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May 12, 2022

Sent via Email to:

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Superintendent

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Counselor and Title IX Compliance Officer

Chad Ramminger - *cramminger@kiel.k12.wi.us*
Principal and Title IX Investigator

Dear Superintendent Ebert, Ms. Kautzer and Mr. Ramminger:

We represent the families of three eighth grade boys (and the boys themselves) who the District recently charged with sexual harassment under Title IX for “mispronouncing.” The District’s position appears to be that using what the District calls “incorrect pronouns” “after being informed that a student’s preferred pronouns were ‘they/them’” automatically constitutes punishable sexual harassment under Title IX.

The complaint against these boys, and the District’s ongoing investigation, are wholly inappropriate and should be immediately dismissed. The mere use of biologically correct pronouns not only does not constitute sexual harassment under Title IX or the District’s own policy, it is also speech protected by the First Amendment. The District has also violated Title IX procedures and its own policy in its handling of the complaint. The District should promptly end the investigation, dismiss the complaints, and remove them from each of the boys’ records.

Sexual harassment, as defined in both Title IX and the District’s policy, typically covers things like rape, sexual assault, dating violence, stalking, inappropriate touching, and quid pro quo sexual favors. None of that—or anything even close to it—is alleged here. While there is a catchall for “unwelcome conduct” that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education,” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); 34 CFR § 106.30, courts have made clear that this high standard does not cover “commonplace schoolyard altercations, [such as] name-calling, teasing, and minor physical scuffles,” “even where these comments target differences in gender.” *Doe v. Galster*, 768 F.3d 611, 618 (7th Cir. 2014). It certainly does not cover

using biologically correct pronouns simply because the District characterizes it as “mispronouncing,” which is the sole allegation in the one page Title IX complaint.

“Mispronouncing” is also not sexual harassment under Title IX because gender identity is not included within the definition of sex within Title IX. In fact, the Department of Education is currently attempting to amend Title IX to add it.

And none of the “other conduct” described in the statement from the music teacher (which the families of the boys eventually received with the Title IX complaint) comes remotely close to sexual harassment. The statement even acknowledges that the whole class “expressed frustration with remembering pronouns.” At most, the statement describes a few isolated incidents of teasing and arguments between the 8th grade students in question. To be clear, this statement does not accurately or fully portray the incidents described—as you know, the student in question has teased the boys as much if not more, including calling them numerous names and yelling at them for not using “they/them” pronouns, even when they were not talking to or about her—but even if everything in the music teacher’s statement were accurately characterized, it does not amount to the sort of “severe, pervasive, and objectively offensive” conduct that crosses the line into sexual harassment.

Middle school students “are still learning how to interact appropriately with their peers,” and “often engage in insults, banter, teasing, shoving, pushing, and [even] gender-specific conduct.” *Davis*, 526 U.S. at 651. Such conduct is certainly inappropriate, and if the boys did tease the other student, that can and should be dealt with through the ordinary disciplinary process (though the District needs to treat both sides equally when the teasing goes both ways). But none of this warrants accusations of sexual harassment and the serious reputational harm that comes with it. The District’s policy and Title IX regulations require it to immediately dismiss a complaint “if the conduct alleged,” “even if proved,” “would not constitute sexual harassment.” 34 CFR § 106.45(b)(3)(i); District Policy 2266 at 10. That is true here on the face of the complaint, so it should be dismissed and the investigation closed.

More troubling, the District appears to believe that any so-called “mispronouncing” is punishable speech under Title IX. We have been in touch with another family whose daughter was recently given an in-school suspension for “sexual harassment” based on a single statement using an allegedly “wrong” pronoun—and the statement was said to a *third party*, not even to the allegedly “misgendered” student. To the extent this is the District’s view, the District is wrong as a matter of law and is engaged in a clear First Amendment violation.

Under the law, “students do not shed their constitutional rights to freedom of speech or expression, even at the school house gate.” *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044 (2021). The use of pronouns is protected speech, as courts have recognized, because pronouns “convey a powerful message implicating a sensitive topic of public concern.” *Meriwether v. Hartop*, 992 F.3d 492,

508 (6th Cir. 2021). Many people reasonably believe that “sex is fixed ... regardless of an individual’s feelings or desires” and do not want to endorse the idea that gender is self-declared. *Id.* at 509. The use of “they/them” pronouns, in particular, is awkward, grammatically incorrect, and, until recently, unheard of. Indeed, illustrating how difficult it is to refer to a single person as a “they/them,” our clients have frequently heard the Title IX investigator, teachers, other staff, and students refer to the student in question using she/her pronouns.

As much as the District may want to control which pronouns students use, it “do[es] not have a license to act as classroom thought police.” *Id.* at 507. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The District’s policy says it will not be applied to “expressive conduct that is protected by the First Amendment.” District Policy 2266 at 17. The District needs to make clear to its Title IX coordinator, to its staff, and to students, that they will not be punished merely for using what the District contends are the “wrong” pronouns.

In addition to the substantive violations of our clients’ rights, the District has also failed to follow Title IX procedures and its own process, an independently sufficient reason to dismiss the complaints for lack of due process. Indeed, one of the main grounds for reversing on appeal is a “[p]rocedural irregularity that affected the outcome of the matter (e.g., material deviation from established procedures).” Policy 2266 at 15; 34 CFR § 106.45(b)(8)(i)(A).

Both the District’s policy and Title IX regulations require notice of the allegations *before* beginning any investigation so that the accused has “sufficient time to prepare a response before any initial interview.” Policy 2266 at 9; 34 CFR § 106.45(b)(2)(i)(B). And the notice must contain “sufficient details,” including “the identities of the parties involved,” “the conduct allegedly constituting sexual harassment,” and “the date and location of the alleged incident.” *Id.*

The District violated our clients’ due process rights by failing to provide a detailed notice of the allegations, consistent with these legal requirements, instead providing only a generic letter, one day before the interview, stating that the boys were accused of “using incorrect pronouns.” Then, contrary to its Policy, the District conducted interviews without providing additional details or giving the boys and their families time to prepare.

After receiving the letter, the families asked for more specific information, which the District did not provide for several days. The District eventually provided a one page Title IX complaint and statement from the music teacher, but these documents raise some questions.

The Title IX complaint is dated 3/29/22, but the music teacher’s statement includes events that occurred *after* that date. Thus, either the Title IX complaint is mis-dated or it was prepared before the author (Ms. Kautzer) would have seen the music teacher’s statement. Please explain the timing, and, under the Wisconsin Open Records Act and/or the Policy, consider this letter a request for all records that would show the date the Title IX complaint was prepared by Ms. Kautzer, the date the music teacher prepared her statement, and the date the statement was sent to Ms. Kautzer.

During the interviews with our clients on April 26–27, Mr. Ramminger asked various questions, many of which were unrelated to the incidents described in the subsequently provided statement from the music teacher, suggesting a fishing expedition to *find* evidence of sexual harassment. And when one family considered halting the interview to get a lawyer, Mr. Ramminger responded with something to effect of, “you could, but how would that look”? All of this leaves the impression that the District is weaponizing its Title IX process to strong-arm minor students into compliance with its preferred mode of speech. This is wrong and illegal.

To summarize, because what the District calls “mispronouncing” does not amount to sexual harassment under Title IX as a matter of law, and because the District’s conduct infringes our clients’ First Amendment and Due Process rights, the District should immediately end its investigation, dismiss the complaints, and remove them from the students’ records. We request and expect a response from the District within 8 days, by Friday, May 20, 2022.

Finally, so that we have a full understanding of the District’s allegations, please also consider this letter a request under the Open Records Act, and the District’s Policy giving parties the right “to inspect and review any evidence obtained,” Policy 2266 at 12, for all records that contain: (1) any statements that the District has from anyone of alleged sexual harassment by any of our clients with respect to the student who the District claims our clients sexually harassed, (2) any statements that the District has from anyone that the student who the District claims our clients sexually harassed has threatened, yelled at, sworn at, teased or otherwise harassed any of our clients.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.



Luke Berg
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