

THE STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Pupil Discrimination Appeal: Hazel Behling, Saffia Buckley, Casaiya Keyser and Cultivative Coalition v. Chippewa Falls Area Unified School District	DECISION AND ORDER DPI Case No. 21-PDA-04
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On September 30, 2021, Hazel Behling, Saffia Buckley, Casaiya Keyser and the Cultivative Coalition, a community organization formed by Ms. Behling, Ms. Keyser and others, appealed a pupil discrimination complaint determination by the Chippewa Falls Area Unified School District (CFAUSD). The complaint alleged that CFAUSD discriminated against students on the basis of race, sex, and sexual orientation by causing, encouraging, accepting and tolerating a school climate hostile to students with those protected statuses. Following an investigation, CFAUSD concluded, with respect to each allegation of discrimination, that there was either no evidence or insufficient evidence to conclude that CFAUSD created or was responsible for a hostile environment on the basis of race, sex, or sexual orientation that was 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 CFAUSD. The record indicates that CFAUSD performed an adequate investigation and supports CFAUSD’s conclusion. Therefore, this appeal will be denied.

PROCEDURAL HISTORY

On June 7, 2021, appellants, through their attorney, filed a pupil discrimination complaint with CFAUSD alleging CFAUSD had discriminated against students on the basis of race, sex, and sexual orientation by causing, encouraging, accepting and tolerating a school climate hostile to students with those protected statuses. Appellants alleged that harassment of students of color,

female students and LGBTQ students was pervasive in CFAUSD schools and cited the experiences of one current student and three former students who graduated in 2018 and 2020, anonymous stories of harassment and discrimination shared with Cultivative Coalition and incidents reported to CFAUSD during the 2020-2021 school year. The complaint alleges that:

1. Harassment of students of color, female students, and LGBTQ students is pervasive in CFAUSD schools.
2. Saffia Buckley, a student currently attending Chippewa Falls High School, experienced race-based and sex-based harassment, and was subjected to differential treatment because of sex with regard to CFAUSD's dress code. Ms. Buckley is Native American.
3. Casaiya Keyser, a 2018 graduate of Chippewa Falls High School, experienced race-based harassment while a student in the district. Ms. Keyser is Black.
4. Hazel Behling, a 2018 graduate of Chippewa Falls High School, experienced sexual orientation-based harassment, and was subjected to differential treatment because of her sexual orientation with respect to a school resource officer investigation while a student in the district. Ms. Behling identifies as LGBTQ.

5. [REDACTED]

6. The district's response to Cultivative Coalition's discrimination concerns was inadequate.

CFAUSD appointed an attorney to investigate the complaint. The investigator interviewed approximately 35 individuals, including the complainants, current and former administrators, current and former staff members and parents of current and former students. The investigator also gathered and reviewed numerous documents. At the conclusion of the investigation, the investigator prepared a 64-page written report discussing the legal standards, her factual findings and her conclusions and presented the report to CFAUSD.

On September 22, 2021, CFAUSD notified appellants of its final decision with respect to the complaint. CFAUSD agreed with the conclusions reached by the investigator that, with

respect to each allegation, that there was either no evidence or insufficient evidence to conclude that CFAUSD created or was responsible for a hostile environment on the basis of race, sex, or sexual orientation that was 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 CFAUSD. CFAUSD notified appellants of their right to appeal the negative determination to the state superintendent.

LEGAL STANDARD

Wis. Stat. § 118.13 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 sex, race or sexual orientation. Wis. Admin. Code § PI 9.02(5) 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 sex, race or sexual orientation.

The Department of Public Instruction (DPI) reviews pupil discrimination appeals pursuant to Wis. Stat. § 118.13(3)(a)1. and Wis. Admin. Code § PI 9.08(1)(a). DPI's review of a district's determination under Wis. Stat. § 118.13 is informed by guidance promulgated by the United States Department of Education Office for Civil Rights (OCR), which provides an investigative approach and standards for determining whether discrimination occurred based on analogous federal law. *See generally Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448-54 (Mar. 10, 1994). A school district has a general duty to provide a nondiscriminatory educational environment. *Id.* at 11449. "The type of environment that is tolerated or encouraged by or at a school can therefore

send a particularly strong signal to, and serve as an influential lesson for, its students.” *Id.* Racial discrimination by a district 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. A hostile environment does not exist in the abstract but exists only in relation to a particular individual. The fact that one student experiences a hostile environment does not mean that all students are experiencing a hostile environment. Thus, a complainant must make the case that a hostile environment exists with respect to an identifiable individual.

Once a school district has notice of a hostile environment, it must take reasonable steps to eliminate it. *Id.* at 11,450. “The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or nonemployees.” *Id.* “Examples of possible elements of appropriate responsive action include imposition of disciplinary measures, development and dissemination of a policy prohibiting racial harassment, provision of grievance or complaint procedures, implementation of racial awareness training, and provision of counseling for the victims of racial harassment.” *Id.*

A claim that a student was disciplined more harshly for the same conduct than other students not in the student’s protected class is a claim of “differential treatment.” In reviewing a claim of differential treatment under Wis. Stat. § 118.13, DPI will apply to appellants’ sex-based

differential treatment claim the multi-part test adopted by OCR that was originally set out by the U.S. Supreme Court in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), a case involving a federal racial nondiscrimination employment law. To establish a prima facie case, the record must indicate that the complainant was treated differently than similarly situated members of another sex. *Cf. Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. at 11,451. Only after a prima facie case of sex discrimination has been established does DPI consider whether the district had a legitimate, nondiscriminatory reason for its actions that would rebut the prima facie case against it. *Id.* Finally, only after the district sets out a legitimate, nondiscriminatory reason does DPI determine whether the asserted reason is a mere pretext for discrimination. However, the ultimate burden of persuasion remains at all times with the complainant. *Id.* at 11451-52 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

In accordance with Wis. Admin. Code § PI 1.04(9), DPI's decision is based on a review of the record developed by CFAUSD during its investigation into the underlying complaint.

DISCUSSION

I. CFAUSD's Procedural Challenges Do Not Support Dismissal of the Appeal.

CFAUSD challenges appellants' standing to file a complaint or appeal on behalf of other current and/or former students, citing Wis. Admin Code. § PI 1.03(1). CFAUSD is correct that Wis. Admin. Code § PI 1.03(1) does not contemplate appellants acting as representatives of others in the filing of an appeal with DPI. Appellants respond that they are pursuing the complaint and appeal in their own right as residents of the district. Residents of a school district may file a complaint alleging violations of Wis. Stat. § 118.13 with respect to identifiable individuals who have been discriminated against. Therefore, appellants have standing to file the

complaint and appeal. However, the fact that appellants have standing does not mean that a remedy is available under Wis. Stat. § 118.13.

Even if DPI substantiated the individual allegations of Ms. Keyser, Ms. Behling, and [REDACTED], no relief would be granted related to any hostile environment that only they experienced because they are no longer legally entitled to participate in CFAUSD's school programs or activities as students. DPI's only authority upon finding that a district violated Wis. Stat. § 118.13 or Wis. Admin. Code ch. PI 9 is to "issue an order to comply which includes a requirement that the board submit a corrective action plan, including a schedule." Wis. Admin. Code § PI 9.08(1)(a)4. If the victims of the alleged discrimination are no longer students (and cannot choose to return as students because of their age or because they have graduated from high school), then the school board has no ability to come into compliance with respect to those former students and there is no relief available under Wisconsin law. Wis. Stat. § 118.13 and Wis. Admin. Code ch. PI 9 do not provide any remedy of damages for past discrimination. Instead, the laws allow DPI to order a district to take reasonable steps to stop discrimination that is occurring in the present. Although allegations of discrimination suffered by former students may be relevant to a district's knowledge of a hostile environment or to the pervasiveness of the discriminatory harassment, they do not support issuance of an order to comply without evidence that the hostile environment continued to exist at the time the complaint was filed. DPI will issue an order to comply under Wis. Admin. Code § PI 9.08(1)(a)4 only when corrective action has the potential to correct discrimination at the time the complaint is filed. When all identifiable victims of discrimination have graduated prior to the filing of a complaint, that potential no longer exists. Therefore, DPI will not consider the allegations made by Ms. Keyser, Ms. Behling and [REDACTED] that are specific to their individual experiences.

CFAUSD also challenges appellants' assertion that they are residents of the district. Because this argument was first raised in a sur-reply brief and because the individual allegations of the former students are not capable of correction through a corrective action plan under Wis. Admin. Code § PI 9.08(1)(a)4, it is unnecessary for me to resolve this dispute as to residency. For purposes of this appeal, I will accept as true appellants' assertion that they are residents of the district and thus had standing under Wis. Stat. § 118.13(2)(a) to file the complaint.

CFAUSD also asserts that DPI should dismiss the appeal because Ms. Buckley is a minor and the appeal does not comply with provisions of Wis. Admin Code. §§ PI 1.03(1) and (2) regarding appellants who are minors. Although appellants' attorney did not file a notice of representation including the written consent of Ms. Buckley's parents, in general, DPI assumes that an attorney is representing her clients with the permission of the clients, and there is no evidence in the record to the contrary. Therefore, DPI will not dismiss the appeal for noncompliance with Wis. Admin. Code §§ PI 1.03(1) and (2).

Appellants complain that CFAUSD's investigator failed to consider as part of her investigation into appellants' complaint allegations made by a student in a separate complaint. When a student has chosen to file a separate complaint, it is appropriate to consider whether a hostile environment exists for that student in the context of her separate complaint. Any corrective action necessary in such a situation will be addressed in the separate complaint and will not be considered on this appeal. The record in this appeal is the record created in the investigation based on the allegations in this complaint.

II. CFAUSD's Investigation was Adequate and Its Findings Will be Upheld.

Student harassment is behavior towards students based, in whole or in part, on a protected status such as race, sex or sexual orientation, which substantially interferes with a student's

school performance or creates an intimidating, hostile, or offensive school environment. Wis. Admin. Code § PI 9.02(9). An investigation into a complaint of a hostile environment necessarily must begin with establishing facts to determine whether such an environment does or does not exist. However, Wis. Stat. § 118.13 and Wis. Admin. Code ch. PI 9 do not require an exhaustive investigation and do not require a school district to perform the same level of investigation that OCR might perform. A district satisfies those provisions when it performs an investigation that is reasonably calculated to determine whether the allegations of discrimination in a complaint are true. CFAUSD Policy 2260 (Nondiscrimination and Access to Equal Educational Opportunity) requires investigations to be “concluded as expeditiously as feasible, in consideration of the circumstances, while taking measures to complete a thorough investigation.” The investigation will include “consideration of any documentation or other evidence presented by the Complainant, Respondent, or any other witness which is reasonably believed to be relevant to the allegations.” These provisions are consistent with the requirements of Wis. Stat. § 118.13 and Wis. Admin. Code ch. PI 9 and the record indicates that they were complied with in this case.

Appellants complain that CFAUSD’s investigator did not conduct focus groups with current students. The investigator was not required to do so in order to conduct an adequate investigation. It is appellants’ burden to prove the allegations in the complaint by a preponderance of the evidence. It is not CFAUSD’s responsibility to interview current students unnamed in the complaint to determine whether they may have suffered discrimination. The record indicates that CFAUSD’s investigator performed an investigation of the numerous and diverse allegations contained in the complaint that was reasonably calculated to determine whether the allegations were true. Specifically, the investigator interviewed approximately 35

witnesses and asked questions of relevant witnesses about all of the numerous allegations in the complaint, including those made anonymously. The investigation report adequately describes the factual information obtained during the investigation. However, with respect to many allegations, the investigator failed to state whether she concluded that the facts uncovered in the investigation met the standard for a hostile environment. Instead, in many cases, the investigator stated solely a legal conclusion that “there is no evidence to conclude that the District has created or is responsible for a hostile environment on the basis of one’s race, sex, or sexual orientation 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 the District.” This misunderstands the goal of the investigation, which first must investigate the allegations of the complaint to determine whether facts exist that are sufficient to find a hostile environment. It is only after a finding that a hostile environment exists that the investigator considers whether a district created or is responsible for that environment. CFAUSD is cautioned to ensure that any future investigations make this important initial finding.

A. CFAUSD did not Discriminate against Ms. Buckley.

a. Racial Name-calling

Ms. Buckley is Native American. Ms. Buckley alleges that in 2019, when she was in 9th grade, she was called Sacajawea and Pocahontas in the math hallway at school by people she thought were her friends. During the 2020-2021 school year, Ms. Buckley was called redskin over social media by a student who goes to Chippewa Falls High School. During a September 2, 2021 interview, Ms. Buckley told the investigator that she did not report the name-calling to CFHS staff until the beginning of the 2020-2021 school year. Ms. Buckley reported the name-calling to English teacher Pam Bowe, who referred Ms. Buckley to high school principal Donna

Goodman and told Ms. Buckley to tell Ms. Bowe if it happened again. Ms. Buckley told Ms. Goodman about the name-calling incidents during the first week of the 2020-2021 school year when she met with Ms. Goodman to discuss Ms. Goodman's statement that "all lives matter," discussed below. Ms. Buckley did not tell Ms. Bowe or Ms. Goodman the names of the students who called her race-based names. (Ms. Buckley did name the students who called her Sacajawea and redskin when interviewed by the investigator in September 2021.) Ms. Bowe told Ms. Buckley about the equity committee and encouraged Ms. Buckley to join it so that she would have a voice in making improvements. Ms. Buckley subsequently joined the equity committee. Ms. Buckley did not report continuing harassment to Ms. Bowe or during her interview with the investigator.

The investigator failed to state whether she found that the redskin, Pocahontas and Sacajawea comments subjected Ms. Buckley to a hostile environment. Instead, the investigator skipped straight to the legal conclusion: "[t]here is no evidence to conclude that the District has created or is responsible for a hostile environment on the basis of one's race, sex, or sexual orientation 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 the District." Given the time that had passed and Ms. Buckley's failure to share the names of the individuals who called her those names when she initially reported it to Ms. Bowe and Ms. Goodman, CFAUSD's failure to take any action to prevent further similar name-calling by the responsible students was reasonable. It is also reasonable that CFAUSD did not attempt to investigate the incidents when the responsible students' names were provided to the investigator more than a year later. Therefore, although the investigator should have first determined whether

the name-calling created a racially hostile environment for Ms. Buckley, the investigator's ultimate conclusion was correct.

b. "All lives matter"

The record indicates that in September 2020, talking about Black Lives Matters banners that had been put up outside the building, Ms. Goodman said over the school speaker system something to the effect that "over the summer we had experienced some hard times" and "we should remember that all lives matter." Ms. Goodman told the investigator that she was unaware of a movement related to the term "all lives matter" and that when she said "all lives matter," she meant that "everyone is welcome here." The Black Lives Matter banners were removed because they had not been approved and the school does not allow any political posters or banners on school grounds. Ms. Buckley emailed Ms. Goodman to express her concern about "how problematic it is to say all lives matter." Ms. Buckley had a meeting with Ms. Goodman during the first week of the 2020-2021 school year and shared with Ms. Goodman anti-racism protocols other students had recommended that Ms. Goodman follow. Ms. Buckley told the investigator that Ms. Goodman "was all for it," meaning that Ms. Goodman was receptive to Ms. Buckley's statements about the anti-racism protocols.

After interviewing Ms. Goodman, the investigator believed "that Ms. Goodman had no intent to make a political statement to counter the Black Lives Matters banners." Although the investigator should have made an explicit finding as to whether Ms. Goodman's statement that "all lives matter" created a hostile environment, the record supports the investigator's conclusion that "[t]here is no evidence to conclude that District has created or is responsible for a hostile environment" with respect to this incident.

c. Dress code

Appellants' allegations with respect to the dress code involve both hostile environment and disparate treatment claims. Ms. Buckley disagrees with most of the dress code. Ms. Buckley alleges that she felt humiliated and objectified by CFAUSD's enforcement of its dress code policy, but she did not report her concerns about dress code enforcement until she wrote it in the complaint. Specifically, Ms. Buckley told the investigator that in 6th grade (4 years before the complaint was filed), Ms. Buckley's teacher made her check the length of the spandex she was wearing and shamed her in front of Ms. Buckley's friends, saying that she should change. Ms. Buckley saw front office staff Theresa Gammon yell at a girl Ms. Buckley did not know for wearing a crop top and "was just basically shaming her, even though all she needed was a pass." Separately, Ms. Gammon told Ms. Buckley's older sister that she could not wear a flowy crop top on picture day and that she needed to go home and change.

The complaint alleges that when students have reported male students catcalling female students or commenting on their clothing, "the school's response has typically been to send out a reminder email about the dress code instead of investigating or intervening in male students' harassing behavior." The record contains emails from Dean of Students Joe Nelson about the dress code; nothing in the emails suggests that they were sent in response to reports of catcalling. In addition, contrary to Ms. Buckley's contention, the emails do not suggest that students need to cover up in order to not be catcalled. Instead, the emails reasonably remind students of the dress code and ask them to comply with it. On September 8, 2020, Mr. Nelson sent an email with the subject "Student Handbook Reminder" that quoted the dress code:

Hello Students,

This is a reminder for everyone to please review the dress and grooming policies here at the high school. Teachers, staff, and parents have noticed an increase in violations by both boys and girls.

An easy reminder for many students is to remember that if you see it on TikTok or the beach...it's probably not appropriate for a school/business setting.

Thanks, and have a wonderful day.

DRESS AND GROOMING

Shoes must be worn at all times. Hats, bandanas, hoods, and other head coverings are not allowed to be worn inside the building. Winter or trench coats are not allowed in classrooms and must be stored in the student's locker during the school day. Inappropriate language, graphics displaying drugs, alcohol, tobacco products or other offensive printing on clothing is not allowed. Clothing, jewelry or other personal items that bear statements, slogans, images or insights that harass, threaten, intimidate, demean, suggest hate, violence or sexual innuendo or that creates a reasonable risk of substantial interference of the educational process is not permitted. Additionally, clothes that are too tight, expose the body inappropriately, show bare midriffs or undergarments are not acceptable. Students may be asked to change if they come to school in inappropriate attire.

On January 25, 2021, Mr. Nelson sent an email with the subject "Student Policies":

Good morning Students,

I know this may come as a surprise to many of you...but there are no hats and hoods allowed in the building. Just kidding, it should not be a surprise because it has been that way since forever.

I will say that we will be evaluating the dress code in the future, and perhaps changes may come in that area. Until then, it is not up for debate.

Thank you!

The record supports the investigator's conclusion that "None of the e-mails addressed female students in particular or implied that female students are responsible for sexual harassment."

Ms. Buckley's descriptions of staff "sexualizing" clothing in her investigative interview can be described as complaints about having to follow a dress code policy with which she disagreed. The dress code policy applies equally to males and females and Ms. Buckley did not suggest that the students involved in the incidents she described were in compliance with the dress code. Although Ms. Buckley may have felt humiliated and objectified when CFAUSD

enforced its dress code with respect to her, the examples she provided do not suggest that CFAUSD's actions were applied only to females and not to all students.

Ms. Buckley described one incident of catcalling by a male student. During the first week of school, on dress-like-the-decade-2000 day, Ms. Buckley wore red velvet shorts with a red velvet top and a male student told her "damn, baby, like you're hot" while she was on school grounds walking to school. Ms. Buckley did not report this incident because she did not think anything would happen and she felt that she would be shamed even more if she reported it. Ms. Buckley believes that through the dress code and Mr. Nelson's emails, CFAUSD created a culture where students thought it was ok to say such things. The record contains no evidence that CFAUSD created a culture in which sexual catcalling was acceptable. Because CFAUSD did not have notice of the catcalling incident until Ms. Buckley told the investigator about it a year after it happened, it was reasonable for the investigator to conclude that CFAUSD did not create and was not responsible for a hostile environment based on this incident.

Appellants concede that the dress code language barring clothes that "are too tight, expose the body inappropriately, show bare midriffs or undergarments" is gender-neutral. The record contains no evidence of selective enforcement against females. Contrary to appellants' assertion, the investigator was not required to review all dress code violations broken down by sex in order to adequately investigate the allegations about dress code enforcement. Furthermore, there is no evidence in the record that documentation of dress code enforcement exists: Ms. Goodman stated that there would be no consequence for a dress code violation and did not believe a teacher would put it in infinite campus, noting that a dress code violation is not considered a write-up or disciplinary action. The Chippewa Falls Senior High School Student/Parent Handbook 2021-2022 lists "dress code violation" as a "minor" in the

Minors/Majors T-Chart. The handbook states that “[m]inors are classroom behaviors that are managed by the teacher in an attempt to address and resolve the behavior before it becomes a Major Office Discipline Referral (ODR).”

Appellants cite *Hayden v. Greensburg Cnty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014), to support their claim that the dress code is selectively enforced against female students in a manner that reinforces invidious sex stereotypes. However, *Hayden* involved a hair length policy that explicitly treated boys and girls differently. In contrast, in the present case, appellants concede that the dress code language they challenge is gender-neutral. Appellants have failed to meet their burden of showing a prima facie case of selective enforcement.

B. The Record Supports CFAUSD’s Conclusion That CFAUSD Did Not Discriminate During the 2020-2021 School Year.

The complaint includes seven allegations, not involving appellants, that were reported to CFAUSD during the 2020-2021 school year. The allegations involve distinct types of incidents, many of which on their face do not rise to the level of harassment. The investigator adequately investigated the allegations but failed to make a finding as to whether the allegations, together or individually, created a hostile environment. Despite this, with respect to the allegations that may have constituted harassment, such as the allegations that a sixth-grade student used the N-word in class and that a male sixth-grade student snapped a female student’s face mask when she refused to kiss him, the record supports the investigator’s finding that “[t]he evidence [] shows that the District acted promptly to address the matters and prevent additional situations.”

With respect to the allegation that middle school students used confederate flags as their profile pictures at an online school event, the record shows that Middle School Principal Derrick Kunsman responded promptly to the parent who expressed concern, acknowledging in a January

22, 2021 email that the “concern is definitely valid and something we continually monitor.” Mr.

Kunsman continued:

There have been multiple court cases over the issue of confederate flags in school settings and how it relates to the First Amendment. Currently, under *Tinker* (1965), school officials may discipline a student for expressive conduct that is otherwise protected by the First Amendment if the conduct “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school,” or if school officials can reasonably forecast that the speech will cause a material and substantial disruption.

The “material and substantial disruption” [standard] is something that we continually use as our barometer on a daily basis when it comes to inappropriate images, clothing, etc. I can give you an example of one that we have handled recently. We have students who might have the confederate flag as a small part of a shirt, belt, or boots. These types of displays typically don’t cause a substantial disruption. However, we had a student wear a sweatshirt that the entire shirt, sleeves and all, was the confederate flag. This did cause a disruption and the student had to change the shirt or go home.

In regards to a virtual setting – if a student were sending confederate flag images on the chat, waving a flag on their camera, etc. we would be looking at a substantial disruption. However, we haven’t seen the profile icon cause a substantial disruption to the learning at this time. We recognize that could definitely change.

I hope this helps a little with the very real dilemma we face in addressing this issue. It is definitely on our radar and something we will continue to monitor.

(Record – Documents Gathered from Complainants.pdf at 29.)

Appellants do not suggest that Mr. Kunsman misstated the applicable legal standard or that CFAUSD did not follow that standard. Instead, appellants complain that Mr. Kunsman failed “to explore how widespread was the use of confederate flags as profile pictures, or the effect it was having on students of color.” However, Mr. Kunsman stated that the school continually monitors the use of profile pictures to determine whether their use rises to the level of a substantial disruption, which would allow the school to take action. It was reasonable for CFAUSD to conclude that because the profile pictures had not caused a substantial disruption, that it could not prohibit students from

using the confederate flag as their profile picture. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) (rejecting school’s argument that protecting gay students from harassment was allowable basis to prohibit student from wearing t-shirt with slogan “Be Happy, Not Gay” in the absence of evidence that wearing t-shirt caused substantial disruption). Neither appellants nor the reporting parent alleged that the profile pictures caused a substantial disruption.

The Court of Appeals for the Seventh Circuit recently affirmed *Tinker’s* continued validity in the school setting. *See N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 422–24 (7th Cir. 2022). The court noted that the United States Supreme Court has identified three categories of student speech that schools may regulate regardless whether the circumstances meet *Tinker’s* “substantial disruption standard”: (1) “indecent[,] ... vulgar[,] and lewd speech.”; (2) speech “that can reasonably be regarded as encouraging illegal drug use”; and (3) student expression that others “might reasonably perceive to bear the imprimatur of the school.”¹ *Id.* (citations omitted). The use of confederate flags as profile pictures does not fall into any of these categories. Appellants have failed to demonstrate that the investigator’s finding that “[b]ased on the totality of the evidence, there is no evidence to conclude that the District has created or is responsible for a hostile environment” with respect to this allegation or any of the seven reported incidents during the 2020-2021 school year was unreasonable.

¹ The third exception allows schools to ban student expression in “school-sponsored publications, theatrical productions, and other expressive activities” that “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

C. CFAUSD's Middle School Handbook Should Include the Discrimination Complaint Procedure.

Appellants' argument that CFAUSD failed to implement policies and procedures necessary to reasonably prevent discrimination in its schools, in violation of Wis. Stat. § 118.13(2)(a), presupposes that CFAUSD failed to respond appropriately to incidents of harassment. As discussed above, the record does not support such a finding. Appellants also complain that CFAUSD's high school and middle school student handbooks for the 2021-2022 school year fail to comply with Wis. Admin. Code § PI 9.05(3) because they do not contain the discrimination complaint procedure. Specifically, appellants contend that the middle school handbook includes a Nondiscrimination Policy and Equity Statement but does not provide information about the discrimination complaint procedure and that the high school handbook includes some discussion of the complaint process, but provides no guidance about what information should be included in a written complaint or which district employees are designated to receive complaints.

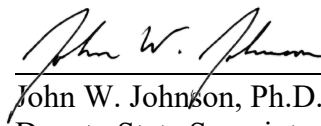
Each school board shall "[i]nclude the complaint procedure in pupil and staff handbooks." Wis. Admin. Code § PI 9.05(3). The only requirement for the complaint procedure is "a provision for written acknowledgement within 45 days of receipt of a written complaint and a determination of the complaint within 90 days of receipt of the written complaint unless the parties agree to an extension of time." Wis. Admin. Code § PI 9.04(2). Wis. Admin. Code ch. PI 9 does not require that any specific information be included for a complaint to be considered received under Wis. Admin. Code § PI 9.04(2). Although the board must designate an employee of the school district to receive discrimination complaints, Wis. Admin. Code § PI 9.04(1), that employee is not required to be listed in the complaint procedure itself. In this case, CFAUSD's Policy 2260 (Nondiscrimination and Access to Equal Educational Opportunity) designated two employees to receive discrimination complaints.

The high school handbook states, “If any person believes that the Chippewa Falls Area Unified School District or any part of the school organization has failed to follow the law and rules of S. 118.13, Wis. Stats., or in some way discriminates against pupils on the basis listed above, he/she may bring or send a complaint to the administration office at the following address: 1130 Miles Street, Chippewa Falls, WI 54729.” Although an employee must be designated to receive complaints, that employee is not required to be named in the procedure for receiving complaints and the information in the high school handbook adequately describes the procedure for receiving complaints. The procedure described in the high school handbook also contains the timeline stated in Wis. Admin. Code § PI 9.04(2). The record does not show that the middle school handbook contains the complaint procedure and CFAUSD is advised to add that information to its middle school handbook.

ORDER

This appeal is **DENIED**.

Dated this 28th day of November, 2022



John W. Johnson, Ph.D.
Deputy State Superintendent of Public Instruction

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.

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).