

## Wisconsin Pupil Nondiscrimination Updates

### State Superintendent's Conference on Special Education and Pupil Services Leadership Issues

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**2020-21 Annual Pupil Nondiscrimination Report was Due December 23, 2021.** As of 10/1/2022, 253 of 421 districts have submitted the report.

#### School Year 2020-21 Results (Incomplete)

Protected Class/Basis of Complaint	2020-2021 School Year
Ancestry	13
Disability	97
Pregnancy, Marital or Marital Status	1
National Origin	14
Race	432
Religion/Creed	19
Sex	357
Sexual Orientation	238
<b>TOTAL</b>	<b>1171</b>

**2021-22 Annual Pupil Nondiscrimination Report is Due December 23, 2022.** As of 10/1/2022, 20 of 421 districts have submitted the report.

- Complaints received July 1, 2021, through June 30, 2022
- Reporting system continues to use WAMSid and password
- Access to prior year's reports
- More information: <https://dpi.wi.gov/sped/pupil-nondiscrimination/pi9-07>

#### Wisconsin Pupil Discrimination Appeals Findings

Six pupil discrimination appeals have been filed with the department this year. Three of the appeals alleged discrimination on the basis of disability, two on the basis of religion, and one on the basis of race.

**21-PDA-09.** The appeal alleged the district had not met its responsibilities under its policies and state law to provide an appropriately diverse curriculum, and the district was, therefore, “discriminating against its diverse students”.

The essential purpose of Wis. Stat. § 118.13(1) is to ensure students are not deprived of the benefits of a school district’s educational program because of their protected class status. The complaint process specified in Wis. Stat. § 118.13(2) and Wis. Admin. Code § PI 9.04(4) is predicated on identifying who has been harmed and the nature of the harm. DPI will overturn a district’s finding of no discrimination only when the evidence in the record is sufficient to show a student suffered an adverse consequence due, in whole or in part, to their protected class status.

The appeal fails to identify who has been harmed and what the nature of that harm is with sufficient specificity. In general, DPI has not interpreted the law to require that a complainant provide an extensively detailed catalog of each and every instance of perceived discrimination in order to trigger a district’s affirmative duty to conduct a full investigation. However, the claims here that the district was “discriminating” against “diverse students” are vague in the extreme. There is no evidence in the record that, during the course of the investigation, complainants provided any specific facts to refine their original allegations of discrimination. Without greater specificity as to the nature of the alleged discrimination, it is impossible to conduct the legal analysis required under the law and establish a direct connection between the student’s protected class status and the alleged harm to the student. Because of complainants’ lack of specificity, vital questions are left unanswered by the record. For example, do “diverse students” belong to one or more protected classes? How have these “diverse students” been harmed by the district’s alleged lack of a “diverse curriculum”? How have they been: denied admission, denied participation, or denied the benefits of the district’s curricular program; denied opportunities, roles, or rewards; or been harassed or stereotyped?

#### **21-PDA-06**

The appeal alleged race-based harassment had occurred at a football game. During the course of the game two home team members had used a racial slur in reference to visiting team members, and a third member of the home team had use a separate racial slur to another visiting team member.

##### **1. The District Did Not Comply with its Own Policies in Responding to the Complaint.**

In this case, the district did not interview the complainant, 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 as required by policy.

##### **2. The District Did Not Comply with its Obligation to Notify the Complainant of Her Right to Appeal.**

The Wisconsin Administrative Code requires districts to notify complainants of their right to appeal a final negative determination to the state superintendent and the procedures for making the appeal. The district did not provide such notice in this case.

### 3. The Record Developed by the District is Inadequate for Determination of the Appeal.

Largely as a result of the district's failure to comply with the requirements of its own pupil harassment policy, the record developed by the district left the department 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 record that the shows the district interviewed a number of persons but does not indicate who those persons were or what information they provided. The record shows a student was disciplined but is unclear whether the student was disciplined for violating the athletic code, nondiscrimination policy, or both. Likewise, it is unclear from the record what standards the Activities Council used in considering the suspended student's appeal and whether the Activity Council's decision had any effect on the determination as to whether race-based harassment had occurred. In short, without a sufficient factual record to consider, the department is unable to determine whether the district had notice that racial harassment had occurred, whether that racial harassment has created a racially hostile environment, and whether the district responded appropriately to a racially hostile environment (if substantiated).

### **22-PDA-02**

The district maintains a policy regarding students who have been deemed to have close contact with a person that has tested positive for COVID-19. Under the policy, students who have not been vaccinated for COVID-19 are required to quarantine for a period of 10 – 14 days after close contact with a COVID-positive person. Consequently, these unvaccinated students are not allowed to attend school. Students who have been vaccinated for COVID-19 are not generally required to quarantine; these vaccinated students may attend school but may be required to monitor symptoms and report irregularities to the district.

A student enrolled in the district who had not been vaccinated for COVID-19, was deemed by the district to have had close contact with a COVID-positive person. Consequently, she was not allowed by the district to attend school for 14 days pursuant to the policy.

#### 1. The District's Policy is not Discriminatory.

On its face, the district's policy makes no distinction on the basis of a student's religion. The district asserts the policy was developed and implemented for the purpose of limiting the spread of COVID-19 within the school community, and the various provisions of the policy were based on guidance provided to the district by local, state, and federal health officials. The only distinction contained in the protocol is between vaccinated and unvaccinated students. As the district notes in its final determination, students may be unvaccinated for a variety of reasons. Those reasons include those based on religion or creed and those that have nothing to do with religion or creed. Complainant has not offered any evidence, and there is none in the record, that the district created and adopted the policy with the intent to deny pupils participation in or the benefits of the district's education program on the basis of their religious beliefs. In the absence of such evidence, the policy is not discriminatory on its face.

2. The District Did Not Discriminate in Applying its Policy to the student or Other Similarly Situated Students.

Complaint rested solely on his contention that the policy itself was discriminatory. The evidence in the record indicates the sole basis for the district's requirement that student stay home for 14 days was her status as an unvaccinated person who had close contact with a COVID-positive person. Nothing in the record indicates the district was even aware of the religious beliefs of the student prior to the complaint. There is also no evidence in the record, that the district generally distinguished between religious and non-religious students by applying the quarantine provisions of the district's policy differently to religious and non-religious unvaccinated students.

### **Wisconsin Court Decisions**

#### *Ervins v. Sun Prairie Area School District*

On February 1, 2021, three sixth-grade social studies teachers at Sun Prairie Middle School distributed electronic learning materials about ancient Mesopotamia. A quiz at the end of the materials asked students to assume the position of judge and apply the Code of Hammurabi to several factual scenarios, one of which asked the students to decide how to punish a defiant slave. The district apologized, commissioned an investigation, and suspended the teachers who ultimately resigned. Parents bring federal case claiming the Mesopotamia materials and the school districts handling of the incident violated their rights under the 14<sup>th</sup> Amendment, the Establishment Clause of the First Amendment, and federal-anti discrimination law.

On summary judgment, the federal district court concluded that:

1. The parents did not have individual standing, but the students did, including a student who was not present in class when the lesson was provided.
2. Title VI racially hostile environment claims dismissed as a single incident of an upsetting lesson does not rise to the requirement of consistent and or severe misconduct.
3. Establishment clause claims dismissed as teaching about Hammurabi's Code is not religious education it is a history lesson.

### **OCR Resolutions**

#### *Chino Valley Unified School District, CA, April 4, 2022*

The evidence shows that students on a district athletic team experienced unwelcome sexual conduct on the team bus, in the locker room, in the weight room, and in the Athletics PE classroom when students witnessed or were the targets of unwelcome sexual conduct, including: students exposing their genitalia to other players; a student sending images of his genitalia to students during a bus trip from an away game; students placing their genitals on or near the faces of other players; students engaging in simulated sexual acts or "dry humping;" removing students' pants against their will exposing their genital area; and videotaping the incidents of simulated sexual acts that took place at School and posting the images on social media. While some students stated that they were not impacted by the behavior or thought it was a joke, other

students reported to the district that the behavior disgusted or shocked them, impacted their ability to concentrate, caused them to not want to participate in the team's social media, caused them to avoid the locker room, and caused them fear that they would be targeted. OCR found that the district had notice of the conduct and failed to provide an effective response to several incidents of sexual harassment.

*Los Angeles Unified School District, CA, April 28, 2022*

OCR found that the district failed to provide a FAPE as required by Section 504 to qualified students with disabilities in violation of Section 504. Specifically, OCR found that during remote learning, the District (1) limited the services provided to students with disabilities based on considerations other than the student's individual educational needs, did not evaluate those students' needs prior to determining what services they would receive during remote learning, and did not ensure that the placement decisions were made by a group of persons knowledgeable about the students' needs; (2) failed to accurately or sufficiently track services provided to students with disabilities; and (3) failed to develop and implement a plan adequate to remedy denials of FAPE during remote learning.

The district did not create a comprehensive guidance on compensatory education to address the non-provision of services during the COVID-19 pandemic. The district instead created a "recoupment service" process focused on students' learning loss, not their loss of services. By design, that process does not purport to address whether and to what extent students with disabilities may need compensatory education as a result of the district's failure or inability to provide appropriate services during the COVID-19 pandemic

*Tamalpais Union School District, CA, June 23, 2022*

A transgender student was harassed by a fellow student who intentionally made fun of and mispronounced the student's name, referred to her by her previous male name, mixed-up male and female pronouns when referring to her and mocked her voice. Conduct reported by both the student and the student's parent to teachers and school administrators.

The district was unable to provide evidence it had conducted an investigation of the alleged harassment. OCR found the district's response, which consisted of separating the students and ordering them not to have any additional contact and permitting the teacher to talk to the class about kindness and respect were not reasonably calculated to prevent recurrence. No interim measures offered to the student and the conduct continued.

*Kyrene School District, AZ, August 23, 2022*

The student was subjected to a hostile environment related to the Student's Jewish ancestry. Incidents included the use of several ethnic slurs; making jokes about the Holocaust, speaking or pretending to speak in German, and marching/saluting like Nazi soldiers, to and in the presence of the student; and students making other disparaging statements about the student's ancestry including references to concentration camps. At least nine of the student's peers engaged in the harassment and the incidents occurred throughout the school, as well as online. OCR further found that:

1. Despite multiple occurrences of harassing conduct, the principal failed to provide timely, specific, and clear communication to school staff regarding the harassment of the student. Although the principal addressed staff in general terms by e-mail and much later in a meeting, staff with a need to know were ill-informed to monitor the situation or identify ongoing harassment.
2. With the investigation concluded and while the student was still attending school, the principal waited to address the student's schedule, which resulted in the student and the other students attending class together at least one day until her schedule, not theirs, was changed.
3. The district's response was not reasonably calculated to fully redress the problems experienced by the student at the school as a result of the harassment. The district abdicated its obligation to provide the student with a safe school environment.
4. The principal failed to address what was clearly a school-wide problem with anti-Semitic harassment. After determining that nine students had engaged in anti-Semitic harassment over a period of several months, the remedial measures he undertook were narrow and focused primarily on the punishment of the individual perpetrators. The information gathered by the principal confirmed that incidents of anti-Semitic harassment occurred on-campus and in classrooms, yet the principal failed to conduct interviews with the very teachers who had oversight of the classrooms where some of the harassment occurred. By failing to conduct interviews with staff or attempting to gather additional information about the extent of the anti-Semitic conduct throughout the school, the district disregarded its obligation to assess whether the verified widespread conduct negatively impacted other students. The only school-wide measure to specifically address anti-Semitic harassment was not implemented until approximately seven months after the principal first determined that the nine students had engaged in harassment and this training was provided only to school staff, not the student body. This delay allowed a potential hostile environment to persist in the school