by students, and to notify students and their families of such discrimination. Federal agencies that provide financial assistance to educational programs are authorized to enforce the provisions of Title VI and Title IX through rules, regulations, or orders of general applicability. Enforcement includes the termination of funding if the agency has advised the appropriate person of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. Furthermore, a school district can be held liable if the district official has actual knowledge of the discriminatory behavior and who has authority to address the alleged discrimination does not institute corrective measures on behalf of the federal funding recipient and is deliberately indifferent to the misconduct.⁴ Similar protections apply to students with disabilities.⁵

It is well known that a school's failure to protect a student from harassment may constitute actionable discrimination under federal law. For example, more than 25 years ago, the U.S. Department of Education published its Investigative Guidance on "Racial Incidents and Harassment Against Students at Educational Institutions,"⁶ which made it clear that allowing a racially hostile environment to exist can violate Title VI so long as the recipient had actual or constructive notice of the racially hostile environment and failed to respond adequately to redress the racially hostile environment. A racially hostile environment is created when conduct interferes with or limits the ability of a student to participate in or benefit from services, activities or privileges provided by the school.⁷

In 2010, the U.S. Department of Education Office for Civil Rights confirmed that school districts are obligated to protect students from harassment based on race, color, national origin, sex, or disability – including from harassment by other students.⁸ That harassing conduct can take many forms including,

² 34 C.F.R. Pt. 100.

³ 20 U.S.C. § 1681(a) (hereinafter "Title IX").

⁴ *See generally*, 34 C.F.R. Pts. 100, 106.

⁵ *See, e.g.*, 34 C.F.R. Pt. 104.

⁶ 59 Federal Register 11448 (March 10, 1994), viewed 10/6/19 at <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

⁷ *Id.*

⁸ "Dear Colleague" letter, U.S. Dept. of Education Office for Civil Rights (2010), viewed 10/6/19 at

but not limited to, verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment need not include intent to harm, be directed at a specific target, or involve repeated incidents. When harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces. As the Dear Colleague letter also makes clear, a school is “responsible for addressing harassment incidents about which it knows or reasonably should have known.”⁹ This includes harassment occurring in hallways and during classes, but also in other situations where the school becomes aware of misconduct that may lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. At the very least, the school is under an obligation to conduct an investigation once it becomes aware of racially and sexually harassing conduct by students and take steps to end the harassment, whether or not an individual student complains. Importantly, the steps a school takes “*should not penalize the student who was harassed.*”¹⁰ This letter also provides suggestions on how school districts might properly respond to ongoing racial and sexual harassment and may be useful as districts work on plans for addressing the race and equity issues that are so prevalent across the state.

Depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. School districts should be teaching cultural competency so that staff can examine their professional practices and biases to ensure that no student is exposed to racial or sexual harassment. School faculty who understand their legal obligations to address harassment are in a better position to prevent it from occurring and to respond appropriately. A school may also be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response may also need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district’s Title IX coordinator.

Appropriate steps to end harassment may also include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. Again, *these steps should not penalize the student who was harassed.* For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target’s educational program (e.g., not requiring the target to change his or her class schedule).

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. Even when bullying or harassment is not a civil rights violation, school personnel should seek to stop it in order to protect students from the emotional

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

⁹ *Id.* at 2. (citing OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (*Sexual Harassment Guidance*), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.htm>)).

¹⁰ *See id.* at 2-3. (emphasis added).

and physical harm it may cause.

Fair Discipline

In addition to protecting students from harassment, schools must ensure that discipline policies and practices - as written but also as implemented - do not have the effect of discriminating on the basis of a protected characteristic, something that would be prohibited by federal law.

African American, Latino, disabled, and other minority students are suspended and expelled at a disproportionate percentage in school districts throughout Wisconsin.¹¹ For example, Black students are suspended at rates two to three times higher than other students and are overrepresented in office referrals, expulsions, and corporal punishment.¹² Black students are also punished more severely for less serious discipline infractions. This disproportion is not due to higher rates of disruption or violence¹³, but it is likely due to minority students being present in schools that rely heavily on harsh disciplinary practices. In addition, statistical analyses show that racial gaps are as likely or more likely to occur in affluent, suburban districts.¹⁴ For example, White students are referred to the office more than Black students for more objective offenses, such as smoking and vandalism, while Black students are referred more than White students for more subjective offenses, such as disrespect or loitering.¹⁵ Disciplinary disparities also can occur between students of color and White students due to cultural misunderstandings and insufficient training in culturally responsive classroom management.

There have been particular problems in Wisconsin, where many school districts have racially disparate discipline outcomes.¹⁶ Many of these disparities are driven by severe discipline policies, including zero tolerance policies that impose explicit, predetermined punishments for specific violations of school rules, regardless of the circumstances or context of the behavior. Often, the punishment is severe, such as suspension or expulsion from school. It is not evident that zero-tolerance policies are succeeding in improving school culture and safety. Furthermore, evidence has long suggested that these policies may have an adverse effect on student academic and behavioral outcomes.¹⁷

There are many negative effects associated with zero-tolerance policies, especially for students of color. A strong link exists between being suspended from school and an increase in the likelihood of

¹¹ See Moriah Balingit, *Racial Disparities in School Discipline are Growing, Federal Data Show*, The Washington Post (April 24, 2018), https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html?noredirect=on&utm_term=.4cf9b84f7071.

¹² "Data Snapshot: School District Discipline," U.S. Department of Education Office for Civil Rights (2014), viewed 10/6/19 at <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

¹³ See Russel Skiba, *The Failure of Zero Tolerance*, Reclaiming Children and Youth (2014), http://reclaimingjournal.com/sites/default/files/journal-article-pdfs/22_4_Skiba.pdf.

¹⁴ See generally *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*, U.S. Commission on Civil Rights (2018), viewed 10/6/19 at <https://www.epi.org/publication/education-inequalities-at-the-school-starting-gate/>.

¹⁵ "Data Snapshot: School District Discipline," U.S. Department of Education Office for Civil Rights (2014), viewed 10/6/19 at <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

¹⁶ See Erin Richards, *Wisconsin Black Suspension Rate Highest in U.S. for High Schools*, Journal Sentinel (Mar. 1, 2015), <http://archive.jsonline.com/news/education/wisconsin-black-suspension-rate-highest-in-us-for-high-schools-b99451618z1-294596321.html/>.

¹⁷ "Are Zero Tolerance Policies Effective in Schools: an evidentiary review and recommendations," American Psychological Association Zero Tolerance Task Force (2008), viewed 10/6/19 at <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>; see also Christopher Boccanfuso, Ph.D., and Megan Kuhfeld, B.S., *Multiple Responses, Promising Results: Evidence-Based Nonpunitive Alternatives to Zero Tolerance* (2011), viewed 10/6/19 at https://www.childtrends.org/wp-content/uploads/2011/03/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf.

subsequent suspension or expulsion. If a student is suspended in middle or high school, he or she is significantly less likely to graduate on time and more likely to drop out. Psychological research suggests that suspension and expulsion are likely to further reinforce negative behavior because removing a student from school eliminates opportunities for positive socialization and nurtures a distrust of adults, both of which inhibit adolescent development. In addition, in a school that has a zero-tolerance policy for discipline, a student who is bullied may face the same suspension for retaliating in an altercation as the bully who initiated the confrontation, which we have seen repeatedly in Wisconsin schools. Therefore, zero tolerance policies may deter other students from coming forward and informing school staff of the bullying incidents.

There are alternative strategies to school discipline that have the potential for reducing harassment and ensuring safety for all students. Social-emotional learning can help teach students alternatives to harassment and violence by resolving interpersonal problems before the harassing behavior is targeted toward another. School-wide behavioral and discipline plans can help create consistency and communication throughout the school and help reduce subjective discipline. Each school district must create clear, written policies to help combat harassment and discrimination. Enforcement mechanisms for violations of district harassment and discrimination policies must be accessible and clear. Finally, school and district-wide data systems can disaggregate data by race and ethnicity and can be used to evaluate school and district progress in handling disciplinary incidents. Disaggregation of those data for minority groups who have been disproportionately affected by school discipline is important in having equitable school discipline policies.

We request that you promptly review existing policies that address harassment and bullying in your school district and ensure they are in compliance with federal and local law. Further, we ask that you notify us of the steps the district will take to end the racial and sexual harassment of students, including but not limited to taking appropriate actions against the harassers and providing necessary training to faculty and staff, to ensure that such harassment does not recur, and to prevent any form of retaliation against the students or their families -- by other students, other families, or district faculty and staff.

Sincerely,

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