

THE STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Pupil Nondiscrimination Appeal, ██████████ v. Burlington Area School District	DECISION AND ORDER DPI Case No. 20-PDA-02
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I. NATURE OF THE APPEAL AND PROCEDURAL HISTORY

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 118.13(2)(b). On March 26, 2020, ██████████, on behalf of her children, submitted a “Discrimination Complaint Form” to the designated complaint officer for the Burlington Area School District (BASD). On July 20, 2020, ██████████ filed an appeal with the State Superintendent. Pursuant to Wis. Admin. Code § PI 9.08(1)(a)5., the matter was referred back to BASD as it was still under consideration by the BASD Board.

On August 4, 2020, Attorney Saveon Grenell, engaged by BASD to conduct an investigation into ██████████ Complaint, issued an Investigation Report to Superintendent Stephen Plank and Assistant Superintendent Connie Zinnen. On the same date, Attorney Grenell sent a letter to ██████████ summarizing the investigation and identifying his conclusions.

Specifically, the conclusion was that:

there is no direct evidence or sufficient circumstantial evidence that the District, by or through its employees, discriminated against your daughter on the basis of race or otherwise, in violation of the District’s Nondiscrimination or Harassment policies. There is also no evidence that the District has encouraged racism or engaged in racist practices.

The letter identified that Superintendent Plank had adopted Attorney Grenell’s findings and conclusions. Sometime thereafter, ██████████ apparently appealed Superintendent Plank’s

decision to the Board. A private conference between the Board and [REDACTED] was held on August 19, 2020. On September 1, 2020, the Board issued a written answer indicating it was upholding Superintendent Plank's adoption of the Investigation Report.

[REDACTED], by counsel, appealed the Board's September 1, 2020 decision. As that decision was a negative determination of the board properly before the State Superintendent, the appeal was ripe for consideration and a briefing schedule was issued. The briefing schedule directed that the District should file the record of the matter, which should consist of, at a minimum: "records relating to the complaint, including investigative notes; copies of any and all of the District's pupil nondiscrimination policies and complaint procedures in effect during the 2019-20 school year; and any and all other documents related to the complaint or the allegations." The District submitted its record. Briefing followed in the form of an initial brief from [REDACTED], a responsive brief from BASD and a reply brief from [REDACTED].

II. 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.

The Department of Public Instruction (hereinafter "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). A school district has a general duty to provide a nondiscriminatory educational environment. *Id.* at 3. “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.* 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. DPI adopts the standard promulgated in guidance by OCR, which provides for a finding of discrimination when: 1) a racially hostile environment exists; 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.*

BASD argues that the appropriate standard to be applied to the district’s response to a racially hostile environment is merely whether the district was “deliberately indifferent”. A district’s actions in response to racial harassment are deliberately indifferent only if they were clearly unreasonable in light of the known circumstances. *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 (2nd Cir. 2012) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)). In the educational context, the deliberately indifferent standard arises out of the tenet that “judges make poor vice principals” and courts should refrain from second-guessing disciplinary decisions made by school administrators. *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d

982, 996-97 (5th Cir. 2014). Unlike a judge, DPI is a regulatory agency uniquely suited to exercise oversight of districts with respect to the actions taken in response to discrimination. As such, the standards promulgated by OCR, rather than reviewing courts, are more properly applied here.

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 BASD on appeal. DPI will conclude discrimination occurred or did not occur when the evidence in the record supports such a finding. DPI may also conclude that the evidence in the record does not support any finding.

III. UNDERLYING PROCEDURAL HISTORY AND ALLEGATIONS

The Grievance Procedure which governs BASD's review of discrimination complaints requires that the complainant complete a specific "discrimination complaint form" found on the district web site. *See* BASD Administrative Regulation R-112. ██████████ submitted her March 26, 2020, Complaint via email with an attached completed discrimination complaint form. In the body of the email ██████████ included further allegations of discrimination, including three particular incidents she specifically mentioned as "an extension of [her] official complaint" because there was not enough space on the form.¹

The allegations made by ██████████ span the years 2016 through 2020 and were made on behalf of her children; hereinafter these children are referred to as Student A and Student B. During this time period: Student A progressed from Grade █ to Grade █ and grew from █ years

¹ The BASD "Discrimination Complaint Form" provides five single-spaced lines in which the complainant is to make their "Statement of complaint", including the "type of discrimination charged and the specific incident(s) in which [they] occurred".

old to [REDACTED] years old; and Student B progressed from Grade [REDACTED] to Grade [REDACTED] and grew from [REDACTED] years old to [REDACTED] years old.

The “Discrimination Complaint Form” alleges that her children were: 1) subjected to verbal harassment, [REDACTED]; 2) [REDACTED]; 3) told by a principal [REDACTED] and 4) [REDACTED].

The body of the March 26, 2020, email contains the following allegations: 1) the principal of Student A’s school discriminated against her in October 2017 [REDACTED]; 2) [REDACTED]; 3) the principal of Student A’s school discriminated against her in February 2019 [REDACTED]; 4) BASD repeatedly failed to include [REDACTED] previous discrimination complaints in its required reporting to DPI; and 5) suspension rates for Black students were 25 times higher than suspension rates for white students.

On April 7, 2020, after Attorney Grenell’s investigation had commenced, [REDACTED] sent an email to him which detailed additional “racial discrimination complaints.” She reiterated that there was not enough room on the complaint form to detail all the incidents of racial discrimination that had occurred in the district. According to the Investigation Report, Attorney Grenell interviewed or received information from the following individuals: [REDACTED]; Principal Scott

² This Decision and Order contains direct quotes of offensive racial slurs. These slurs are repeated verbatim in order to convey the serious nature of the incidents in question.

Schimmel; Principal Jacqueline Syens; and Assistant Superintendent Connie Zinnen. No students or other staff of BASD were interviewed.

Some of these allegations are discrete incidents which can be addressed accordingly. Some can be consolidated into a general allegation that a racially hostile environment existed in BASD and BASD failed to appropriately respond to the hostile environment.

IV. DISCRETE ALLEGATIONS THAT BASD DISCRIMINATED AGAINST STUDENT A BY TREATING HER DIFFERENTLY THAN SIMILARLY-SITUATED STUDENTS.

Discrimination occurs when district employees, acting within the scope of their official duties, treat a student differently on the basis of their race without a legitimate, nondiscriminatory reason. A “standard different treatment analysis” should be applied to allegations of racial discrimination by district employees or agents. F.R. Doc. No. 94-5531 at 2. Essentially, when a student has been treated differently than other similarly-situated students of other races, the district must show legitimate, nondiscriminatory reasons for the treatment. *Id.* at 7. These asserted reasons cannot be a “mere pretext” for discrimination. *Id.*

A. BASD Discriminated Against Student A [REDACTED]
[REDACTED]
[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED], [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]”.

[REDACTED]

[REDACTED] BASD must show

legitimate, nondiscriminatory reasons for this different treatment. F.R. Doc. No. 94-5531 at 7.

These reasons cannot be a “mere pretext” for discrimination. *Id.* DPI is not persuaded that there

were legitimate, nondiscriminatory reasons [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED].³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

³ [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. BASD has not identified any legitimate, nondiscriminatory reason [REDACTED]

[REDACTED].

[REDACTED] also asserts that it was discriminatory for Principal Syens to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] The record does reflect a legitimate, nondiscriminatory reason [REDACTED]

[REDACTED]

[REDACTED]. Given these facts, DPI cannot conclude that the reasons offered by BASD for [REDACTED]

[REDACTED] were a mere pretext for discrimination.

**B. BASD Did Not Discriminate Against Student A During [REDACTED]
[REDACTED]**

[REDACTED]

[REDACTED] Principal Scott Schimmel investigated [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]. There is no evidence supporting a finding that Principal Schimmel treated Student A differently [REDACTED]

[REDACTED].⁵

C. Based on the Record, DPI is Unable to Determine Whether BASD Discriminated Against Student A When [REDACTED]

[REDACTED]

⁴ [REDACTED]

⁵ However, certain aspects of Principal Schimmel's actions [REDACTED] will be discussed in more detail later in the Decision.

[REDACTED]

[REDACTED] Based on the record, DPI is unable to make a determination as to whether BASD discriminated against Student A when [REDACTED]

[REDACTED]. The Investigation Report contains recommendations to “ensure there is uniformity and equity in the utilization of law enforcement within the District”. DPI agrees this is an area of concern that BASD should address.

V. BASD FAILED TO RESPOND ADEQUATELY TO REDRESS THE HOSTILE RACIAL ENVIRONMENT WHICH EXISTED IN THE DISTRICT.

Discrimination occurs when: 1) a racially hostile environment exists; 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. F.R. Doc. No. 94-5531 at 3. Many of the allegations raised by [REDACTED] can be consolidated into a general allegation that there was a racially hostile environment at BASD which BASD failed to adequately redress.

⁶ [REDACTED]
⁷ [REDACTED]

A. A Racially Hostile Environment Existed in BASD.

A racially hostile environment exists in a district when racial harassment is “severe, pervasive or persistent”. F.R. Doc. No. 94-5531 at 3; *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). In determining whether the severe, pervasive or persistent standard is met, many factors are considered, including “the context, nature, scope, frequency, duration and location of racial incidents, as well as the identity, number and relationships of persons involved.” F.R. Doc. No. 94-5531 at 3. The age of the student also should be taken into account, as younger students are more impressionable and incidents that may not be considered harmful to older students may be severe and harmful to their younger counterparts. “Particularly for young children in their formative years of development, therefore, the severe, persistent standard must be understood in light of the age and impressionability of the students involved”. *Id.* A racially hostile environment can result from a single incident if it is sufficiently severe, such as injury or threats. *Id.* at 4. With respect to identity of the persons involved, the effect of racially-based conduct by a district employee may have a greater impact on a student than the same conduct by another student and the effect of racially-based conduct by a group of students may have a greater impact than by a single student. *Id.* Importantly, “racial acts need not be targeted at the complainant in order to create a racially hostile environment. The acts may be directed at anyone.” *Id.*

OCR resolution documents – which are issued as a result of discrimination complaints investigated by OCR – are instructive in showing how these factors are applied in real-world educational environments. In 2018, OCR investigated complaints of racial discrimination in the School District of River Falls, Wisconsin. *See School District of River Falls*, No. 05-18-1304 (U.S. Dep’t of Educ. Office for Civ. Rts. Oct. 31, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05181304-a.pdf>. OCR found

that a hostile racial environment existed where, over the course of a semester, an African-American student was taunted regularly on the basis of her African-American features. *Id.* at 3. This included comments about the student’s hair, nose and skin color. *Id.* These comments often left the student “visibly shaken”. *Id.* A comment was also made to another African-American student that he could not do something other students could do “because he is black and they are white”. *Id.* at 4.

Further guidance is found in other recent cases involving OCR investigations. For instance, OCR and a district reached a resolution short of a formal finding and the district agreed to take actions to bring the district into compliance over a complaint there was a racially hostile environment because a student had identified multiple uses of “the N-word” by other students at his school. *See Northwest Allen County Schools*, No. 05-20-1020 (U.S. Dep’t of Educ. Office for Civ. Rts. May 28, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05201020-a.pdf>. Also in 2020, OCR and a district reached a resolution over racial harassment in the course of one school year, and specifically an incident of two students calling a group of four elementary school children “burnt chicken nigglets”. *See Mountain Iron-Buhl Public School District #712*, No. 05-20-1187 (U.S. Dep’t of Educ. Office for Civ. Rts. July 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05201187-a.pdf>. Finally, a resolution was reached in a case involving allegations a white student physically assaulted an African-American student, called him “the ‘n-word’” and told him “black people smell”. *See Prospect Heights School District 23*, No. 05-16-1067, (U.S. Dep’t of Educ. Office for Civ. Rts. Nov. 25, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05161067-a.pdf>.

i. There Were, At a Minimum, Nineteen Incidents of Racial Harassment at BASD During the Years 2016 Through 2020.

A student discipline report is included in the record which apparently reflects nineteen discipline incidents involving “BULLYING RACE” documented in BASD during the relevant school years (2016 – 2020).

- In September 2016, an eighth grader called another student a “nigger” while lining up to leave class. This comment was overheard by other students.
- In December 2016, a ninth grader used “racial remarks toward another student”.
- In December 2016, a ninth grader said that another student was “as dark as burnt toast”.
- In January 2017, a tenth grader made “racial comments and told a Spanish student that he hated Spanish students.”
- In February 2017, a tenth grader “used ethnic and sexual references/picture in a message sent to another student”.
- In March 2017, a ninth grader made unspecified “racial comments” on the bus that were apparently so significant that police contact was warranted.
- In March 2017, an eleventh grader made “racial comments” in the classroom.
- In April 2017, a tenth grader “called an African-American student chocolate and a Hispanic student vanilla loudly in front of the whole class”.
- In February 2018, a seventh grader yelled “Mexicans are idiots, go eat your tacos somewhere else” at other students.
- In March 2018, a seventh grader told a Hispanic student “Mexicans are sneaking drugs into the US. That’s why Trump is building a wall.”
- In May 2018, a tenth grader used an “offensive racial slur towards another student.”
- In November 2018, a sixth grader called another student “the ‘n-word’ and [said] he didn’t care if he was being racist.”
- In November 2018, a ninth grader called another student a “racial slur and pushed them”.
- In February 2019, a seventh grader “repeatedly [made] racial remarks to another student.”
- In March 2019, a seventh grader called out to a female student “you ugly! You an ugly ho!”
- In April 2019, a seventh grader shoved a student and called the student a “nigger”.
- In November 2019, an eleventh grader said “the N-word” to two Black students approximately five times as they walked past.
- In February 2020, a fifth grader said to two other students “I hate Mexicans like you, I hate everything about them” and called them “Mexican whores”.
- In February 2020, a ninth grader said “watch out, here comes another one of those monkeys” about a Black student.

inherent in the words used, it is ambiguous whether these incidents – [REDACTED] – were racially-motivated.

[REDACTED]

However, there is no indication that Principal Schimmel asked any questions to determine whether the altercation was racially-motivated. Just as with the allegations of verbal harassment, BASD has not developed sufficient evidence to specifically refute [REDACTED] version of these events. Based on this record, DPI is unable to determine if these incidents were racial harassment.

[REDACTED]

iv. DPI Determines That Racial Harassment at BASD was Severe, Pervasive and Persistent.

DPI determines that racial harassment at BASD was severe, pervasive and persistent during the period from 2016 until the Complaint was filed in 2020. The environment at BASD was akin to the environment in River Falls, where OCR determined a racially hostile environment existed where a student was “subjected to frequent racial taunting” over the course of one semester. *School District of River Falls* at 10. OCR notes that “the comments in question were not severe racial epithets” but were persistent and pervasive. The environment at BASD was also akin to environments at districts where OCR did not reach a formal determination of a racially hostile environment, but reached resolutions with districts where: “the N-word” was used multiple times, *Northwest Allen County Schools* at 3; racial harassment was alleged over the course of one year and elementary students were called “burnt chicken nigglets”, *Mountain-Iron Buhl Public School District #712* at 5; and an African-American student was called “the ‘n-word’” and told “black people smell”. *Prospect Heights School District 23* at 3.

At BASD, the record reflects at least nineteen instances of students subjected to racial comments and slurs over the course of four years, including eight separate instances in the 2016 – 2017 school year alone. Further, at BASD, the racial harassment often consisted of severe epithets; there are at least four documented instances of the word “nigger” being used by, and directed at, BASD students. [REDACTED]

[REDACTED] However, it is important to note that “racial acts need not be targeted at the complainant in order to create a racially hostile environment. The acts may be directed at anyone.” F.R. Doc. No. 94-5531 at 4. As noted by OCR, a racially hostile environment can result from a single incident if it is sufficiently severe and this standard must be “understood in light of the age and impressionability of the students involved”. F.R. Doc.

No. 94-5531 at 4. Student A was [REDACTED] to [REDACTED] years old during the relevant years. Here, where she and her fellow students were [REDACTED] on a consistent basis over the course of several years, DPI determines a racially hostile environment existed.

B. BASD Had Actual Notice of the Racially Hostile Environment.

There is no question that BASD had actual notice of the racially hostile environment. Beyond its own student discipline reports, which reflect the incidents recited above, [REDACTED] continually raised concerns to the District about [REDACTED]. The record reflects that, beginning in February 2019 and continuing through November 2019, [REDACTED] was in frequent communication with Principal Schimmel [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED] communications: eventually included Superintendent Plank and Superintendent Smet; included speaking at Board meetings to take her concerns about the racially hostile environment at BASD directly to the Board; and expanded to reporting racial comments that were being told to her from other BASD students who wanted to remain anonymous.

C. BASD Failed to Appropriately Respond to the Racially Hostile Environment.

Once a district has notice of a racially hostile environment, it must “take reasonable steps to eliminate it”. F.R. Doc. No. 94-5531 at 5. “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”. *Id.* When a district learns:

of harassment based on race by a student’s peers, the [district] must investigate the incident(s) promptly and respond appropriately. The responsibility to respond to harassment based on race, when it does occur, includes taking prompt and effective action reasonably calculated to end the harassment, eliminating any hostile

environment that has been created, preventing it from recurring, and where appropriate, remedying the effects of the harassment on the student who was harassed. These duties are a [district]'s responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Platteville Public Schools, No. 05-13-1098 (U.S. Dep't of Educ. Office for Civ. Rts. Nov. 20, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05131098-a.pdf>.

OCR has provided specific guidance on what an appropriate response calculated to prevent recurrence by a district might include. With respect to individual incidents, steps may include “separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed.” *Dear Colleague Letter 3*, (U.S. Dep't of Educ. Office for Civ. Rts. Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. However, the response should not end with addressing specific incidents. Depending on the extent of the harassment, a district “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.” *Id.* An effective response may need to include issuance of new policies against harassment and procedures by which complaints may be made. *Id.* The district also must take steps to prevent further harassment of complainants and prevent retaliation. *Id.* “At a minimum, the school’s responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.” *Id.*

OCR has even offered suggestions on reasonable response in the form of a checklist. *Checklist for a Comprehensive Approach to Addressing Harassment* (U.S. Dep't of Educ. Office

for Civ. Rts.), <https://www2.ed.gov/policy/rights/guid/ocr/checklist.html>. Additional appropriate steps to form an appropriate response include: “creating an effective anti-harassment program in consultation with parents, students, and community groups”; using the district’s curriculum to “foster respect and appreciation for diversity”; staff training and professional development programs to support the district's anti-harassment efforts; development of guidelines and procedures for collaboration with law enforcement officials; and regular assessment of the effectiveness of the district’s anti-harassment efforts. *Id.*

OCR’s specific findings in the River Falls investigation once again are helpful to see the real-world application of these principles. There, the parent raised the frequent racial taunting suffered by her daughter to the district; thereafter, the principal met with the parents to discuss further but offered no solutions other than to speak with the student doing the taunting. *School District of River Falls* at 5. The victim was offered support through the school counselor, including regular check-ins. *Id.* The parent continued to raise concerns to the principal about the ongoing racial harassment, but the principal never forwarded the matter to the superintendent or initiated any formal investigation until the parent indicated the student would withdraw from the district. *Id.* at 6-8. The district’s formal response to the allegations of harassment was a finding that staff took measures to address the concerns and there was no evidence staff ignored the issues or allowed the comments to persist. *Id.* at 8. The district asserted it could not “monitor the activities of students at all times and eliminate incidents of bullying”. *Id.* On these facts, OCR determined that “the District failed to take effective action to immediately stop the harassment, prevent its recurrence, and remedy its effect on” the student. *Id.* at 11. OCR specifically noted that although the district addressed reports of harassment as they arose in a “concerned and caring fashion”, the district’s interventions were not effective when viewed cumulatively. *Id.* While each allegation

was addressed, no formal investigation was launched and there were no steps taken to prevent the harassment from recurring. *Id.* OCR further noted that the counseling offered to the student was “intended not to help her overcome the effects of the harassment, but to teach her self-esteem and self-advocacy”. *Id.*

The OCR’s investigation in Platteville also provides guidance on what constitutes failure to appropriately respond. There, the complaint alleged the district was aware of racial harassment but did not take appropriate action to respond. *Platteville Public Schools* at 1. Multiple students were substantiated by the district as having made derogatory racial remarks to African-American students. *Id.* at 13. Also, one African-American student was involved in misconduct incidents in which he asserted white students were the aggressors engaging in racial harassment with the intent to push him to retaliate so that he would then be disciplined. *Id.* at 8. In finding that the district failed to respond appropriately, OCR noted the district failed to offer any remedies to the victims. *Id.* at 13. Further, the district responded to the harassing conduct by placing the onus on the victims to respond. *Id.* The principal told the student involved in misconduct incidents that the student needed “to show other students what it was like to be a ‘black man’ when advising him to ignore other students’ efforts to antagonize him”. *Id.* OCR specifically stated this comment created a hostile environment for the student. *Id.* The principal also suggested students needed to be taught how to keep themselves from responding to harassment and to simply “turn the page” in the face of harassment. *Id.* OCR identified that “[a]lthough the School investigated each incident of alleged harassment, the School did not take sufficient responsive action because the incidents of harassment continued”. *Id.* Further, the district “conveyed a message to the two students that... it was their responsibility to combat the harassment or negative stereotypes.” *Id.*

OCR has expressed concern over the sufficiency of other district responses, including: a failure to create and maintain documentation of responses to complaints of racial harassment, *Mountain-Iron Buhl Public School District #712* at 6; offering a “trusted adult” to whom students suffering from racial harassment could report incidents, but not otherwise offering the students “counseling or other remedies” following substantiated incidents, *Northwest Allen County Schools* at 3; and not implementing training for students and staff regarding ongoing racial harassment and reports of racially offensive language. *Id.*

OCR has also expressed concerns specifically over district investigations that focused on bullying to the exclusion of considering whether racial harassment occurred. *See Hampton School District / SAU 90*, No. 01-19-1290, (U.S. Dep’t of Educ. Office for Civ. Rts. Feb. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01191290-a.pdf>. In that matter, the parent raised concerns over racial comments made to their child. *Id.* at 2. However, the investigation focused solely on bullying; OCR noted the information gathered indicated that the district may not have considered whether these incidents constituted racial harassment, nor investigated the impact of the comments on the victim or any other students, focusing instead on what disciplinary action was necessary. *Id.* at 4.

i. BASD’s Investigation Into the Racially Hostile Environment Was Not Reasonable.

A district’s duty to investigate racial harassment and whether a racially hostile environment existed is not triggered only by a formal complaint. *Platteville Public Schools* at 4. Here, the duty arose for BASD as early as the first documented instance of a racial slur was used in the district. Yet, there is little evidence in the record that BASD conducted any investigation into a larger problem at the district starting in 2016 or even in February 2019 when it is documented [REDACTED]

[REDACTED]

DPI also has concerns over the formal investigation that was ultimately conducted as a result of [REDACTED] Complaint. The Complaint clearly includes allegations that there was a racially hostile environment present at BASD, yet the investigation focused only on certain discrete incidents raised by [REDACTED]. As noted previously, *see* section V.A.ii., there is one conclusory statement in the Investigation Report addressing the racially hostile environment. Relevant witnesses were not interviewed, including the SRO. No BASD students were interviewed. In combination with the BASD's lack of investigation prior to March 2020, the result is a lack of evidence in the record reflecting any consideration of the racially hostile environment present in BASD. This failure to consider and investigate is clearly not a reasonable and appropriate response given the persistent racial harassment in the district.

ii. BASD's Responsive Actions to Racial Harassment Were Not Reasonably Calculated to Prevent Recurrence.

BASD did take actions to address racial harassment as it occurred within the district, but these actions were not reasonably calculated to prevent recurrence and were not effective when viewed cumulatively. The record reflects that discipline was imposed on those students documented to have engaged in racial bullying. However, as the Investigation Report notes, there was no "uniformity in the severity of punishment given to students who make remarks based on race." In fact, the difference in discipline imposed for these incidents is stark. For instance, an eighth grader who called another student "nigger" was given one day of lunch/recess detention while an eleventh grader who said "the N-word" to two students five times was given two days of out-of-school suspension. Of the nineteen documented incidents of racial bullying, only two served out-of-school suspension and one was referred for police contact; most received detention or one day or less of in-school suspension. It is logical that use of racial slurs and comments in the district continued when the consequences for students doing so were almost non-existent.

More importantly, BASD's response to pervasive racial harassment seemingly ended after discipline was imposed. Just like in River Falls and Platteville, where the district addressed certain instances of harassment as they arose, there is no evidence in the record that BASD took steps to prevent the recurrence of the harassment. There was a significant absence of any district-wide and systematic consideration of how to address underlying causes of the harassment and ensure such racial harassment would not continue. As noted above, OCR has provided many examples of steps that encompass an appropriate response to pervasive racial harassment. There is scant evidence in the record that BASD took any of these steps from 2016 to March 2020.¹¹ BASD did not: provide training to students, staff and the school community on recognizing recurring harassment and how to respond; issue new policies on harassment or refine its procedures on harassment complaints; provide [REDACTED] clarity on how to formally report discrimination complaints; develop guidelines for collaboration with law enforcement officials; or work to develop an effective anti-harassment program. None of these strategies are necessarily mandatory to address the pervasive racial harassment in this case, but the record demonstrates that BASD's response was insufficient.

The correspondence between [REDACTED] and BASD reflects many ways in which the district claimed it was responding to racial issues in BASD. In March 2019, BASD agreed with [REDACTED] suggestion that a committee on diversity and inclusion should be formed within the district. However, no demonstrable progress was made on forming this committee thereafter. In November 2019, [REDACTED] was still inquiring as to what steps, if any, had been taken to start that process. Principal Schimmel suggested in February 2019 to [REDACTED] that racial issues were being addressed through "Monday Meeting lessons" focused on diversity and respect and a "Compassion Day" led by students focused on compassion for others and inclusion. [REDACTED]

¹¹ BASD has presented evidence regarding steps it has taken since [REDACTED] formal Complaint was resolved. Those will be addressed in the Order, below.

asked several follow-up questions about these events, including what the goals of the events were and whether the participants were racially and culturally diverse. The record does not contain any further information on if, or how, these events addressed the ongoing racial harassment. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

BASD's response was substantially similar to districts where OCR either specifically found a district failed to respond appropriately or expressed concerns over the response. Like in Hampton, even though certain incidents were investigated, there was usually no exploration as to whether the incidents constituted racial harassment and the focus was on bullying in general and disciplining students without consideration of how the incidents impacted Student A. Similarly, like in Mountain-Iron Buhl, there was a lack of documentation supporting responses to incidents of racial harassment. [REDACTED]

[REDACTED]

[REDACTED] Finally, like Northwest Allen, there was no implementation of district-wide training for students or staff in response to ongoing reports of racial harassment. Based on its review of the record, DPI concludes that the responsive actions BASD did take were not reasonably calculated to prevent recurrence of racial harassment within the district.

iii. BASD's Response Was Not Reasonable Because [REDACTED]
[REDACTED].

BASD also failed to reasonably respond when it [REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], [REDACTED]

VI. BASD FAILED TO COMPLY WITH ITS POLICY AND PROCEDURE IN HANDLING NONDISCRIMINATION COMPLAINTS.

BASD’s Nondiscrimination Policy, Code No. 112, adopts the provisions of Wis. Stat. § 118.13 which prohibit discrimination based on legally-protected characteristics. BASD’s Nondiscrimination Procedure, Code No. R-112, provides a bare bones process for the filing and resolution of complaints: “[i]n the event that an individual wishes to file a complaint regarding discrimination the following procedure must be followed. The district will follow due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by civil rights regulations.” To commence a complaint, the procedure requires the

“discrimination complaint form” be completed and submitted to the Assistant Superintendent. There is no further detail provided on what must be contained in the form; the procedure does not require any level of detail or specificity in the allegations.

There is no dispute that [REDACTED] properly submitted her complaint to BASD in accordance with this procedure. The allegations contained on the complaint form itself as well as in her accompanying email (it was necessary for her to include additional allegations in her email given the lack of space on the form) are detailed in Section III above. While it is true the bulk of the specific allegations pertain to incidents involving Student A, the complaint form specifically provides that [REDACTED] is making it on behalf of her children. The Complaint clearly asserts that her children – both Student A and Student B – [REDACTED]. Nonetheless, the investigation wholly ignored any allegations regarding Student B, who was attending Burlington Area High School at the time the Complaint was submitted. The Investigation Report specifically states “[t]he allegations related to the high school were not the subject of the Complaint and therefore not within the scope of my investigation.” Further, as detailed in section V.C.i., the investigation did not sufficiently address allegations of a hostile environment at-large in BASD.

BASD has also taken inconsistent positions on how it uses its nondiscrimination policy and procedure to report discrimination complaints to DPI. Wis. Admin. Code § PI 9.07(2) requires school boards to annually report to DPI the name of the employee designated to receive complaints regarding discrimination and the number of complaints received during the year. The DPI form utilized by districts to make this annual report asks “[d]id the district receive any verbal or written complaints based on pupil discrimination and/or harassment”? For the years 2016 through 2019, BASD reported to DPI that it received zero discrimination or harassment complaints. This issue was previously raised to DPI outside of the scope of this Complaint and DPI exercised its oversight authority under Wis. Admin. Code § PI 9.08(2)(c) to determine whether BASD was complying

with its own established policies and procedures in reporting to DPI. During that inquiry, BASD represented that it had not reported any complaints raised by ██████████ during the years 2016 through 2019 because the district did not read her complaints to contain any specific allegations about race discrimination. BASD directly contradicted itself in the Investigation Report on this matter, stating ██████████ complaints were not reported because she “never submitted a formal discrimination complaint pursuant to the District’s Nondiscrimination Policy”. BASD must develop a consistent position on when discrimination complaints are reported to DPI. ██████████ alleges that BASD’s failure to include the complaints she raised to the district prior to 2020 in its required reporting to DPI is evidence BASD perpetuated the racially hostile environment present in the district. As detailed in V.C.i, DPI agrees that BASD did not reasonably respond to the complaints raised by ██████████. As noted previously, however, a district’s duty to investigate complaints of racial harassment arises whether complaints are “informal” or formal”.

VII. THE DISPROPORTIONATE SUSPENSION OF BLACK STUDENTS DOES NOT ESTABLISH RACE-BASED DISCRIMINATION.

██████████ alleges that suspension rates in BASD are also evidence of racial discrimination. ██████████

██████ There is no additional evidence in the record which shows that BASD globally treats similarly-situated white and Black students differently in terms of suspension. DPI has historically determined that the mere existence of disproportionate rates of suspension is insufficient to establish differential treatment discrimination.

VIII. BASD’S NONDISCRIMINATION POLICY AND PROCEDURE DO NOT COMPLY WITH WISCONSIN ADMINISTRATIVE CODE.

Beyond the authority afforded by Wis. Stat. § 118.13 to review an appeal from a district’s negative determination on a discrimination complaint, DPI has general oversight authority over districts’ compliance with Wis. Stat. § 118.13 and Wis. Admin. Code ch. PI 9. *See* Wis. Admin.

Code § PI 9.08(2)(a),(c). In its review of this matter, DPI has identified that BASD's nondiscrimination procedure does not comply with Wis. Admin. Code § PI 9.04(2), which requires that such procedure include a provision for "determination of the complaint within 90 days of receipt of the written complaint." BASD's nondiscrimination grievance procedure provides timelines for response by the Assistant Superintendent and, if that response is appealed, by the Superintendent. However, the procedure does not contain any timeline for ultimate determination of the complaint.

ORDER

NOW THEREFORE, ██████████ appeal is denied in part and granted in part.

Within 30 days, Burlington Area School District shall submit to the Department of Public Instruction a corrective action plan specifying steps it will take to: 1) prevent further instances of discrimination in discipline; 2) adequately redress the racially hostile environment present in BASD; 3) review its past reporting on discrimination complaints to ensure compliance with BASD policies and procedures and enact clear guidelines for future reporting; and 4) revise its policies and procedures to ensure they are in compliance with the Wisconsin Administrative Code.

BASD has offered evidence of actions it has undertaken since its resolution of ██████████ ██████████ Complaint, including: working with the National Equity Project; an open letter from the Superintendent and the Board rejecting racism, discrimination and harassment; and training on working with SROs. These actions are important first steps to addressing the racially hostile environment at BASD, but BASD is under a continuing obligation to ensure these measures are reasonably calculated to prevent the recurrence of racial harassment throughout the district.

Dated this 9th day of April, 2021.



Barbara Van Haren, PhD
Assistant State Superintendent

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 the 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).