



July 23, 2021

VIA EMAIL ONLY

Ms. Jessie Mchomvu

c/o Attorney Elisabeth Lambert, American Civil Liberties Union of Wisconsin
elambert@aclu-wi.org

Todd Bugnacki, District Administrator

Cedarburg School District

c/o Attorney Mary L. Hubacher, Buelow Vetter – Buikema Olson & Viet, LLC
mhubacher@buelowvetter.com

Re: DPI Case No. 21-PDA-02
In the Matter of the Pupil Nondiscrimination Appeal, Jessie Mchomvu v.
Cedarburg School District

Dear Ms. Mchomvu and Mr. Bugnacki:

On January 25, 2021, the Department of Public Instruction (DPI) received a pupil nondiscrimination appeal from Jessie Mchomvu (“Parent”), via counsel, regarding a final determination of a pupil discrimination complaint by the Cedarburg School District (“District”). The appeal specifically challenges the District’s conclusion that it did not have a duty to investigate or respond to Parent’s allegation that students in the district created a racially hostile environment by wearing masks and other apparel with messages hurtful and threatening to students of color because the First Amendment protects such messages. This is DPI’s Decision and Order for the appeal.

SUMMARY

Parent’s appeal is granted. The district failed to comply with its own discrimination complaint policies and procedures when a vice principal conducted an informal investigation of alleged pupil harassment instead of referring the matter to a district compliance officer. Upon receipt of a formal discrimination complaint, the District failed to develop the facts necessary to make a determination whether the alleged conduct occurred. As a result, the District’s investigation into the allegation a racially hostile environment existed was deficient. The district is ordered to submit a corrective action plan to specify steps it will take to: ensure future compliance with its discrimination policies and procedures; and conduct an appropriate investigation into the alleged racially hostile environment in the district.

STANDARD OF REVIEW

Section 118.13 of the Wisconsin Statutes provides that no person may be denied participation in, be denied the benefits of, or be discriminated against in any curricular or other program or activity because of the person's race. Section PI 9.02(5) of the Wisconsin Administrative Code defines "discrimination" to include any action, policy, or practice which is detrimental to a person and differentiates or distinguishes among persons, or which limits or denies them opportunities, privileges, roles, or rewards based, in whole or in part, on their race.

DPI reviews appeals of districts' final determinations of pupil nondiscrimination complaints pursuant to Wis. Stat. § 118.13(3)(a)1. and Wis. Admin. Code § PI 9.08(1)(a)1. DPI's review of discrimination allegations under Wis. Stat. § 118.13 is informed by guidance promulgated by the Department of Education, Office for Civil Rights (OCR), which provides an investigative approach and standards for determining whether discrimination occurred under analogous federal law. *See generally Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, F.R. Doc. No. 94-5531 (1994).

Discrimination occurs when a district

has created or is responsible for a racially hostile environment[,], i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a [district]. A [district] has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged[,], accepted, tolerated, or failed to correct a racially hostile environment of which it has actual or constructive notice.

Id. at 3. DPI will find discrimination occurred by a district when: 1) a racially hostile environment existed; 2) the district had actual or constructive notice of the racially hostile environment; and 3) the district failed to adequately redress the racially hostile environment. *Id.*

In accordance with Wis. Admin. Code §§ PI 1.04(5), (9), DPI's decision is based on a review of the record developed by the district during its investigation into the underlying complaint; DPI is necessarily limited to the record offered by the District on this appeal.

PROCEDURAL HISTORY AND FACTS

The District maintains policies prohibiting student harassment (Board Policy 5517) and pupil discrimination (Board Policy 2260). Both policies set out procedures for filing and investigation of harassment and discrimination complaints. Those procedures specify any harassment or discrimination complaint brought to the attention of district staff will be referred to a district compliance officer (CO). The policies direct the CO to conduct an investigation and issue a report of findings to the superintendent. The superintendent may direct further investigation or adopt the findings of the CO and issue a final determination to the complainant. Policy 5517 designates the district's director of human resources as CO for those particular complaints; Policy 2260 designates the district's director of human resources or the director of technology as COs.

In the fall of 2020, Parent's child, a bi-racial student at the District's high school ("Student A"), reported to the vice principal that a fellow student ("Student Z") had praised Kyle Rittenhouse and stated that Student Z would drive a vehicle through Black Lives Matter protestors if Student Z ever went to a protest ("Initial Incident"). As a result, the vice-principal spoke with Student Z and expressed to them how words can hurt others. The vice-principal also spoke with a teacher of both Student A and Student Z to determine whether there were any in-class problems between the two. The vice-principal reported his actions to Parent.

On October 15, 2020, Parent filed a complaint with the District under Wis. Stat. 118.13, Wis. Admin. Code Chapter PI 9, and both Board Policy 2260 and Board Policy 5517 ("the Complaint"). In addition to the Initial Incident, the Complaint alleged, among other things, that: Parent's child frequently heard the N-word in the hallways of the high school; students at the high school displayed Confederate flags on vehicles in the parking lot; and many students wore Trump 2020, MAGA, and Thin Blue Line apparel during the school day. The Complaint asserted that these actions created a racially hostile environment.

On receipt of the Complaint, the District retained an independent investigator. The investigator interviewed Parent and one district employee. On December 23, 2020, the investigator submitted his report to the superintendent. The investigator determined that there was no evidence of racial harassment or bullying, and the District had not violated any board policy or any applicable state or federal law.

On January 11, 2021, the superintendent issued a final determination of the Complaint, which adopted the findings and conclusions of the investigator.

DISCUSSION

Pursuant to Wis. Stat. § 118.13(2)(a), school boards are required to develop written policies and procedures for receiving and responding to complaints of pupil discrimination. Wis. Admin. Code §§ PI 9.03 and 9.04 set forth specific requirements for these policies and procedures.

Pupil discrimination may include harassment based on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability. Wis. Admin. Code §§ PI 9.02(5), 9.02(9). As noted above, DPI will find a racially hostile environment exists when harassment is severe, pervasive, or persistent. Factors such as the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved, must be considered in determining whether a racially hostile environment exists.

1. District Did Not Comply with its Own Policies in Handling the Initial Incident.

When Student A brought concerns regarding Student Z's comments about the Initial Incident to the attention of the vice-principal, the district's policies required the vice-principal to forward the matter to a district CO. The record indicates the vice-principal failed to do so and, instead, conducted his own informal investigation. This action deprived Parent and Student A of, and delayed their access to, important procedural rights under both district policy and the Wisconsin Administrative Code. Specifically, they had the right to a formal investigation, the right to a formal written determination, and the right to appeal a negative determination to the state superintendent.

DPI recognizes that the vice-principal did not act with indifference to the report of the Initial Incident. DPI also recognizes in certain circumstances, it is difficult to determine when a complaint about student conduct is a complaint of racial harassment that requires adherence to certain district policies. However, the conduct in the Initial Incident – comments by a student that he would drive over people advocating for “Black Lives Matter” – was unequivocally racially hostile. It was unreasonable for the vice-principal to have interpreted the concerns raised as anything other than a complaint of racial harassment, which should have been reported to a CO and investigated pursuant to Policy 2260 or 5517.

2. District Did Not Conduct a Reasonable Investigation of the Complaint.

An investigation into a complaint of a racially hostile environment necessarily must begin with establishing facts to determine whether such an environment does or does not exist. In its investigation of the Complaint, the District failed to take even the most basic steps to develop sufficient facts essential to make that determination, including whether the conduct alleged in the Complaint occurred and, if so, whether the conduct was severe, persistent, and pervasive.

The District asserts that a full investigation into the Complaint was difficult because Parent did not provide sufficient details regarding the alleged incidents. On the contrary, Parent provided specific examples of behavior that Parent believed created a racially hostile environment. As noted above, these examples included: confederate flags displayed on cars in the parking lot; and students regularly using the N-word at school. The fact that Parent did not provide an extensively detailed catalog of each and every instance of perceived racial harassment did not absolve the District of its affirmative duty to investigate whether a racially hostile environment did, in fact, exist at the high school.

The record in this appeal indicates the District's investigation consisted solely of interviews with Parent and a single district employee, the vice-principal. There is no evidence that District, by observation or through investigative interviews, actually attempted to ascertain whether students were using the N-word in the hallways or that cars in the parking lot displayed confederate flags. Likewise, there is no evidence in the record that District examined whether or not there had been any complaints alleging similar racially hostile behavior by other students. Given the absence of such basic facts, it was not possible for District to have reasonably determined that the behavior in question was not based in whole, or in part, on race. Further, the District could not have reasonably concluded such behavior, if determined to be based on race, was not severe, pervasive, or persistent throughout the high school.

In both the investigator's report and the District's final determination, the District indicated that there were limits as to what actions the District may take to regulate the complained of behavior in light of the First Amendment. Students are, in fact, entitled to substantial, though not unlimited, First Amendment rights at school. However, a district's duty to conduct an investigation into an alleged racially hostile environment is independent from any First Amendment rights of its students. The fact that certain student speech may be protected by the First Amendment should not limit a district's prompt, fair and equitable investigation into whether the speech creates a racially hostile environment. If a district determines, after a full investigation, that a racially hostile environment exists, the district's

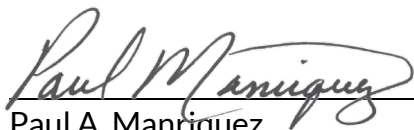
obligation under the law is to take steps reasonably calculated to eliminate the hostile environment. F.R. Doc No. 94-5531 at 5. Only at that point, in determining what steps a district should take, would it be appropriate for a district to consider any limitations imposed by the First Amendment.

Here, the District failed to develop sufficient facts necessary to even make a threshold determination regarding whether a racially hostile environment existed at the high school. As such, its investigation into the Complaint was deficient and unreasonable.

ORDER

This appeal is **GRANTED**.

Pursuant to Wis. Admin. Code § PI 9.08(1)(a)4, Cedarburg School Board shall, within 30 days, submit a corrective action plan and schedule. The corrective action plan shall specify the steps District will take to ensure future compliance with the procedures specified in its policies 2260 and 5517. The corrective action plan shall also specify the steps District will take to conduct a complete factual investigation into Parent's allegation of a racially hostile environment at the high school and, based on the results thereof, make any appropriate amendments to its final determination of the Complaint.



Paul A. Manriquez
Assistant State Superintendent
Division for Learning Support

If you have any questions about this Decision and Order, please contact Paul Sherman, School Administration Consultant, at (608) 267-9157, or paul.sherman@dpi.wi.gov.

APPEAL RIGHTS

This Decision and Order is the final agency decision regarding this appeal.

Any person aggrieved by this Decision and Order may, within 20 calendar days after service of this decision, request a rehearing by filing a written petition for rehearing which specifies in detail the grounds for the relief sought and supporting authorities, as provided by Wis. Stat. § 227.49. In a petition for rehearing, the State Superintendent of Public Instruction shall be named as respondent.

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Any person aggrieved by this Decision and Order may petition for judicial review by filing a petition within 30 days after service of this Decision with the clerk of the circuit court for the county where the judicial review proceedings are to be held, as provided by Wis. Stat. § 227.53. In a petition for judicial review, the State Superintendent of Public Instruction shall be named as respondent.

This notice is provided pursuant to Wis. Stat. § 227.48(2).