

No. 60A20

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

ASHLEY DEMINSKI, as guardian ad)
litem on behalf of C.E.D., E.M.D. and)
K.A.D.)

Plaintiff-Appellants,)

v.)

PITT COUNTY BOARD OF)
EDUCATION,)

Defendant-Appellee.)

From Wake County
No. 17-CV-15159
COA 18-998

BRIEF OF AMICUS CURIAE
NORTH CAROLINA SCHOOL BOARDS ASSOCIATION

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**BRIEF OF AMICUS CURIAE
NORTH CAROLINA SCHOOL BOARDS ASSOCIATION**

Pursuant to North Carolina Rule of Appellate Procedure 28(i), the North Carolina School Boards Association (“NCSBA”) respectfully submits this Amicus Curiae Brief in support of Defendant-Appellee Pitt County Board of Education.

INTEREST OF AMICUS CURIAE

The NCSBA is the professional organization that represents all local boards of education in North Carolina. Founded in 1937, the NCSBA provides broad-

ranging services and support to local school boards and the public schools that they oversee. Among other things, the NCSBA assists with developing, communicating, and advocating for the perspective of North Carolina local school districts in state and federal courts and before the North Carolina General Assembly and the State Board of Education. The NCSBA, which serves as a unified voice for school districts across the State, enables local school boards to work collectively to impact issues of significance to public education at state and federal levels in multiple fora. Its mission, “as an advocate for public school education, is to provide leadership and services that enable local boards of education to govern effectively.”

SUMMARY OF ARGUMENT

Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution obligate the State of North Carolina to provide for a system of public schools that is designed to provide children with the opportunity to receive a sound, basic education. These clauses direct the executive and legislative branches, which are responsible for collecting and expending funds and developing and implementing programs, to fulfill their constitutional obligations to the citizens of North Carolina. These clauses are not directed at individuals. Plaintiffs’ proposal, that this Court recognize a damages claim for personal injury under the education

clauses of the North Carolina Constitution, will result in uncontrollable, unworkable litigation. Instead of Plaintiffs pursuing the statutory and constitutional processes already available to rectify their harms, this new claim will substitute judges for educators and impose open-ended financial burdens on the public schools and the courts.

ARGUMENT

I. *Leandro* Is the State's Constitutional Obligation, Not an Individual's Tort Claim.

In *Leandro I*, this Court set out the *Leandro* standard, which is concerned with the overall outcomes from the public school system – that is, whether students attending North Carolina public schools are, in fact, offered an opportunity to develop a sufficient ability to read and write; a sufficient fundamental knowledge of mathematics, physical science, geography, history, and political systems; sufficient skills to pursue a vocation or higher education; and the like. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (citing N.C. Const. Art. I, § 15; N.C. Const. Art. IX, § 2). Because the constitutional standard measures the educational opportunities being offered by the State in its public school system, compliance does not depend on whether an individual student actually learned the requisite skills on any given day or year.

In *Leandro II*, this Court determined whether the State met this standard by considering de-identified output data and the inputs offered by the State. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 620-38, 599 S.E.2d 365, 380-91 (2004). The Court did not look at an individual student to determine if the education that a child was in the midst of receiving met the standard. *Id.* In applying the standard to the evidence, this Court emphasized that it was not dictating how much money a local school board must spend, what policies and practices must be put in place, or even what steps must be taken to prevent and address harassment and bullying; rather, the North Carolina Constitution is concerned with whether the State has provided a public school system that offers children the opportunity to attain certain knowledge and skills. *Id.*, 358 N.C. at 638, 599 S.E.2d at 391 (approving of the trial court’s order in part because it “refus[ed] to dictate how existing problems should be approached and resolved”).

Together, the two *Leandro* decisions define the State constitutional guarantee and describe the standards that must be satisfied by the State of North Carolina. It is the responsibility of the executive and legislative branches of the State to fulfill this guarantee. *See Silver v. Halifax Cnty. Bd. of Commissioners*, 371 N.C. 855, 869, 821 S.E.2d 755, 764 (2018) (“The allegations in plaintiffs’ complaint, if true, are precisely the type of harm *Leandro I* and its progeny are

intended to address. In keeping with *Leandro*, however, the duty to remedy these harms rests with the State, and the State alone.”).

Neither *Leandro* decision established an individual constitutional claim for injuries sustained by a particular student in a particular public school setting. Such a claim is akin to a tort or due process claim for individual harms. The constitutional challenge in *Leandro* held the State of North Carolina to account and necessitated a system-wide assessment. The claim presented in the lawsuit at bar is an entirely different proposition, asking the courts to apply those same education clauses, with all of their weight and magnitude, to tort-like harms suffered by an individual child.

II. Individual Remedies for Plaintiffs’ Harms Already Exist, Including Under the North Carolina Constitution.

Despite the assertions of Plaintiffs and amici, Plaintiffs did have multiple avenues of redress for the harms they suffered, obviating the need to create a brand new cause of action. The situation described in this complaint is bullying or harassment by another student at the school. If a child is being harassed or bullied, the Pitt County Board of Education’s policies prohibiting bullying, harassment, and discrimination provide avenues for redress, including an appeal to the Board. *See* Pitt County Board of Education Policy Code: 1720/4015/7225 Discrimination,

Harassment and Bullying Complaint Procedure (attached hereto as Exhibit A).¹

This policy is enacted pursuant to N.C. Gen. Stat. § 115C-407.15, which prohibits bullying and harassment in public schools, and N.C. Gen. Stat. § 115C-407.16, which mandates that local boards of education enact policies to enforce this prohibition. Allegations of any violation of law or board of education policy may be brought before the local board of education and must be heard, and a right of appeal lies in superior court. N.C. Gen. Stat. § 115C-45(c). This process is the state law remedy that has been established to empower parents to bring concerns about bullying or harassment to the attention of educators, and which mandates that those educators investigate and address the conduct in question. If there is a failure to alleviate the hostile environment, local board policy requires the situation be referred to the superintendent, followed by referral to the school board – and then, if there is a violation of law, referral to Superior Court.

The bullying policy is only one of the ways that Plaintiffs can vindicate their rights. Contrary to the Plaintiffs' assertions, Plaintiffs have substantive and procedural due process rights to education that, if infringed, give rise to a cause of action under the state constitution. This basic tenet was true before the *Leandro* decision and remains true today.

¹ This policy was in place at the relevant time period of the Complaint. Pursuant to regulatory changes in Title IX (34 C.F.R. § 106.30, *et. seq.*), the Pitt County Board of Education may revise its policies on harassment. New policies will still be required to provide mechanisms for addressing bullying as required by state law.

It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process. *See* U.S. Constitution, Amendment XIV; North Carolina Constitution, Article I, Section 19; *Givens v. Poe*, 346 F.Supp. 202 (W.D.N.C. 1972). Where that right is threatened with restrictions, the basic fairness of the procedures employed must be evaluated in light of the particular parties, the subject matter, and the circumstances involved. *Grimes v. Nottoway Cnty. School*, 462 F.2d 650, 653 (4th Cir. 1972), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 439, 34 L.Ed.2d 300; *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980).

That is, there has been and still is a way to seek redress if a student is denied equal access to education, through due process claims under the state constitution. *See King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. of Educ.*, 364 N.C. 368, 704 S.E.2d 259 (2010). “In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest.” *Toomer v. Garrett*, 155 N.C.App. 462, 469, 574 S.E.2d 76, 84 (2002). For students in North Carolina, the claim for an unreasonable infringement on the right to education is through the due process jurisprudence – a mechanism that allows for a balance between government and individual interests.

The State and local board have established a thorough set of laws, rules, processes, and procedures to manage individual issues of the sort alleged by Plaintiffs, without requiring each injury that befalls a student in a North Carolina public school classroom to rise to the level of a constitutional violation. And if there is an actual deprivation of a child's fundamental right, the student can file suit if these processes are inadequate. *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788–91, 688 S.E.2d 426, 427–30 (2010).

Additionally, public school boards in North Carolina, by accepting federal funds, agree to comply with the requirements of Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, 34 C.F.R. §§ 106.45, *et. seq.*).² Title IX prohibits sexual harassment in schools and mandates that schools not be deliberately indifferent to student-on-student harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). Plaintiffs rely heavily on Title IX jurisprudence in making the case that the North Carolina Constitution must recognize their claim, though Plaintiffs did not bring a Title IX claim. Just as this Court need not create a new constitutional claim when constitutional remedies already exist, this Court

² In addition to Title IX, other federal laws also provide remedies. For hostile environment claims based on disability, *see* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et. seq.*; Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, 34 C.F.R. § 104.1, *et. seq.*; *S.B. ex rel. A.L. v. Bd. of Educ. of Harford County*, 819 F.3d 69, 75–77 (4th Cir. 2016) (discussing standard for school liability for disability-based bullying of student under Section 504). North Carolina and federal statutes also provide a remedy for students who qualify for exceptional children services – including students with autism – who claim that they were deprived of a free and appropriate public education; those claims are asserted through a contested case proceeding and heard on an expedited calendar in order to correct any educational deprivations quickly. *See* Education of Children with Disabilities, Article 9 of Chapter 115C of the North Carolina General Statutes; Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et. seq.*

likewise need not adopt wholesale federal jurisprudence into our state's education clauses as Plaintiffs urge. Whether a school was deliberately indifferent to student-to-student harassment is indeed an entirely different question than whether the State has offered a sound, basic education to all children.³

To be clear, NCSBA emphatically believes that children in the State's public schools must be protected from harm. These school-level processes exist in order to do just that, and the existing statutory procedures and constitutional mechanisms enable children to hold school systems accountable when that does not happen. But to accuse a school board of violating the constitutional standard to provide a sound, basic education to the children of its community each time a child is regrettably injured is not what the framers of the Constitution or the authors of the *Leandro* opinions intended.

III. An Individual Remedy Under *Leandro* Is Entirely Unworkable.

The proposed cause of action would proceed not through the protections and processes established by the state and local elected bodies, as described above, but

³ Many other courts have refused to allow plaintiffs to cloak a tort-like claim for educational malpractice or personal injury in the garb of another statutory or constitutional provision – recognizing that the creation of causes of action and the regulation of the school setting is outside the province of the courts. *See Thomas v. Olshausen*, 2008 U.S. Dist. LEXIS 48667, 2008 WL 2468738 at *3 (W.D.N.C. June 16, 2008), *aff'd*, 2009 U.S. App. LEXIS 5005 (4th Cir. N.C. March 12, 2009); *Wright v. Carroll Cty. Bd. of Educ.*, No. 11-CV-3103, 2013 WL 4525309, at *11 (D. Md. Aug. 26, 2013) rejecting tort claims cloaked as violations of the Individuals with Disabilities Education Act – “plaintiffs’ claims are ‘indistinguishable from educational malpractice’ . . . In sum, they allege that the [Defendants] failed to train teachers and staff as to bullying, failed to protect R.W. from bullying, and, did not afford R.W. an appropriate IEP or FAPE, thereby causing tort-like injuries to R.W. and his parents.”); *Alligood v. Cty. of Erie*, 299 A.D.2d 840, 840, 749 N.Y.S.2d 349, 350 (2002) (rejecting breach of contract and breach of fiduciary duty claims that were really educational malpractice claims).

instead straight to the judiciary. Recognition of this claim means that the parents of any child who is bothered by an educational decision can walk straight into court seeking money damages, without even giving the Board of Education (let alone the teachers and administrators) an opportunity to determine what is happening at school.

This new constitutional claim would require courts to become, effectively, educational “experts,” determining for each student what amounted to a constitutionally appropriate education based on the day-to-day implementation of policies and the many variables that affect each and every action taken in each school by each educator – in other words, this is an educational malpractice claim. Now the elementary school teacher must be assessed by the judge to determine – did her failure to intervene in that bullying situation deprive the child of a sound, basic education? Or, when a parent is upset about a particular grade – did that teacher’s decision deprive the child of a constitutionally adequate education?

As other state courts have observed, developing an appropriate standard of care and estimating damages for education lost is virtually impossible, and when there are so many different theories on how best to teach or even address bullying, the standard of care is not something that a court can define. *Gurbani v. Johns Hopkins Health Sys. Corp.*, 237 Md. App. 261, 292, 185 A.3d 760, 778 (2018) (“Citing an extensive body of out-of-state authority, the Court of Appeals [in

Hunter v. Board of Education of Montgomery County, 292 Md. 481 (1982)] observed that so-called ‘educational malpractice’ claims had been unanimously rejected in other jurisdictions based on considerations of public policy.”) (internal citations and quotations omitted). State courts across the country have concurred with this view, rejecting claims that require judges and juries to step into the shoes of educators and determine what was and was not the appropriate way to work with a student. *Page v. Klein Tools, Inc.*, 461 Mich. 703, 705, 610 N.W.2d 900, 900 (2000) (“We hold that plaintiff’s allegations amount to a claim of ‘educational malpractice,’ which we decline to recognize.”); *Doe v. Bd. of Educ. of Montgomery Cnty.*, 295 Md. 67, 74–75 (1982); *Peter W. v. San Francisco Unified School Dist.*, 60 Cal App. 3d 814, 825–26 (1976); *Donohue v. Copiague UFSD*, 47 N.Y.2d 440, 444–46 (1979); *Telluselle v. Hawaii Pac. Univ.*, No. CIV. 11-00343 BMK, 2012 WL 3800213, at *2 (D. Haw. Aug. 31, 2012), *aff’d*, 528 F. App’x 739 (9th Cir. 2013); *Henderson v. Engstrom*, No. CIV 10-4116-RAL, 2012 WL 4009108, at *13 (D.S.D. Sept. 12, 2012).

IV. The Expense of This New Constitutional Claim Will Thwart the State’s Efforts to Meet Its Obligations Under *Leandro*.

Plaintiffs’ attempt to claim that any loss suffered as a result of a student bullying incident amounted to a violation of constitutional magnitude so as to eviscerate immunity for the governmental body ignores years of jurisprudence wherein courts have refused to open schools up to such extensive legal and

financial exposure. What is more, the financial implications of subjecting school boards to individual claims under *Leandro* would be ruinous. School boards operate on an annual budget established by the Legislature and supplemented by the County. They do not have the ability to raise funds nor do they have any independent source of revenue. With very limited funds generally budgeted and restricted for distinct purposes, boards are not financially equipped to litigate such open-ended claims.

Similarly, the Courts do not have the resources to become mired in disputes between parents and educators. The morass of new litigation will overwhelm the courts at a time when judicial resources are already strained. Public funds need not be spent on such lawsuits when there are locally elected boards of education that already make difficult educational decisions for the children in their communities.

At this time in particular, those financial resources are further constrained at school boards seek to provide the connectivity and technological devices necessary for children to engage in remote learning during a pandemic, provide additional supports and tutoring to remediate learning losses that have occurred, and rush to find additional facilities and transportation so that teachers and students can stay socially distanced. While hopefully these additional costs will not become permanent fixtures of the school budgets, imposing extensive financial obligations on school boards at this time will jeopardize the ability of these school boards to do

the many things they need to do to continue to educate children. As this Court held in *Leandro*, the amount of inputs are inadequate already. Redirecting these limited dollars to pay for the grievances of individual students who disagree with the decisions of educators would leave fewer resources for school boards to carry out the constitutional mandate to provide a sound, basic education to all of North Carolina's children.

CONCLUSION

The North Carolina Constitution guarantees that the State will provide a sound, basic education; this obligation of our state is vital – not just to the children who attend public schools but to all citizens of our state. This obligation however cannot and should not be measured by the circumstances of one individual student. The NCSBA urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted, this the 5th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Amicus Curiae North Carolina School Boards Association certifies that the foregoing brief, which is prepared using a proportionally-spaced font, is less than 3,750 words (excluding cover, captions, indexes, tables of authorities, certificates of service, this certificate of compliance, counsel's signature block, and appendixes) as reported by the word-processing software used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **Brief of Amicus Curiae North Carolina School Boards Association** via United States mail, postage prepaid, addressed to the following parties:

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This the 5th day of October, 2020.

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EXHIBIT A

DISCRIMINATION, HARASSMENT, AND BULLYING COMPLAINT PROCEDURE

Policy Code: 1720/4015/7225

The board takes seriously all complaints of unlawful discrimination, harassment, and bullying. The process provided in this policy is designed for those individuals who believe that they may have been discriminated against, bullied, or harassed in violation of policy 1710/4021/7230, Prohibition Against Discrimination, Harassment, and Bullying, or policy 1730/4022/7231, Nondiscrimination on the Basis of Disabilities. Individuals who have witnessed or who have reliable information that another person has been subject to unlawful discrimination, harassment, or bullying also should use the process in this policy to report such violations to one of the school system officials listed in subsection C.1. In addition, the process in this policy should be used to report a violation of policy 4040/7310, Staff-Student Relations.

Any report made through the process established in this policy may be made anonymously, except mandatory employee reports. The school system will ensure that institutional interests do not interfere with the impartiality of the process for investigating and resolving complaints established in this policy.

The process set forth in this policy does not apply to allegations regarding or related to the identification, evaluation, educational placement, or free appropriate public education of a student under Section 504 or the IDEA. Such allegations may be raised through the procedures established under policy 1730/4022/7231, Nondiscrimination on the Basis of Disabilities (for Section 504 complaints), or in accordance with the procedures described in the *Parents' Rights Handbook* published by the NC Department of Public Instruction (for IDEA complaints).

A. DEFINITIONS

1. Alleged Perpetrator

The alleged perpetrator is the individual alleged to have discriminated against, harassed, or bullied the complainant.

2. Complaint

A complaint is an oral or written notification made by a person who believes he or she is the victim of unlawful discrimination, harassment, or bullying.

3. Complainant

The complainant is the individual complaining of being discriminated against, harassed, or bullied.

4. Days

Days are the working days, exclusive of Saturdays, Sundays, vacation days, or

holidays, as set forth in the school calendar. In counting days, the first day will be the first full working day following receipt of the complaint. When a complaint is submitted on or after May 1, time limits will consist of all weekdays (Monday–Friday) so that the matter may be resolved before the close of the school term or as soon thereafter as possible.

5. Investigative Report

The investigative report is a written account of the findings of the investigation conducted in response to a complaint.

6. Investigator

The investigator is the school official responsible for investigating and responding to the complaint. The investigator must be a person free of actual or reasonably perceived conflicts of interest and biases for or against any party.

7. Report

A report is an oral or written notification that an individual, other than the reporter, is a suspected perpetrator or victim of unlawful discrimination, harassment, or bullying.

B. REPORTING BY EMPLOYEES OR OTHER THIRD PARTIES

1. Mandatory Reporting by School Employees

Any employee who witnessed or who has reliable information or reason to believe that a student or other individual may have been discriminated against, harassed, or bullied in violation of policy 1710/4021/7230 or policy 1730/4022/7231 must report the offense immediately to an appropriate individual designated in subsection C.1, below. Suspected violations of policy 4040/7310, Staff-Student Relations, should be reported directly to the superintendent or designee. An employee who does not promptly report possible discrimination, harassment, or bullying or violations of policy 4040/7310 shall be subject to disciplinary action.

2. Reporting by Other Third Parties

All members of the school community including students, parents, volunteers, and visitors are also strongly encouraged to report any act that may constitute an incident of discrimination, harassment, or bullying.

3. Anonymous Reporting

Reports of discrimination, harassment, or bullying may be made anonymously (except mandatory reports by school employees) but formal disciplinary action may

not be taken solely on the basis of an anonymous report.

4. Investigation of Reports

School officials shall sufficiently investigate all reports of discrimination, harassment, or bullying, even if the alleged victim does not file a complaint or seek action by school officials, to understand what occurred and to determine whether further action under this policy or otherwise is necessary. School officials shall take such action as appropriate under the circumstances, regardless of the alleged victim's willingness to cooperate. At the option of the alleged victim, the report may be treated as a complaint by the alleged victim under this policy.

C. COMPLAINTS BROUGHT BY ALLEGED VICTIMS OF DISCRIMINATION, HARASSMENT, OR BULLYING

1. Filing a Complaint

Any individual who believes that he or she has been discriminated against, harassed, or bullied is strongly encouraged to file a complaint orally or in writing to any of the following individuals:

- a. the principal or assistant principal of the school at which either the alleged perpetrator or alleged victim attends or is employed;
- b. an immediate supervisor if the individual making the complaint is an employee;
- c. the assistant superintendent of human resources if the alleged perpetrator or alleged victim is an employee of the school system (or the superintendent if the assistant superintendent of human resources is the alleged perpetrator);
- d. the Title IX coordinator for claims of sex discrimination or sexual harassment (see policy 1710/4021/7230 for contact information);
- e. the Section 504 coordinator or the ADA coordinator for claims of discrimination on the basis of a disability (see policy 1710/4021/7230 for contact information); or
- f. for claims of other forms of prohibited discrimination, the applicable civil rights coordinator as established in policy 1710/4021/7230.

2. Time Period for Filing a Complaint

A complaint should be filed as soon as possible but no later than 30 days after disclosure or discovery of the facts giving rise to the complaint. Complaints submitted after the 30-day period may be investigated; however, individuals should

recognize that delays in reporting may significantly impair the ability of school officials to investigate and respond to such complaints.

3. Informal Resolution

The board acknowledges that many complaints may be addressed informally without a full investigation and/or hearing, through such methods as conferences or mediation. The board encourages the use of informal procedures such as mediation to the extent possible in appropriate cases and when all parties voluntarily agree after receiving a full disclosure of the allegations and the option for formal resolution; however, mediation or other informal procedures will not be used to resolve complaints alleging sexual assault or sexual violence, complaints by a student of sexual harassment perpetrated by an employee, or when otherwise deemed inappropriate by the investigator or applicable civil rights coordinator.

If an informal process is used, the principal or other designated personnel must (1) notify the complainant that he or she has the option to end the informal process and begin formal procedures at any time and (2) make a copy of this policy and other relevant policies available to the complainant. Any informal process should be completed within a reasonable period of time, not to exceed 30 days unless special circumstances necessitate more time. If informal procedures fail to resolve the matter in a reasonable period of time or are inappropriate, or if the complainant requests formal procedures, the complaints will be investigated promptly, impartially, and thoroughly according to the procedures outlined in the remainder of this policy.

4. Other Resources

Individuals may also contact the Office for Civil Rights at the U.S. Department of Education:

4000 Maryland Ave, SW
Washington, DC 20202-1475
Telephone: 202-453-6020 TDD: 800-877-8339
FAX: 202-453-6021 Email: OCR.DC@ed.gov

D. PROCESS FOR ADDRESSING COMPLAINTS OF ALLEGED INCIDENTS OF DISCRIMINATION, HARASSMENT, OR BULLYING

1. Initiating the Investigation

a. Whoever receives a complaint of discrimination, harassment, or bullying pursuant to subsection C.1. shall immediately notify the appropriate investigator who shall respond to the complaint and investigate. The investigator of a complaint is ordinarily determined as follows; however, the superintendent may determine that individual circumstances warrant the

assignment of a different investigator.

- 1) If the alleged incident occurred under the jurisdiction of the principal, the investigator is the principal or designee, unless the alleged perpetrator is the principal, the assistant superintendent of human resources, the superintendent, or a member of the board. If the alleged perpetrator is any other employee, the principal or designee shall conduct the investigation in consultation with the assistant superintendent of human resources or designee.
 - 2) If the alleged perpetrator is the principal, the assistant superintendent of human resources or designee is the investigator.
 - 3) If the alleged incident occurred outside of the jurisdiction of a principal (for example, at the central office), the assistant superintendent of human resources or designee is the investigator unless the alleged perpetrator is the assistant superintendent of human resources, the superintendent, or a member of the board.
 - 4) If the alleged perpetrator is the assistant superintendent of human resources, the superintendent or designee is the investigator.
 - 5) If the alleged perpetrator is the superintendent, the board attorney is the investigator. (In such cases, whoever receives a complaint of discrimination, harassment, or bullying shall immediately notify the assistant superintendent of human resources who shall immediately notify the board chair. The board chair shall direct the board attorney to respond to the complaint and investigate.)
 - 6) If the alleged perpetrator is a member of the board, the board attorney is the investigator. (In such cases, whoever receives a complaint of discrimination, harassment, or bullying shall immediately notify the superintendent who shall direct the board attorney to respond to the complaint and investigate. Unless the board chair is the alleged perpetrator, the superintendent shall also notify the board chair of the complaint.)
- b. As applicable, the investigator shall immediately notify the Title IX, Section 504, ADA, or other relevant coordinator of the complaint, and, as appropriate, may designate the coordinator to conduct or assist with the investigation.
- c. The applicable coordinator and the investigator shall jointly assess the need for interim measures of support for either party and, as necessary, shall implement appropriate measures in a timely manner and monitor the effectiveness of the measures during the pendency of the investigation. Interim measures that restrict the ability of either party to discuss the

investigation (“gag orders”) may not be used.

- d. The investigator shall explain the process of the investigation to the complainant and inquire as to whether the complainant would like to suggest a course of corrective action.
- e. Written documentation of all reports and complaints, as well as the school system’s response, must be maintained in accordance with policy 1710/4021/7230.
- f. Failure to investigate and/or address claims of discrimination, harassment, or bullying shall result in disciplinary action.

2. Conducting the Investigation

The investigator is responsible for determining whether the alleged act(s) constitutes a violation of policy 1710/4021/7230, policy 1730/4022/7231, or policy 4040/7310. In so doing, the investigator shall impartially, promptly, and thoroughly investigate the complaint. In complaints alleging sexual misconduct between students, each party will receive notice and access to information consistent with guidance from the U.S. Department of Education, Office for Civil Rights.

- a. The investigator shall interview all individuals who may have relevant information, including (1) the complainant; (2) the alleged perpetrator(s); (3) individuals identified as witnesses by the complainant or alleged perpetrator(s); and (4) any other individuals, including other possible victims, who may have relevant information. The investigation will include a review of all evidence presented by the complainant or alleged perpetrator.
- b. If the investigator, after receipt of the complaint, an interview with the complainant, and consultation with the board attorney, determines that the allegations submitted, even if factual, do not constitute discrimination, harassment, or bullying as defined in policy 1710/4021/7230 or policy 1730/4022/7231, school officials will address the matter outside the scope of this policy. Information regarding the investigator’s determination and the process for addressing the complaint will be provided to the complainant.
- c. The complaint and investigation will be kept confidential to the extent possible. Information may be shared only with individuals who need the information in order to investigate and address the complaint appropriately and those with a legal right to access the information. Any requests by the complainant for further confidentiality will be evaluated within the context of the legal responsibilities of the school system. Any complaints withdrawn to protect confidentiality must be recorded in accordance with policy 1710/4021/7230.

- d. The investigator shall review the factual information gathered through the investigation to determine whether, based on a preponderance of the evidence, the alleged conduct constitutes discrimination, harassment, or bullying, giving consideration to all factual information, the context in which the alleged incidents occurred, the age, and maturity of the complainant and alleged perpetrator(s), and any other relevant circumstances. The investigator shall submit a written investigative report to the superintendent and, as applicable, to the Title IX, Section 504, ADA, or other coordinator.
3. Notice to Complainant and Alleged Perpetrator
- a. The investigator shall provide written notification to the complainant of the results of the investigation within 15 days of receiving the complaint, unless additional time is necessary to conduct an impartial, thorough investigation. The investigator shall specify whether the complaint was substantiated and, if so, shall also specify:
 - 1) reasonable, timely, age-appropriate, corrective action intended to end the discrimination, harassment, or bullying, and prevent it from recurring;
 - 2) as needed, reasonable steps to address the effects of the discrimination, harassment, or bullying on the complainant; and
 - 3) as needed, reasonable steps to protect the complainant from retaliation as a result of communicating the complaint.
 - b. Information regarding specific disciplinary action imposed on the alleged perpetrator(s) will not be given to the complainant unless the information relates directly to the complainant (e.g., an order requiring the perpetrator not to have contact with the complainant).
 - c. If the investigator determines that the complaint was substantiated, the perpetrator(s) shall be subject to discipline or other corrective steps, as described in policy 1710/4021/7230. If the corrective steps involve actions outside the scope of the investigator's authority, the superintendent will be notified so that responsibility for taking the corrective steps may be delegated to the appropriate individual.
 - d. Each alleged perpetrator will be provided with a written summary of the results of the investigation in regard to whether the complaint was substantiated, whether the alleged perpetrator violated relevant law or board policies by his or her actions, and what, if any, disciplinary actions or consequences will be imposed upon the perpetrator in accordance with board policy. The perpetrator may appeal any disciplinary action or

consequence in accordance with board policy and law. However, an appeal by the perpetrator of disciplinary action does not preclude school officials from taking appropriate action to address the discrimination, harassment, or bullying.

4. Appeal

- a. If the complainant is dissatisfied with the results of the investigation, he or she may appeal the decision to the superintendent (unless the alleged perpetrator is the assistant superintendent of human resources or the superintendent, in which cases the complainant may appeal directly to the board in accordance with the procedure described in subsection D.4.b below). The appeal must be submitted in writing within five days of receiving the notice of the results of the investigation. The superintendent may review the documents, conduct any further investigation necessary, or take any other steps the superintendent determines to be appropriate in order to respond to the complaint. The superintendent shall provide a written response within 10 days after receiving the appeal, unless further investigation is needed.
- b. If the complainant is dissatisfied with the superintendent's response, he or she may appeal the decision to the board within five days of receiving the superintendent's response. The board will review the documents, direct that further investigation be conducted if necessary, and take any other steps that the board determines to be appropriate in order to respond to the complaint. Upon request of the complainant, the board will hold a hearing pursuant to policy 2500, Hearings Before the Board, within 30 days of receipt of the request. The superintendent will provide written notice of the board's decision within 10 days of the hearing, unless further investigation is necessary or the hearing necessitates that more time be taken to respond.

E. TIMELINESS OF PROCESS

The school system will make a good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with a prompt and equitable resolution. The number of days indicated at each step of the process should be considered a maximum. Every effort should be made to expedite the process. The school system reserves the right to extend any deadline contained in this policy for good cause with written notice to the parties of the delay and the reason for the delay.

If any school official charged with investigating the complaint or reviewing the investigation fails at any step in the process to communicate a decision within the specified time limit, the complainant will be entitled to appeal the complaint to the next step unless the official has notified the complainant of the delay and the reason for the delay, such as the complexity of the investigation, review, or report. The school official shall make reasonable efforts to keep the complainant apprised of progress being made during any

period of delay. Delays that interfere with the exercise of any legal rights are not permitted.

Failure by the complainant at any step in the process to appeal a complaint to the next step within the specified time limit will be considered acceptance of the decision at that step, unless the complainant has notified the investigator of a delay and the reason for the delay and the investigator has consented in writing to the delay.

F. GENERAL REQUIREMENTS

1. No reprisals or retaliation of any kind will be taken by the board or by an employee of the school system against the complainant or other individual on account of his or her filing a complaint or report or participating in an investigation of a complaint or report filed and decided pursuant to this policy, unless the person knew or had reason to believe that the complaint or report was false or knowingly provided false information.
2. All meetings and hearings conducted pursuant to this policy will be private.
3. The board and school system officials will consider requests to hear complaints from a group, but the board and officials have the discretion to hear and respond to complainants individually.
4. The complainant may be represented by an advocate, such as an attorney, at any meeting with school system officials. Should the complainant choose to be represented by an attorney, the complainant should notify school officials in advance so that an attorney for the school system may also be present.
5. Should, in the judgment of the superintendent or designee, the investigation or processing of a complaint require that an employee be absent from regular work assignments, such absences shall be excused without loss of pay or benefits. This shall not prevent the superintendent or designee from suspending the alleged perpetrator without pay during the course of the investigation.

G. RECORDS

Records will be maintained as required by policy 1710/4021/7230.

Legal References: Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, 34 C.F.R. pt. 110; Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, 28 C.F.R. pt. 35; Family Educational Rights and Privacy Act, 20 U.S.C. 1232g; Rehabilitation Act of 1973, 29 U.S.C. 705(20), 794, 34 C.F.R. pt. 104; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, 34 C.F.R. pt. 100; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 29 C.F.R. pt. 1604; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, 34 C.F.R. pt. 106; Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 C.F.R. pt. 108; *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, U.S. Department of Education, Office for Civil Rights (1994); *Revised Sexual Harassment Guidance*:

Harassment of Students by School Employees, Other Students, or Third Parties, U.S. Department of Education, Office for Civil Rights (2001); *Notice of Non-Discrimination*, U.S. Department of Education, Office for Civil Rights (2010); *Dear Colleague Letter (Bullying)*, U.S. Department of Education, Office for Civil Rights (2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; *Dear Colleague Letter (Sexual Harassment)*, U.S. Department of Education, Office for Civil Rights (2006), available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; *Q&A on Campus Sexual Misconduct*, U.S. Department of Education, Office for Civil Rights (2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>; *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); G.S. 115C-407.15 through -407.18

Cross References: Prohibition Against Discrimination, Harassment, and Bullying (policy 1710/4021/7230), Nondiscrimination on the Basis of Disabilities (policy 1730/4022/7231), Student and Parent Grievance Procedure (policy 1740/4010), Hearings Before the Board (policy 2500), Staff-Student Relations (policy 4040/7310), Assaults, Threats, and Harassment (policy 4331)

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