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June 2, 2022

Sent via Email to:

Tess O'Brien-Heinzen – tobrien@boardmanclark.com
Boardman & Clark LLP

Dear Tess:

In our letter to the District on May 12, 2022, we pointed out in detail, with legal citations, why the allegations in the Title IX complaint, even if proven true, would not support a Title IX violation by our clients. Since then we have been waiting for the District to make a decision on our request that the Title IX complaint be dismissed. We have also been waiting for the District to provide the information we requested in that letter.

In your email yesterday, you responded to our request for dismissal by saying that “Title IX does not allow a District to conclude one way or another that the facts alleged by a complainant constitute a violation of Title IX.” As I’m sure you know, that is simply not true. Title IX and the District’s own policy say the opposite.

Kiel Area School District Policy 2266, which is consistent in this respect with the provisions in Title IX, states that the District shall investigate the allegations in a formal complaint *unless* the conduct alleged in the formal complaint would not constitute sexual harassment (as defined in the Policy) even if proven. The Policy goes on to say that if the allegations would not constitute sexual harassment as defined, then the Title IX Coordinator *shall* dismiss the formal complaint.

Thus, Title IX and District Policy actually require the District to determine whether the allegations, if proven, constitute sexual harassment under Title IX and to do so before undertaking an investigation. In our May 12, 2022 letter we specifically cited this rule and asked the School District to make this determination.

As a reminder, we pointed out that 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. We also pointed out that 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).

The formal complaint itself says that it is based on “mispronouncing.” As we pointed out in our previous letter, the use of biologically correct pronouns is not sexual harassment under Title IX, and is also speech protected by the First Amendment. We also explained that none of the “other conduct” described in the statement from the music teacher comes remotely close to sexual harassment.

The District has proposed an informal resolution process under Title IX. We are declining that option. As should be clear, we do not believe that any part of Title IX applies here, including the Title IX informal resolution process.

We are specifically requesting that the Title IX Coordinator make the determination required by the Policy and determine that the complaint be dismissed. It would certainly be appropriate for the Title IX Coordinator to give the complainant the opportunity to respond to our request and we would not object to the Coordinator doing so. We would also like to reply if there is a response.

In our view, there are two main options for the District at this point: 1. Dismiss the Title IX complaint and investigation, as required, and then we’ll work through whatever remains; or 2. If the District will not dismiss the Title IX complaint, give us an explanation as to why not, and then we can go through the formal Title IX process and we will present all of our defenses both substantive and procedural.

We are open to discussions with the District and with the complainant as to other methods of resolution (though we do not see what other options there are at this point), but not as part of what we see as an illegitimate Title IX investigation, and not until the District has shared the information we have requested under both district policy and open records law, which the District still has not provided. And the meeting would only be with lawyers, parents, and District personnel, to discuss some other resolution that the District would need to propose and describe.

Finally, since we still have not received any of the information we requested, we want to reiterate our various requests:

1. An explanation of the timing issues regarding the date of the Title IX complaint and the statement from the music teacher, including 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;

2. Any statements that the District has from anyone of alleged sexual harassment by any of our clients with respect to the complainant;
3. Any statements that the District has from anyone indicating that the complainant has threatened, yelled at, sworn at, teased or otherwise harassed any of our clients; and
4. All records containing communications between District employees relating to or referring to our May 12, 2022 letter to the District. *We will agree to limit this request to such communications to or from (a) employees in the District's central administration and (b) any teachers who have or had the complainant and/or our clients in class this school year.*

Please provide a response as soon as possible.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.



Luke Berg
Deputy Counsel



Cory Brewer
Associate Counsel