



VIA EMAIL ONLY

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Stephen Plank, District Administrator
Burlington Area School District
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Re: DPI Case No. 21-PDA-06
In the Matter of the Pupil Nondiscrimination Appeal, Burlington Area
School District

Dear Ms. Lambert and Mr. Plank:

On October 29, 2021, the Department of Public Instruction (DPI) received a pupil nondiscrimination appeal from Laura Bielefeldt, via counsel, regarding a final determination of a pupil discrimination complaint by the Burlington Area School District ("District"). This is the department's final determination of the appeal.

SUMMARY

The District failed to follow the requirements of its own discrimination policy, which required certain specific investigation steps by the District's designated Compliance Officer. Where the District has defined a specific investigation procedure for use with properly-filed discrimination complaints, the existence of a separate investigation that may be occurring by other district staff does not relieve the District of its obligation to comply with the specific investigation procedure it has identified and adopted for discrimination complaints.

STANDARD OF REVIEW

Section 118.13(1) 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 pupil harassment. Pupil harassment means behavior towards pupils based in whole or in part on race which substantially interferes with a pupil's school performance or creates an intimidating, hostile, or offensive school environment. Wis. Admin. Code § PI 9.02(9).

Section 118.13(2)(a) of the Wisconsin Statutes provides that each school board must develop policies for receiving and investigating complaints of discrimination filed by district residents and for making determinations as to whether discrimination has occurred. Section PI 9.04 of the Wisconsin Administrative Code requires a school district to: designate an employee of the school district to receive complaints of discrimination; establish a procedure for receiving and resolving complaints from residents of the school district or aggrieved persons; and notify the complainant of their right to appeal a negative determination to the state superintendent.

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.

DISTRICT POLICIES

The District has adopted and maintains two policies related to preventing discrimination: 2260 Nondiscrimination and Access to Equal Educational Opportunity; and 5517 Student Anti-Harassment/Anti-Racism. The District asserts that Policy 2260 does not apply to the

complaint at hand, essentially because 2260 “concerns the [d]istrict’s obligation to provide equal educational opportunities to its own students”. Here, where the complaint relates to misconduct by students against visitors, the District argues Policy 5517 applies because it “references the District’s separate responsibility to curate a physically safe and psychologically safe and respectful environment for all students, personnel, and school visitors.” DPI is not persuaded by this distinction.

While Policy 2260 does reference the District’s commitment to nondiscrimination, it is a fundamental principle of any such commitment that the District, when made aware, must act to prohibit students from engaging in harassing behavior. As cited in the Standard of Review above regarding racially hostile environments, districts may be responsible for discrimination that occurs as a result of harassing conduct of its students. Policy 2260 acknowledges that it “is intended to support and promote nondiscriminatory practices in all District and school activities, particularly” in areas like “prohibition of harassment towards students and procedures for the investigation of claims”. Policy 2260 further provides that “[s]tudents, parents and all other members of the School District community are encouraged to promptly report suspected violations of this policy”. Policy 2260 designates a district Compliance Officer (CO). Critically, Policy 2260 provides that “[t]he CO shall investigate any complaints brought under this policy.” (emphasis added).

Such an investigation must include, pursuant to the Policy: interviews with the complainant; interviews with any persons named in the complaint; interviews with any other witnesses who may reasonably be expected to have any information relevant to the allegations, as determined by the CO; and consideration of any documentation or other evidence presented by the complainant, respondent, or any other witnesses which is reasonably believed to be relevant to the allegations, as determined by the CO. The CO shall prepare a written report of findings and recommendations for the superintendent. The superintendent must ultimately issue a final decision on whether or not the complaint of harassment has been substantiated and deliver a copy to the complainant. The superintendent’s decision will be reviewed by the Board upon request.

FACTS

On September 16, 2021, Laura Bielefeldt, a Burlington resident, utilized the district’s publicly-available standard “Discrimination Complaint Form” to file a complaint with the district.¹ The complaint alleged that racial slurs had been directed at athletes of color during a football game between Burlington High School and Westosha Central High School on September 10, 2021. The complaint alleged that Ms. Bielefeldt had been told by a player

¹ This standard form does not reference any specific Board Policy which applies.

on the Westosha Central team that, during the course of the game, two Burlington team members had said “bitch ass nigger” to him and two other Westosha Players. The complaint further alleged that a third named Burlington team member had told one of those same Westosha players to “get off me you f-g monkey”. The complaint provided the names and jersey numbers for each of the Burlington team members that had allegedly made these comments as well as names and jersey numbers for Westosha players that were involved. The complaint also included a quote from a local newspaper account of the incident in which the Westosha Central coach reportedly said he was tired of “classless behavior” from Burlington and that his players had been called “names that are not socially acceptable” for two years in a row.

On September 20, 2021, the District’s designated CO contacted Ms. Bielefeldt and acknowledged receipt of her “discrimination complaint”. The CO informed Ms. Bielefeldt that “most of the information provided in your statement is directly related to an open investigation. As such your statement has been forwarded to the investigator(s) to determine if further inquiry into the details of your statement will be necessary.” The CO did not identify under what policy Ms. Bielefeldt’s complaint was being handled or make any statement that would indicate Ms. Bielefeldt’s complaint was being rejected for not meeting some threshold requirement of any complaint policy.

On September 30, 2021, the District’s CO again contacted Ms. Bielefeldt. The CO stated that Ms. Bielefeldt’s complaint was

unique in the sense it wasn’t a typical complaint. Person(s) filing a discrimination complaint normally believe that they or their child(ren) have been discriminated against and are able to offer firsthand knowledge to aid the District’s investigation. As stated in my initial response on September 17, 2021, the details provided in your complaint were directly related to an open investigation and shared with the investigation team. Providing anonymous quotes that cannot be vetted, quotes from local news sources available to the public and the lack of firsthand knowledge summarized in your complaint did not offer additional aid to the investigation.

Again, the CO did not cite to any district policy. The CO further informed Ms. Bielefeldt that: the district’s investigation had determined unnamed students had violated the District’s athletic code; that the District had imposed consequences on those students; and an appeals committee had subsequently overturned some of those consequences. The CO noted the District was taking steps to provide an opportunity for the two teams to reconcile and would participate in an athletic conference-wide effort to improve sportsmanship.

The record originally provided by the District consisted solely of the two policies at issue and screenshots regarding an out-of-school suspension served by one of the Burlington players alleged to have made some of the comments cited in the complaint. The offense is listed as “[Student] used the N word during a football game”. Additional documents subsequently provided with the District’s responsive brief reflect evidence of some district investigation conducted by a district “Activities/Athletic Director/Asst. Principal”. This investigation appears to have resulted in a determination that one Burlington student violated the District’s athletics code by the “use of swearing or abusive language toward any coach/advisor, teacher, student, official or opponent.” The record does not reflect whether this was the same student that was suspended; the District’s brief asserts it is. The student was denied participation in extra-curricular activities for the remainder of his high school career. This denial of participation was later reversed by the District’s Activities Council.

DISCUSSION

As noted above, Policy 2260 and its requirements apply to the complaint filed by Ms. Bielefeldt. In its brief, the District asserts it has complied with all substantive requirements of Wis. Stat. § 118.13 and Wis. Admin. Code § PI 9.04 because it conducted an investigation and issued a written determination. However, the district overlooks that Wis. Admin. Code § PI 9.04 only requires that districts craft their discrimination policies and procedures to meet the requirements of Wis. Admin. Code § 9.04. Once a district adopts its own specific discrimination policies and procedures, it must then follow those policies and procedures when complaints are actually made. If the District wanted to set forth different procedures for complaints brought by community members (as opposed to parents, students, etc.), it could do so. But Policy 2260 does not provide for different “types” of investigation based on the identity of the complainant; the CO is mandated to take the same investigative steps for “any” complaint which falls under the policy. As noted in the discussion on district policies, Policy 2260 covers harassing conduct by students. Policy 2260 specifically applies here because even though the allegation is that Burlington students used racial slurs against students from an opposing team, the use of racial slurs can result in a racially hostile environment for all students who hear them, including members of the Burlington students’ own team.

It is undisputed that the District failed to take several of the necessary steps required by Policy 2260. The record reflects that: no interview of the complainant was conducted; the CO did not prepare a written report for the superintendent; and the superintendent did not issue a final written decision and provide a copy to the complainant. The existence of a separate, contemporaneous investigation conducted by the Athletic Director, apparently in collaboration with Westosha personnel, into similar allegations does not relieve the

District of its obligation to comply with a properly-filed complaint pursuant to Policy 2260.

Even if the investigation conducted by the Athletic Director was intended to satisfy some of the requirements of Policy 2260², the record developed by the District leaves DPI unable to determine the nature and extent of the investigation and what legal or policy standards were applied in assessing any findings of the investigation. The District has provided evidence it interviewed at least one of the students involved – the student ultimately suspended – but does not indicate what information that student provided. The District asserts in its brief that the persons named in the complaint – including Burlington and Westosha students – were interviewed, but the documents provided by the District do not reflect who those persons were.³ The record shows a student was disciplined, but is unclear whether the student was disciplined for violating the athletic code, some other board policy (including 2260 or 5517), or both. Likewise, it is unclear what standards the Activities Council used in considering the suspended student’s appeal and whether the Activity Council’s reversal had any effect on conclusions that were presumably reached by the District’s investigation, although no written investigation report is found in the record.

The District asserts “a formal written determination regarding the complaint” was made on September 30th. Presumably, the District means the September 30, 2021, email from the CO to Ms. Bielefeldt. This email states that the District determined an Athletic Code violation occurred but does not reference any other determination with respect to Policy 2260 (or 5517). It is neither a final decision regarding the issues raised in Ms. Bielefeldt’s complaint nor a decision from the Superintendent, as required by Policy 2260.

Finally, the Wisconsin Administrative Code, as codified in Policy 2260, required the district to notify complainant of her right to appeal a final negative determination to the state superintendent and the procedures for making the appeal. Even accepting the District’s assertion that the September 30, 2021, email was its final determination, it is undisputed the District did not provide notice that this determination could be appealed.

ORDER

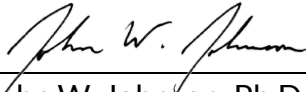
DPI finds that the District clearly failed to comply with its own policies in handling Complainant’s properly-filed complaint regarding alleged discriminatory conduct by Burlington students. The District failed to develop sufficient facts necessary for DPI to make any further findings regarding the alleged discrimination.

² Again, Policy 2260 requires the CO to conduct the investigation.

³ Interview notes provided by the District with its brief appear to have been taken by Westosha personnel (not any Burlington investigator) and any names/numbers including in those notes have been redacted.

This appeal is **GRANTED**.

Pursuant to Wis. Admin. Code § PI 9.08(1)(a)4, DPI orders corrective action. Burlington Area School District is already engaged in an ongoing corrective action plan, resulting from 20-PDA-02, to adequately redress a racially hostile environment in the district (“the ongoing CAP”). DPI acknowledges that many of the action items that may be included in a corrective action plan resulting from this matter are already being taken by the District pursuant to the ongoing CAP. As such, DPI orders an addendum to the ongoing CAP which provides specifically for training of district staff on Policies 2260 and 5517 and training for the District’s COs regarding the proper steps to an investigation under those policies.



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

08/26/2022

Date

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).