

July 6, 2021

Superintendent Robert W. Blair
North Lyon County USD 251
614 Main St.
Americus, KS 66835
Via email: blairb@usd251.org



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Re: North Lyon County USD 251 Title IX Violations

Dear Superintendent Blair:

We write concerning our client, Izzy Dieker, who recently graduated from North Lyon County Elementary School, a USD 251 school. In January 2021, two USD 251 employees, Principal Corey Wiltz and Bus Driver Kristi Gadino, discriminated against Izzy because she is a lesbian, in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Fourteenth Amendment. Moreover, these employees took action against Izzy for exercising her First Amendment rights to free speech precisely because of the content of her speech, thereby engaging in impermissible retaliation.

An independent investigator appointed by USD 251 found that these employees violated Title IX, and that finding was upheld on appeal. We urge USD 251 to take action in light of these findings to avoid prolonged litigation. USD 251 must rectify the wrongs Izzy experienced and ensure that its policies, practices, and training will protect all lesbian, gay, bisexual, transgender, and gender non-conforming students in USD 251 from discrimination and harassment.

I. Factual Background

Izzy Dieker is a fourteen-year-old student in USD 251 who recently graduated from North Lyons County Elementary School (“the school”). On January 27, 2021, while still a student at the school, Izzy was riding the bus home from school.¹ The atmosphere on the bus was chaotic; students leaned in and out of the walkway and many students were using inappropriate language.² Bus driver Kristi Gadino did not address or reprimand any of the students for this language, even though District policies expressly prohibited students from cursing on the bus. Izzy then stated, “I’m a lesbian.” The bus driver immediately pulled over, walked to the back of the bus, and reprimanded Izzy, telling her: “Watch your

¹ The following facts are described in the Initial Investigator Report and the Decision Regarding Responsibility prepared by Sue Givens, Kansas Association of School Boards Field Services Specialist, and Angela Stallbaumer, Assistant Executive Director for Legal Services for the Kansas Association of School Boards, respectively. We have also confirmed the facts as stated herein with our client.

² According to the Initial Investigator Report and the Decision Regarding Responsibility, in the bus video from that day, vulgar phrases such as “fucking,” “what the fuck,” “fuck you,” “touch my dick,” and “gay-assed mother fucker” are audible. None of these were said by Izzy.



language.” Ms. Gadino then told Izzy to move to the front of the bus. Ms. Gadino again chastised Izzy for the content of her speech, stating, “I’ve got little kids up here. Do you think these little kindergarteners need to know what that word means?”

Following that bus ride, Ms. Gadino wrote Izzy up for the following infractions: “Disobeying Driver,” “Unacceptable Language,” and “Rude, Discourteous, Noisy or Annoying.” In particular, Ms. Gadino accused Izzy of cursing. When Izzy arrived home, she told her parents what happened. Later that evening, Principal Corey Wiltz informed Izzy’s parents that Izzy would be suspended from the bus for several days for cursing and failing to follow the directions from the driver.

Izzy maintained that she did not curse and was compliant with the bus driver’s demands. During a meeting the next day with Principal Wiltz, Izzy asked the Principal to review video footage of the incident. Principal Wiltz stated that he would review the video. Later, after watching the video, Principal Wiltz concluded that “for the most part, she [Izzy] did comply with the driver.” The video also revealed that Izzy did not curse, as Ms. Gadino originally reported, but rather stated “I’m a lesbian.”

Principal Wiltz met with Izzy again and informed her that even though she had been compliant and had not cursed, she would still be suspended from the bus because it was inappropriate to say that she is a lesbian. Later that day, a teacher, Ms. Dice, went with Izzy to meet with Principal Wiltz. Ms. Dice asked Principal Wiltz, “If she had said, ‘I am straight’ would we be here?” Principal Wiltz responded, “No, because it’s not inappropriate.” This statement confirmed that Principal Wiltz found Izzy’s description of herself as a lesbian to be “inappropriate.”

Ms. Dice then reached out to Superintendent Robert Blair. In an email, Ms. Dice stated that in four years at the district, she had never received professional development on LGBTQI+ issues or diversity training. She requested on behalf of herself and fellow colleagues a meeting with Superintendent Blair to discuss the District’s Discrimination Policy, LGBTQI+ Student Rights, Diversity, and Professional Development. It is unclear from the record whether or not Superintendent Blair substantively responded to this request and put the desired training into place.

On February 5, 2021, Superintendent Blair reached out to Izzy’s parents to inform them of the right to a formal complaint investigation under Title IX. Izzy’s parents filed a complaint on February 12, 2021. The complaint was investigated by Sue Givens, Investigator, Kansas Association of School Boards Field Services Specialist.

Following a full investigation, on May 6th, 2021, a Decision Maker with the Kansas Association of School Boards concluded that Principal Wiltz and Bus



Driver Gadino discriminated against Izzy on the basis of sex, in violation of Title IX. The Decision Maker further stated that “the actions of [Principal Wiltz and Bus Driver Gadino] reflected that they fundamentally disapproved of [Izzy’s] sexual-orientation and, quite possibly, her as well.” The Decision Maker concluded, “I do believe training of staff members . . . is warranted under these circumstances.”

Principal Wiltz appealed this decision on May 26, 2021. On June 23, 2021, the appellate adjudicator issued his determination that upheld the Decision Maker’s ruling.

Still, Izzy and her family have not heard anything from USD 251 about this incident, or its plans following the Title IX ruling.³

II. Legal Analysis

A. Title IX

Title IX expressly prohibits discrimination “on the basis of sex” in “any education program or activity receiving Federal financial assistance.” Title IX, 20 U.S.C. § 1681 *et seq.* Under recent guidance from the U.S. Department of Education, discrimination on the basis of sexual orientation is discrimination on the basis of sex and is thus barred by Title IX.⁴

Title IX claimants alleging school discrimination must show: (1) they were excluded from participation in an education program on the basis of sex; (2) the education program was receiving federal financial assistance at the time; and (3) the improper discrimination caused the claimant harm. *See Grim v. Gloucester Cnty. School Board*, 972 F.3d 586 (4th Cir. 2020) (cert. denied June 30, 2021); *see also C.T. v. Liberal School Dist.*, 562 F.Supp.2d 1324, 1333 (D. Kansas 2008). Liability under Title IX can also attach, and warrant damages, when “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination . . . and fails adequately to respond.” *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1999 (1998).

The elements of a Title IX violation are clearly met. Ms. Gadino and Principal Wiltz’s actions singled Izzy out based on her sexual orientation: they did not suspend any of the other children riding the bus on January 27, 2021, even though video of the incident shows several others—and *not* Izzy—saying loud,

³ We understand that Mr. Wiltz is no longer employed by North Lyons Elementary School, and that he lost his contract for employment with USD 253 Emporia High School. We are not sure of the employment status of Ms. Gadino at this time. Still, dismissal of particular employees does not absolve the district of its obligations to ensure these sorts of violations do not happen again.

⁴ *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (U.S. Office for Civil Rights, U.S. Dep’t of Educ. June 22, 2021).



vulgar remarks. Suspending Izzy from the bus constituted exclusion from participation in an education program on the basis of her sexual orientation, *i.e.*, on the basis of her sex. USD 251 also receives federal financial assistance. Finally, Izzy was deeply harmed by this discrimination—she felt embarrassed, ashamed, and humiliated.⁵ She was fearful to continue riding Ms. Gadino’s bus given the animus Ms. Gadino displayed towards Izzy because of her sexual orientation. Izzy’s parents, Dan Dieker and Tasha Cooper, drove Izzy back and forth to school for a period of two weeks to help Izzy avoid experiencing any further shame and humiliation.

That Principal Wiltz and Ms. Gadino violated Title IX should be beyond dispute: an independent investigator made this finding already, and it was upheld on appeal. However, additional legal claims are present, as set forth below.

B. Fourteenth Amendment Equal Protection Clause

The District may also be liable for violations of the Equal Protection Clause of the Fourteenth Amendment and/or Section 1 of the Kansas Bill of Rights. The Equal Protection Clause states that “[n]o state shall . . . deny to any person within its jurisdiction equal protection of the laws.” U.S. Const. Amend. XIV § 1. Pursuant to that Clause, “all persons similarly situated should be treated alike.” *Free the Nipple-Fort Collins v. Cty of Ft. Collins, Colo.*, 916 F.3d 792, 798 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). Based on recent Supreme Court precedent and decisions in other Circuits, it is likely that discriminatory government actions taken against individuals on the basis of their sexual orientation will be subject to heightened, or intermediate, scrutiny. *See generally Baskin v. Bogan*, 766 F.3d 648, 661 (7th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 479-84 (9th Cir. 2014); *see also Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) (“[S]exual orientation is both a normal expression of human sexuality and immutable.”); *Bostock v. Clayton Cnty, Georgia*, 140 S. Ct. 1731, 1741 (2020).⁶ But even under a rational basis standard, Ms. Gadino and Principal Wiltz’s actions violated the law, in that they amounted to discrimination against Izzy specifically because she is a lesbian. *See Romer v. Evans* 517, U.S. 620, 625 (1996); *West v. Derby Unifed Sch, Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000).

⁵ A 2019 study found that LGBTQ+ students who experienced discrimination were almost three times as likely to have missed school, they often had lower grade point averages, were less likely to pursue post-secondary education, and had lower self-esteem and higher levels of depression. It concluded that discrimination led to lower educational aspirations, lower grades, and higher absenteeism. Kosciw et al, *The 2019 National School Climate Survey*, The Gay, Lesbian & Straight Education Network, 2020, at 45.

⁶ Similarly, Section 1 of the Kansas Bill of Rights is give “much the same effect” as the Fourteenth Amendment’s Equal Protection Clause. *See State ex rel. Tomasic v. Kansas City*, 237 Kan. 572, 583 (1985). Principal Wiltz and Ms. Gadino’s conduct is therefore actionable under that standard as well.



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Principal Wiltz and Ms. Gadino punished Izzy for simply stating a fact about her sexual orientation. Izzy’s statements did not violate any provision in the student handbook or other school rules. There was no rational basis for disciplining Izzy for her statement, especially given how many other students were seen on the video of the incident cursing, yelling, and otherwise engaging in rule violations. Izzy was clearly singled out for discipline because she is a lesbian and stated so, which offended Ms. Gadino and Principal Wiltz only because of their animus regarding Izzy’s sexual orientation. This violates the Fourteenth Amendment.

C. First Amendment

While students at school do not enjoy the same access to their First Amendment rights as adults do, students do not “shed their constitutional rights to freedom of speech . . . at the school house gate.” *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, No. 20-255, 2021 WL 2557069, at *4 (U.S. June 23, 2021) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969)). Schools have a strong interest in protecting student speech, because “[o]ur representative democracy only works if we protect the ‘marketplace of ideas.’” *See Mahanoy*, 2021 WL 2557069 at *4. Notably, courts in the Tenth Circuit have consistently upheld that speaking of homosexual conduct is protected speech. *See, e.g., Nat’l Gay Task Force*, 729 F.2d at 1274. *See also Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88, 92 (W.D. Okla. 1983) (“[H]omosexual expression is protected.”).

The Supreme Court recognizes three scenarios where schools may regulate student speech: (1) indecent, lewd, or vulgar speech on school grounds, (2) speech that promotes “illegal drug use” on a class trip, and (3) speech that may be reasonably perceived as “bearing the imprimatur of the school”, such as published speech in a school-sponsored newspaper. *See Mahanoy*, 2021 WL 2557069, at *4 (U.S. June 23, 2021) (collecting cases). If student speech does not fall into these three buckets, it is governed by the *Tinker* standard. *See, e.g., Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 36 (10th Cir. 2013). The *Tinker* standard allows schools to regulate speech which otherwise would have been protected only if the speech materially disrupts the work or rights of others or would substantially interfere with appropriate discipline. *See id.* (citing *Tinker*, 393 U.S. at 505–06, 509, 89 S.Ct. 733). While a disruption does not need to actually materialize, school officials must have reasonably forecasted a disruption; officials may not restrict speech out of a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* (citing *Tinker*, at 508–09, 89 S.Ct. 733). For a forecast of disruption to be reasonable, it must have been based on a “concrete threat” of substantial disruption. *Id.* There have been multiple federal district courts that have upheld the rights of students to “come out”. *See Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cty., Fla.*, 567 F. Supp. 2d 1359, 1369 (N.D. Fla. 2008) (collecting cases).



Nothing about Izzy’s declaration that she is a lesbian was lewd or disruptive. Any “disruption” occurring on the bus was already in progress when Izzy engaged in constitutionally protected speech, and there is no evidence that Izzy’s statement contributed to or exacerbated the already occurring offensive and lewd speech of other students, none of whom were disciplined. USD 251 employees simply did not approve of Izzy’s sexual orientation and found it offensive. But Principal Wiltz and Ms. Gadino’s personal feelings about homosexuality are irrelevant, and their conduct clearly punished Izzy for engaging in constitutionally protected speech, in violation of the First Amendment.

Indeed, Principal Wiltz’s conduct could be construed as an act of retaliation against Izzy for engaging in her constitutionally protected right to free speech. The First Amendment prohibits government officials from retaliating against an individual for “speaking out.” *See Holmes*, 830 F.3d at 1162 (citing *Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006)) (to prevail on a First Amendment retaliation claim, the student must show “(1) that she was engaged in a constitutionally protected activity, (2) that defendant’s actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) that defendant’s action was substantially motivated as a response to her exercise of her First Amendment speech rights.”). Based on Principal Wiltz’s decision to punish Izzy, and his unwillingness to admit that he was wrong to do so, other students may fear expressing their own sexual orientation to USD 251 administrators.

III. Conclusion

USD 251 employees have obligations under state and federal law to treat LGBTQI+ students with respect and dignity. Unfortunately, two employees of USD 251 did not meet these obligations, and the District has not yet stepped in to remedy this situation. Izzy and her family are willing to resolve this matter without litigation, but require that the District agree to make specific changes to make clear that anti-LGBTQI+ discrimination has no place in USD 251 schools.

At a minimum, Izzy and her family request that USD 251 agree to provide all employees, including transportation employees like Ms. Gadino, cultural competency training and training on LGBTQI+ rights, including students’ rights to be free from discrimination on the basis of sexual orientation or gender identity. This training should be provided before the start of the next school year and on an annual basis thereafter. Additionally, Izzy requests that USD 251 revise its policies and practices regarding Title IX investigations, and provide clear guidance to students and parents regarding how the District will respond to allegations of Title IX violations on the basis of sexual orientation or gender identity.

Above all, Izzy wants to ensure that other students like her are able to express their sexual orientation without fear of punishment, retaliation, or humiliation

from school officials. We look forward to working with you to resolve these issues and create a better path forward for all students in USD 251. We welcome a discussion at your earliest convenience. We can be reached at sbrett@aclukansas.org and jpierson@aclukansas.org.



Kind regards,

A handwritten signature in black ink that reads "Sharon Brett".

Sharon Brett, Legal Director

A handwritten signature in black ink that reads "J. Pierson".

Josh Pierson, Senior Staff Attorney