February 17, 2020

Carl Bryan, Administrative Rules Coordinator
Wisconsin Department of Public Instruction
125 S. Webster Street
Madison WI 53707-7841
adminrules@dpi.gov

By Email Only

Re: Comments on Department of Public Instruction Clearinghouse Rule 21-007

Dear Mr. Bryan,

The ACLU of Wisconsin, Black Leaders Organizing for Communities, Burlington Coalition Dismantling Racism, GSAFE, Leaders Igniting Transformation, Milwaukee County Human Rights Commission, NAACP Milwaukee Branch, Schools and Communities United, and Urban Underground, all Wisconsin organizations concerned with protecting students from discrimination, submit these comments on Department of Public Instruction Clearinghouse Rule 21-007 relating to pupil nondiscrimination procedures.

The proposed rule includes many positive changes. In particular, the requirements that district employees refer all verbal complaints to a designated complaint officer and that the complaint officer assist complainants in reducing verbal complaints to writing are likely to significantly improve families' access to and utilization of the complaint process. Also, the requirement that districts conduct, publish, and receive public comment on an annual self-evaluation of nondiscrimination and equality of educational opportunity according to specified criteria is to be celebrated as an important step towards transparency and accountability and an invitation to impacted families to participate in shaping school culture.

Nevertheless, we are concerned that the proposed rules do not address certain undeveloped aspects of the complaint process that have, in documented instances, allowed Wisconsin school districts to avoid recognizing and investigating discrimination of which they should have known, and to respond to known discrimination in ways not adequate to end or remedy the problem. We submit the below comments because it is critical that DPI take all steps possible to ensure that all pupil discrimination is promptly identified and fully addressed.

I. DPI should require district employees to report discrimination and harassment of which they are aware.

As the U.S. Supreme Court has recognized,

> Teachers and coaches are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed,

> sometimes adult employees are the only effective adversaries of discrimination in schools.

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181 (2005) (internal quotations omitted). Thus, the U.S. Department of Education's Office for Civil Rights (OCR) has established that teachers and other responsible school employees have a duty to report harassment and other forms of discrimination to school officials. *See* OCR Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance (March 10, 1994) ("Racial Incidents")[1] (so long as a "responsible employee" of the district has notice of racial harassment, that notice will be imputed to the district); OCR Dear Colleague Letter: Harassment and Bullying 2, fn. 9 (Oct. 26, 2010) ("Harassment and Bullying")[2], (establishing that a school has notice of harassment if a responsible employee knew or in the exercise of reasonable care should have known about the harassment and citing OCR's sexual harassment guidance for definition of "responsible employee"); OCR Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 19, 2001)[3] ("Sexual Harassment Guidance") (rescinded on other grounds) (defining "responsible employee" as "any employee who has the authority to redress the harassment, who has the duty to report [harassment] to appropriate school officials, or an individual who a student could reasonably believe has this authority or responsibility"; and further identifying a "principle, campus security, bus driver, teacher, affirmative action officer, or staff in the office of student affairs" as responsible employees).

DPI should make clear that *state* rules impose the same duty to report on all responsible school employees. This means that, beyond referring written and verbal complaints of discrimination and harassment to the designated employee as required under amended § PI 9.03(1)(j), district employees should be required to report *any* discrimination or harassment of which they are aware, regardless how they learned of it. *See* Racial Incidents (notice may be received in many ways, including, *e.g.*. filing of complaint or grievance, communication from parents or other individuals, direct observation by responsible employee, local media reports).

Further, in order to ensure that each school district's annual report to DPI captures all discrimination and harassment incidents of which the district had notice, DPI should amend § PI 9.07(2) to require districts to include incidents of which they learned via staff, employee, or other third-party reports as well incidents identified in verbal and/or written complaints from students or parents. The need for such a requirement was highlighted in a recent PI 9 appeal handled by the ACLU of Wisconsin, where the district reported zero harassment complaints to DPI for the years 2016-19, even though its internal records for the same years include at least twenty incidents where students were disciplined for racial slurs. It is clear that DPI cannot rely on formal complaints alone to obtain a clear picture of district racial climates; districts must report all incidents of which they, including their agents and responsible employees, had knowledge.

---

[1] https://www2.ed.gov/about/offices/list/ocr/docs/race394 html

[2] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf

[3] https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html

II. DPI should impose requirements under § PI 9.04 on districts' use of informal complaint resolution procedures.

Though the existing language of PI 9 does not expressly provide for it, many school districts in Wisconsin have adopted policies to attempt to informally resolve complaints before beginning the investigation process. *See, e.,g.,* Cedarburg School District Public Notification of Student Nondiscrimination Policy,[4] ("When acceptable to the complaining party, the District encourages informal resolution of discrimination complaints and related concerns."); Kenosha Unified School District School Board Policy 5110.1[5] ("The District encourages informal resolution of complaints under this policy.").

While informal resolution procedures may serve a valuable purpose, districts have also used "informal resolution" as an excuse for failing to adequately investigate, and for failing to report to DPI, incidents of discrimination. For example, in one case, a parent complained for several years, by email and in in-person meetings with administrators, of discriminatory discipline and peer on peer racial harassment. Yet the district did not include these communications in its reports to DPI under § PI 9.07(2). The district's argument for its failure to report was that the complainant had not filed the complaints on a specific form, even though the district had never notified the complainant that she had a right to a formal complaint process or had the obligation to use that form. The district then construed the complaints as "informal" and failed to report them. *See* Pupil Nondiscrimination Appeal, 20-PDA-02.

Further, in the same case, the complainant notified the district by email and in person of several specific instances of peer-on-peer racial harassment, arguing throughout the email communications that the incidents reflected a systemic problem with school culture. When, eventually, the complainant was told about the district's process and filed a complaint on the required form making the same allegations—that the individual incidents reflected a pervasive hostile environment—the district claimed that it had already "informally responded to, reviewed and addressed her concerns." However, the "informal response" to her "concerns" considered only the individually-listed incidents of harassment, without acknowledging or investigating the broader concerns about racism in the school culture. The district, relying on this "informal" process, refused to acknowledge or address the complainant's systemic concerns.

DPI should therefore set clear requirements for any use of such informal complaint procedures, both to protect complainant rights and to ensure that district reports are accurate and transparent. First, DPI should require that, whenever possible, districts reduce a verbal complaint to writing *before* deciding to resolve a complaint informally, to ensure that the full scope of the complaint is clear to all parties. Second, DPI should require districts to obtain voluntary, informed consent from both the complainant and the respondent before attempting to resolve the complaint informally. Third, DPI should make clear that *all* complaints received by the complaint officer under § PI 9.04(1) must be reported under § PI 9.07(2)—whether they are written or verbal, whether they are submitted directly to the complaint officer or referred by another district employee, and whether they are formally or informally resolved.

---

[4] https://www.cedarburg.k12.wi.us/departments/ps/2016_2017/student_nondiscrimination_notice_jan_2017.pdf

[5] https://www.kusd.edu/sites/default/files/document-library/english/5110.1.pdf

III. DPI should allow direct appeal under § PI 9.08(1)(a)(2) where a district fails to comply with DPI's updated requirements for handling complaints.

Proposed § PI 9.08(1)(a)(2) allows a complainant to appeal directly to DPI if the school district has not complied with the provisions of proposed amended § PI 9.04(2)—*i.e.*, when the district has not established a procedure for receiving and resolving complaints that meets certain timing and notice requirements. However, key new requirements for district complaint procedures are not found in that section but in § PI 9.03(1)(j), which requires that district employees refer complaints to the complaint officer, and in § PI 9.04(1), which requires that the complaint officer provide the complainant a copy of the complaint procedures and assist the complainant in reducing a verbal complaint to writing. Because a direct appeal to DPI is a key means of enforcing districts' compliance with the procedural requirements of PI 9, the right of direct appeal under § PI 9.08(1)(a)(2) should also be available where a district fails to comply with §§ PI 9.03(1)(j) or PI 9.04(1).

IV. DPI should retain peer harassment and district response as a component of districts' annual self-evaluation under § PI 9.06(1).

Under the proposed revised § PI 9.06, districts must evaluate annually the status of nondiscrimination and equality of educational opportunity in the district and post a report of the evaluation on the district website. As DPI's proposed rule explains, the proposed change is to "ensure school districts are engaging in meaningful assessments and the data reported is useful to both the department and the Legislature." Revised § PI 9.06(1) lists several categories that the district self-evaluation must address, including relevant school board policies and procedures; course enrollment patterns; methods, practices and materials related to curriculum, counseling, and assessment evaluated for bias; disciplinary trends disaggregated by protected status; and trends related to participation in athletic and extracurricular activities.

Although these criteria seem important and useful, the proposed rule deletes the requirement, which exists in current § PI 9.06, that districts also report on their handling of pupil harassment. This is a mistake: harassment is an essential indicator of racial equity in school districts and should be a core part of a district's self-assessment. Indeed, of the four appeals that the ACLU of Wisconsin has brought to DPI under Wis. Stat. § 118.13 in the past year and a half, all have involved situations in which peer harassment created a hostile racial environment. Rather than deleting district handling of pupil harassment from the self-assessment criteria, DPI should add as an additional self-assessment criterion—*i.e.,* as § PI 9.06(1)(i)—data related to harassment disaggregated by the protected status of the victim, together with the district's responses to such incidents.

V. DPI should set parameters under § PI 9.04(2) for an adequate district-level investigation.

Districts have a duty to end and remedy the effects of discrimination (including hostile environments) of which they are aware, and a key purpose of complaint procedures like those outlined in PI 9 is to create a mechanism for districts to discover and learn about discrimination

and equity issues in their schools. *See, e.g.,* Harassment and Bullying at 2 ("In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment."). Consistent with these goals of transparency and truth-finding, a district's investigation of a complaint ought to be reasonably comprehensive, thorough, and rigorous.

However, in our recent, repeated experience, school districts have taken a narrow, technical and defensive approach to the investigation of pupil nondiscrimination complaints, focusing on rebutting the complainant's claims rather than on assembling an accurate picture of discrimination and harassment in the district. For example, in one recent case, a complainant alleged that her children had experienced a racially hostile environment and included in her complaint a list of incidents of racial harassment. Two weeks later she met with the district's investigator and provided an additional list of more than twenty additional incidents of racial harassment; however, the investigator declined to investigate or consider the additional incidents because they had not been alleged in the original complaint. *See* Pupil Nondiscrimination Appeal, 20-PDA-02.

Another common practice is for investigators to meet only with school officials and accept their assertions at face value, without interviewing students, teachers or others who might provide additional information about a school's practices or its racial climate. *Cf. School District of River Falls*, OCR Case No. 05-18-1304 (2018) at 11 (Ex. A) (finding investigation of discrimination complaint inadequate where investigator "did not interview any students, instead speaking to the teacher, Principal and Counselor, and then refuting, point by point, the complainant's allegations"). This practice is especially problematic in cases in which the investigative framework for a claim requires the investigator to evaluate the credibility of an official's assertion—for example, when an investigator must consider whether a district's articulated reason for differential disciplinary treatment of a student of a certain race is a pretext for discrimination. *See* OCR Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014)(("School Discipline")(rescinded on other grounds).[6] An investigator cannot reasonably determine that a school official's claim is not pretextual without considering evidence other than the official's own assertions. *See id.*

DPI should make clear that a district's duty is to conduct an investigation reasonably calculated to ascertain whether the complainant or others experienced unlawful discrimination in the district, and that an investigation that relies only on the assertions of school officials is not so calculated. Further, DPI should make clear that a district's duty is to end and remedy *all* discrimination and harassment of which it learns in the course of an investigation, even if that discrimination was not alleged in the original complaint.

VI. DPI should set parameters for the "remedy" component of a corrective action plan.

Revised § PI 9.04(2)(c) requires a district that has determined that discrimination has occurred to state the steps that it will take to end the discrimination and to remedy its effects. This formulation—"end the discrimination and remedy its effects"—is consistent with the federal Title VI standard for a district response to known discrimination. To comply with this standard, a district

[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi html

must think broadly and critically about the unique effects of a specific experience of racial discrimination on students. *See* Harassment and Bullying at 4. For example, where a student has been harassed over a period of time, a school may need to provide additional counseling or other supportive services to the student. *Id.* at 3. Where a student has been subject to discriminatory discipline, a school may need to provide compensatory education to replace missed classroom time, or school-based supports for the student and training for faculty on the implementation of the supports. *See* "School Discipline."

Yet even though Wisconsin districts have been bound by this standard for some time, many continue to believe that merely revising a policy or disciplining an individual harasser is an adequate response to known and continuing discrimination. DPI should therefore require a district that has determined that discrimination has occurred to undertake a rigorous examination of the effects of the discrimination and to craft a tailored response which considers, as appropriate, interventions for individual perpetrators of discrimination or harassment, systemic interventions for the school community, and supports or services for the victims of the discrimination or harassment. *See* Harassment and Bullying at *3-6.

CONCLUSION

We commend DPI for recognizing the need for greater clarity and rigor in Wisconsin's pupil nondiscrimination regulations and for undertaking this revision of Ch. PI 9. School-based discrimination and harassment are urgent concerns, with lifelong implications for students in areas ranging from academic achievement to criminal legal system involvement to economic mobility to physical and mental health. We urge DPI to seize the opportunity offered by this rule revision and set an unambiguous expectation that districts must assertively protect their students from discrimination and harassment in the schools. The recommendations we have made in this document are means to that end, and we appreciate your consideration of them.

Respectfully submitted,

Elisabeth Lambert, Staff Attorney/Equal Justice Works Fellow
ACLU of Wisconsin
elambert@aclu-wi.org

Angela Lang, Executive Director
Black Leaders Organizing for Communities (BLOC)
angela@blocbybloc.org

Darnisha Garbade, President
Burlington Coalition Dismantling Racism
darnisha.garbade@gmail.com

Brian Juchems, Co-Director
GSAFE
brianj@gsafewi.org

Dakota Hall, Executive Director
Leaders Igniting Transformation
dakota@litmke.org

Robert S. Smith, Chair
Milwaukee County Human Rights Commission
robert.s.smith@marquette.edu

Clarence Nicholas, President
NAACP Milwaukee Branch
president@naacpmke.org

Ingrid Walker and Jenni Hofschulte, Co-Chairs
Schools and Communities United
jenni@wisconsinnetwork.org

Sharlen Moore, Executive Director
Urban Underground
smoore@urbanunderground.org