UNITED STATES DEPARTMT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

Dereian Brown, with his parents,
Malcolm Brown and Bernadine Ward,

Complainants,

v.

Madison Metropolitan School District ("MMSD"),

Recipient.

BRIEF IN SUPPORT OF COMPLAINT

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INTRODUCTION

Complaint, Dereian Brown, with his parents, Malcolm Brown and Bernadine Ward (collectively, "Complainants"), allege that the Recipient, the Madison Metropolitan School District ("MMSD" or "District"), adopted policies, engaged in practices, and conducted specific behavior that, individually and collectively, violated Title VI of the Civil Rights Act of 1964, 42

U.S.C. § 2000d et seq., which prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. Complainant requests that the United States Department of Education Office for Civil Rights ("O.C.R.") investigate the following allegations, make a determination that MMSD, the Recipient, violated Title VI, and impose appropriate remedial and, if appropriate and authorized, punitive relief.

STATEMENT OF FACTS

1. On December 14, 2015, MMSD sent Dereian Brown ("Dereian") and his parents a letter stating that the District was recommending Dereian for expulsion. Letter from Dylan Pauly, MMSD general counsel, to Dereian Brown, Malcolm Brown, and Bernadine Ward (Dec. 14, 2015) (attached hereto as "Exhibit 1"). In the letter, the District alleged that Dereian violated WIS. STAT. § 120.13(1) and MMSD's Behavior Education Plan ("BEP"), which describes the District's expulsion policies and procedures. Ex. 1; MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION, BEHAVIOR EDUCATION PLAN 32 (Sept. 1, 2015) (unpublished report) (attached hereto as "Exhibit 2"). In the December 14, 2015, letter, the District alleged that "on October 30, 2015, while at Cherokee Middle School, [Dereian] possessed a BB gun." Ex. 1.[1]

2. On December 30, 2015, Attorneys Matthew Giesfeldt and Nicholas Gansner, on behalf of Dereian, submitted Dereian Brown's pre-hearing motions seeking dismissal of the proceedings or, in the alternative, suppression of any evidence of any incriminating statements by Dereian. *See, generally,* Notice of Pre-Hr'g Mot. and Pre-Hr'g Mot. to Dismiss and, in the

[1] Note that the District did not seek to expel Dereian under WIS. STAT. § 120.13(1)(c)2m., which provides that a school board "shall . . . expel a pupil for not less than one year whenever it find that the pupil, while at school or while under the supervision of a school authority, possessed a firearm, as defined in 18 USC 921 (a) (3)." *See* Ex. 1. Under this provision, a "firearm" is "any weapon (including a starter gun) which will or is designed to or may be readily converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3). In Dereian's case, the District never alleged that the alleged BB gun was a "firearm" that operated by means of "an explosive." *See, generally,* Exs. 1, 4. The District sought to expel Dereian under WIS. STAT. § 120.13(1)(c)1., which requires a finding of an expellable offense *and* a finding that the "interest of the school demands the pupil's expulsion." WIS. STAT. § 120.13(1)(c)1.; *see also, e.g.,* Ex. 4. The hearing examiner made both such findings in his order recommending Dereian's expulsion. Ex. 14, p. 14.

alternative Suppress (Dec. 30, 2015) (attached hereto as “Exhibit 3”). Dereian sought dismissal of the proceedings and suppression of his statements because, he argued, any statements he may have made to school officials were not credible, that the District’s BEP was, in this instance, not authorized by state statute, and that the District failed to provide proper notice of the proceedings by failing to allege the particulars of the allegations against Dereian. Ex. 3.

3. On January 4, 2016, the District held an expulsion hearing based on the District’s recommendation to expel Dereian Brown. MARY L. MIXON, TRANSCRIPT OF PROCEEDINGS, IN RE THE EXPULSION OF DEREIAN BROWN 1 (Jan. 4, 2016) (attached hereto as “Exhibit 4”).

4. During the hearing on January 4, 2016, Examiner Ezalarab allowed the District to present evidence against Dereian first, before the examiner made rulings on Dereian’s pre-hearing motions, and then, after the District presented its evidence, the examiner sought argument from both Dereian and the District regarding Dereian’s pre-hearing motions. Ex. 4, pp. 78-95. The examiner denied Dereian’s motions without affording Dereian the opportunity to present evidence on those motions. *See id.* The examiner denied Dereian’s motions without reading the District’s written response to such motions. *See id.*

5. During the hearing on January 4, 2016, Examiner Ezalarab noted Dereian’s counsel’s objections to the District’s attempt to put documents into evidence without laying proper foundation. Ex. 4, pp. 104-05. Rather than addressing the District as the party bearing the burden to lay foundation for the exhibit, Examiner Ezalarab instead asked Dereian’s counsel whether Dereian wanted to force the District to call another witness to lay the proper foundation for this evidence. Ex. 4, p. 105.

6. During the hearing on January 4, 2016, Examiner Ezalarab admitted into evidence an exhibit that the District’s only witness, Mr. Hong Tran, had no basis to authenticate. Ex. 4, pp.

97-100. Specifically, the examiner admitted into evidence a letter drafted by Ms. June Wilson because the examiner saw the "exhibit as really an essential exhibit; it's a matter of consistency." Ex. 4, p. 100. Mr. Tran did not see the letter prior to the hearing, and only testified that he knows Ms. Wilson to typically write similar letters. Ex. 4, pp. 98-100. The District's own attorney, Ms. Pauly, later asked the examiner, "And just to clarify, Exhibit 5 [the letter from Ms. Wilson] was denied wholesale?" Ex. 4, p. 113. The examiner responded, "No, no I received it into evidence." *Id.*

7. During the hearing, Mr. Gansner presented evidence of suspension and expulsion data in the District from the 2009-10 school year until the 2014-15 school year. Resp. Ex. 21-26 (attached hereto as "Exhibit 5"). The examiner accepted this data into evidence without objection. Ex. 4, p. 116. The data show that during that time period, 27 students were recommended for expulsion in cases involving BB guns, but only three of those cases ended in expulsion. Ex. 4, p. 190; *see also* Ex. 5.

8. During the hearing, Mr. Gansner summarized the evidence against Dereian as follows, "I don't believe the School District has met its burden. I don't believe they demonstrated that Dereian possessed a BB gun. No one saw him possess it. No one testified here today that they saw him possess it. Other boys were seen by people who did not testify that they possessed BB guns. Those children, already in trouble, then cast aspersions on Dereian. . . . Mr. Tran could not recall what words Dereian used to describe this alleged object, this alleged BB gun. He couldn't remember. He couldn't remember what words Student A used to describe the BB gun or whatever it may have been because we don't have the foggiest idea what it was. It's the same Mr. Tran who can't remember what words were used, and I think those words are kind of important in this context." Ex. 4, pp. 183-85.

9. At the close of the hearing on January 4, 2016, Examiner Ezalarab informed the parties that he would issue a written decision within five days of receipt of the written transcript. Ex. 4, p. 194.

10. On January 10, 2016, Attorney Matthew Giesfeldt sent Examiner Ezalarab a letter via email attempting to clarify the standard of proof applicable in expulsion proceedings. Letter from Matthew Giesfeldt, attorney for Dereian Brown, to Hamdy Ezalarab, hearing examiner (Jan. 10, 2016) (attached hereto as "Exhibit 6"). Mr. Giesfeldt noted that, although Ms. Pauly, in her closing argument, claimed that the standard of proof in an expulsion hearing is a "preponderance of the evidence," the standard of proof is not legally certain. Ex. 6. In response, Examiner Exalarab indicated that he would not consider Mr. Giesfeldt's letter by stating "I have closed the record immediately after concluding the hearing." Email from Hamdy Ezalarab, hearing examiner, to Matthew Giesfeldt, attorney for Dereian Brown (Jan. 10, 2016) (attached hereto as "Exhibit 7").

11. On January 11, 2016, at 3:58 p.m. Central Time, Attorney Gansner emailed Hearing Examiner Ezalarab, stating that Dereian's attorneys "have heard from members of the media that the District has the decision. We have not received it. Could the decision please be made available to us?" Email from Attorney Nicholas Gansner to Hamdy Ezalarab, hearing examiner (Jan. 11, 2016) (attached hereto as "Exhibit 8"). Attorney Gansner copied District Counsel Dylan Pauly on the email. Ex. 8.

12. On January 11, 2016, at 4:01 p.m. Central Time, District Counsel Dylan Pauly replied to Attorney Gansner's previous 3:58 p.m. email, stating, "We received the decision this afternoon and are reviewing it and following all of our next steps. The decision will be sent to you this afternoon per our regular processes." Email from Attorney Dylan Pauly, Madison

Metropolitan School District General Counsel, to Attorney Nicholas Gansner and Attorney Matthew Giesfeldt (Jan. 11, 2016) (attached hereto as "Exhibit 9").

13. On January 11, 2016, at 4:16 p.m. Central Time, Attorney Gansner replied to Attorney Pauly's previous email, stating, "On behalf of Dereain Brown, I object to the process you refer to. I object to the decision of the hearing examiner being made available to one party in advance of it being made available to the other party." Email from Attorney Nicholas Gansner to Dylan Pauly, Madison Metropolitan School District General Counsel (Jan. 11, 2016) (attached hereto as "Exhibit 10"). Attorney Gansner added, "It is unclear to me why the District should have the opportunity to review the decision without Dereian Brown even being aware of what the decision is. This feels very much like ex parte communication has taken place between the hearing examiner and the District." Ex. 10.

14. On January 11, 2016, at 4:47 p.m. Central Time, Attorney Matthew Bell, called Attorney Matthew Giesfeldt. Screenshot, Matthew Giesfeldt's personal cell phone call log (Jan. 11, 2016) (showing a call from 608 663-1868 at 4:47 p.m. on January 11, 2016) (attached hereto as "Exhibit 11"); *Matthew W Bell Contact Information*, MADISON METROPOLITAN SCHOOL DISTRICT, STAFF DIRECTORY, https://www.madison.k12.wi.us/staffdirectory (last visited Mar. 10, 2016) (showing Matthew Bell's phone number as 608 663-1868) (attached hereto as "Exhibit 12"). During that phone conversation, Attorney Bell told Attorney Giesfeldt that the reason that Attorneys Giesfeldt and Gansner had not received the Hearing Examiner's decision yet was due to Attorney Bell's afternoon schedule, which precluded him from sending the decision to Attorneys Giesfeldt and Gansner until almost 5:00 p.m. Aff. of Matthew Giesfeldt, ¶¶ 7, 8 (April 13, 2016) (attached hereto).

15. On January 11, 2016, at 4:59 p.m. Central Time, Attorney Matthew Bell emailed Dereian's attorneys with the "Decision of the Hearing Officer." Email from Attorney Matthew Bell, Madison Metropolitan School District Assistant General Counsel, to Attorney Matthew Giesfeldt and Attorney Nicholas Gansner, attorneys for Dereian Brown (Jan. 11, 2016) (attached hereto as "Exhibit 13"); HAMDY EZALARAB, DECISION OF THE HEARING EXAMINER (Jan. 11, 2016) (unpublished report) (attached hereto as "Exhibit 14"). The examiner did not state what he understood to be the District's standard of proof anywhere in his decision. *See* Ex. 14. Further, the examiner stated that he believed that the interests of the school demanded Dereian's expulsion, but stated no basis for this conclusion except that "when a rule is clearly stated and is not subject to different interpretation, and when such a rule is clearly violated, the hearing examiner may not ignore the interest of the school in expelling the student." Ex. 14.

16. On January 14, 2016, Dereian and his attorneys received a letter, dated January 11, 2016, from the District with a written copy of the Decision of the Hearing Officer. Letter from Matthew Bell, Madison Metropolitan School District Assistant General Counsel, to Dereian Brown, et al. (Jan. 11, 2016; received Jan. 14, 2016) (attached hereto as "Exhibit 15"). In that letter, Mr. Bell noted that the District's Board of Education would review the hearing examiner's decision and "decide whether to approve, reverse, or modify" such decision. Ex. 15, p. 1.

17. Consistent with Mr. Bell's January 14, 2016, letter (Ex. 15, above), Mr. Bell also told Mr. Giesfeldt, via telephone, that the District's attorneys will provide the Board of Education a memorandum to accompany the hearing examiner's decision. Giesfeldt Aff., ¶9. According to Mr. Bell, that memorandum contained information from District Superintendent Jennifer Cheatham regarding her recommendation for the length of the expulsion. Giesfeldt Aff., ¶ 9.

18. On January 19, 2016, Dereian and his attorneys received a letter, dated January 14, 2016, from the District with a written copy of the Board's Order for Expulsion. Letter from Matthew Bell, Madison Metropolitan School District Assistant General Counsel, to Dereian Brown, et al. (Jan. 14, 2016; received Jan. 19, 2016) (attached hereto as "Exhibit 16"); Order (Jan 14, 2016) (attached hereto as "Exhibit 17"). The Board expelled Dereian and offered him reinstatement upon completion of a Violence Risk Assessment and approval by the Early Reinstatement Committee. Ex. 17.

19. On January 14, 2016, District School Board member, Anna Moffit, posted on her personal Facebook page that the School Board "must make final recommendations on numerous occasions that require expulsion under district policy *in which many students do not have legal representation or access to public media*, so creating an equitable and just policy is a priority for our district." (emphasis added) (attached hereto as "Exhibit 18").

20. On January 14, 2016, District School Board member, Anna Moffit, again posted on her Facebook page that, "[o]ur district has policies that need to be followed if we want to work towards consistent decisions regardless of access to external sources or public opinion. . . . I see a number of areas [of the expulsion policy] in need of revision, however, it will require support and feedback from the community. In the past few years, we have made progress, but there is more work to be done in my opinion around discipline policies that are progressive and equitable." (attached hereto as "Exhibit 19").

21. On January 15, 2016, District School Board president, James Howard, was quoted in an article, explicitly covering this case, in the Wisconsin State Journal, stating, "We follow board policy[.] . . . Public perceptions, emails, lawyers – they don't really affect us." Erickson,

Doug. *In BB gun case, Madison School Board votes to expel, but with immediate reinstatement possible*, WISCONSIN STATE JOURNAL (Jan 15, 2016) (attached hereto as "Exhibit 20").

22. On or before January 17, 2016, District School Board member, Ed Hughes, posted on his "Ed Hughes School Blog" and entry entitled, "Expulsion F.A.Q.'s" (attached hereto as "Exhibit 21"). In that blog entry, Mr. Hughes states, "If the principal determines that a student has done something that meets the definition of an expellable offense, he or she sends an expulsion memo downtown. *This is mandatory – the principal has no discretion in the matter*." Ex. 21 (emphasis added). Mr. Hughes also describes the school board's role in reviewing a hearing examiner's decision for expulsion, stating, "As a rule, we apply the standards set out in the [Behavior Education Plan] to the student's behavior. We don't use our consideration of an individual case as a vehicle to change the policies we've established." Ex. 21. Mr. Hughes adds, "I believe that one way to avoid unwarranted disparities is to apply our expulsion standards uniformly and consistently. The unpleasant upshot of this is that any student who commits an expellable offense will end up being expelled. While this can give rise to tough cases, . . . I don't know how any other approach could be workable at all." Finally, Mr. Hughes opines that students do not benefit from being represented by counsel at expulsion hearings, stating:

> This will sound self-serving, but I don't think students benefit much from being represented by attorneys in the expulsion process. The skills that attorneys bring to legal proceedings simply are not that useful for students facing expulsion. First, rarely is there a significant factual dispute about whether the student did what he or she is charged with. Second, typically the only witness at a hearing for the school district will be the principal or assistant principal who investigated the event. There is little reason to think that the witness will be telling anything other than the truth, as he or she perceives it. The witness is also entitled to rely on hearsay (i.e., what other students or staff told the witness they saw or learned about the event). That means that there is little room for effective cross-examination. Third, rules of evidence do not strictly apply at expulsion hearings; nor are all the procedural requirements that have grown up around the 4th and 5th amendments applicable. As a result, grounds for striking testimony or dismissing an expulsion on procedural grounds are exceedingly rare. Fourth, attorneys are not going to make much headway with an argument that a student who committed an expellable offense should

> not be expelled for some reason. An argument that, despite expulsion, a student should be allowed to return to the classroom as soon as possible is one that will receive a better reception. But there is no particular advantage to an attorney making that argument – it can be at least as effective coming from a student's parents or directly from the student. I'm an attorney and certainly don't intend to minimize the critical role attorneys can play for clients enmeshed in the legal system. But for a student recommended for expulsion, the result will just about always be the same whether or not an attorney is involved.

Ex. 21.

23. District School Board member, Ed Hughes, included information personally identifiable to Dereian in his January 17, 2016 blog post. Ex. 21. Specifically, the post includes Deriean's full name. Ex 21.

24. Neither Dereian nor his parents consented to the District's release of any confidential pupil records or identifying information. Giesfeldt Aff., ¶ 10.

25. On January 4, 2016, and updated on January 26, 2016, Cherokee Heights Middle School assistant principal, Hong Tran, was quoted by television reporter Tony Galli from Channel 27-WKOW, stating, "Students who have BB guns, bring them, or have them in the community, the gun could be mistaken for a real gun. . . . And the consequences could be severe, life or death sometimes." Galli, Tony. *Update: Expulsion recommended for Madison middle school student*, WKOW.COM (Jan. 5, 2016; updated Jan. 26, 2016), http://www.wkow.com/story/30882576/2016/01/04/fighttostop12yearoldsexpulsionoverweapon (attached hereto as "Exhibit 22").

26. On January 4, 2016, and updated on January 29, 2016, District School Board president, James Howard, was quoted by television reporter, Tony Galli, stating, "It was important to send a message. . . . We cannot decide this case-by-case." Galli, Tony. *Update: Madison school board expels 12-year old over BB gun incident*, WKOW.COM (Jan. 14, 2016, updated Jan. 29, 2016) (attached hereto as "Exhibit 23").

27. The District first implemented its BEP during the 2014-15 school year. *See* Schneider, Pat, *Survey of Madison teachers says new discipline code has failed to deliver*, The Capital Times (May 15, 2015), *available at* http://host.madison.com/ct/news/local/writers/pat_schneider/survey-of-madison-teachers-says-new-discipline-code-has-failed/article_3246e8ed-dd09-5504-a144-c4a1ab9d973a.html (attached hereto as "Exhibit 24").

28. The total number of suspensions dropped from 2906 in the 2013-14 school year to 1713 in the 2014-15 school year, which was the first year that the District implemented the BEP. Research & Program Evaluation Office, Madison Metropolitan School District, Out-of-School Suspensions (2015), *available at* https://studentservices.madison.k12.wi.us/files/stusvc/out-of-school-suspensions.jpg (attached hereto as "Exhibit 25"). In 2013-14, 59.77% of all out-of-school suspensions were imposed upon Black children; 12.1% on children of two or more races; and 13.5% on White students. *See* Ex. 25. In 2014-15, after implementation of the BEP, 62.1% of all out-of-school suspensions were imposed on Black children; 13.6% on children of two or more races; and 12.9% on White students. *See id.*

29. As of March 8, 2016, for the 2015-16 school year, while the BEP was instituted as policy, the District has recommended 27 students for expulsion. Email from Dylan Pauly, Madison Metropolitan School District General Counsel, to Jill Karofsky (March 8, 2016) (attached hereto as "Exhibit 26"); 2015-2016 Listing of Students Recommended for Expulsion (unpublished report) (attached hereto as "Exhibit 27"). Of those students recommended for expulsion, 55% are Black and 26% are White. *See* Exs. 26 and 27.

30. In 2015, the District had 27,237 students enrolled; of those students, 4,890 were African American. Bo Cready, *Changing Demographics in MMSD, 1990-91 to 2015-16*, MMSD

RESEARCH & PROGRAM EVALUATION OFFICE (Mar. 3, 2016), http://public.tableau.com/profile/bo.mccready#!/vizhome/ChangingDemographics1990-91to2013-14/ChangingDemographics (attached hereto as "Exhibit 28"). Over the last 25 years, the District has maintained an African American population of approximately one-fifth of its total population. *See id.*

31. The data available regarding the District's suspensions and expulsions of all students as compared to Black students shows the following information, cumulatively:

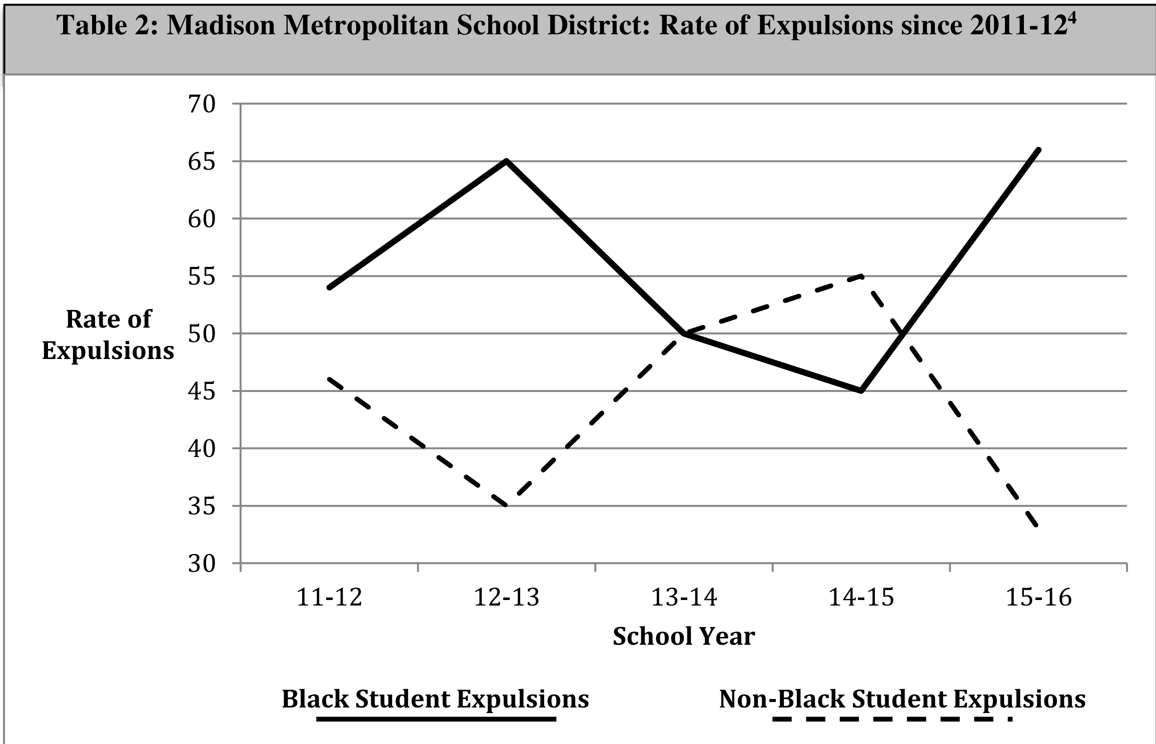
Table 1: **Madison Metropolitan School District Discipline Percentages**[2]

BEP	Year	Black % in total school population	# of students suspended	% of students suspended who are Black	# of students recommended for expulsion	% of students rec. for expulsion who are Black	# of students expelled	% of expelled students who are Black
N	2011-2012	19.93%	4341	62.84%	189	62.96%	11	54.54%
N	2012-2013	18.64%	3863	60.13%	146	58.90%	26	65.38%
N	2013-2014	18.38%	2906	59.77%	103	59.22%	8	50.00%
Y	2014-2015	17.95%	1713	62.41%	52	44.23%	22	45.45%
Y	2015-2016[3]	17.83%	n/a	n/a	27	55.55%	6	66.67%

32. The data available regarding the District's rates suspension and expulsions of all students as compared to the rates of suspensions and expulsions of Black students shows the following information:

[2] The information in this table is derived from Exhibits 5, 25, 27, and 28.

[3] This year's data are through March 8, 2016.



33. The District's BEP requires that, if someone at the school has any reason to believe that any "Level 5" offense has occurred, the student must be recommended for expulsion. *See, e.g.,* Ex. 2, p. 29. Under the applicable Wisconsin statutes, a school district is *required* to expel a student if that student is found to have possessed a firearm on school grounds. *See* WIS. STAT. § 120.13(1)(c)2m. (attached hereto). A school district has *discretion* to expel a student if it finds that the student endangered safety or, if the student is at least 16 years old, that the student "repeatedly engaged in conduct . . . that disrupted the ability of school authorities to maintain order[.]" WIS. STAT. §§ 120.13(1)(c)1., 2. (attached hereto).

ARGUMENT

Based on the *STATEMENT OF FACTS*, above, Complainant argues that the District's actions constitute discrimination against Dereian on the basis of race, prohibited by Title VI. The Department of Education has explained:

[4] The data described in this table are derived from Exhibits 5, 25, 27, and 28.

> The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if a student is subjected to *different treatment* based on the student's race, and second, if a policy is neutral on its face – meaning that the policy itself does not mention race – and is administered in an evenhanded manner but has a disparate impact, i.e., a disproportionate and unjustified *effect* on students of a particular race. Under both inquiries, statistical analysis regarding the impact of discipline policies and practices on particular groups of students is an important indicator of potential violations. In all cases, however, the Departments will investigate all relevant circumstances, such as the facts surrounding a student's actions and the discipline imposed.

See Dear Colleague Letter from Assistant Secretary for Civil Rights Catherine E. Lhamon and Acting Assistant Attorney General for Civil Rights Jocelyn Samuels on Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), at 7, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf (hereinafter, "Discipline DCL").

Section 601 of Title VI of the Civil Rights Act of 1964 prohibits *intentional* discrimination, or disparate treatment, against individuals on the basis of "race, color, or national origin[.]" 42 U.S.C. § 2000d; Pub. L. 88-352, title VI, § 601, (July 2, 1964) (emphasis added) (hereinafter, "Section 601"); *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001).[5] There is a private right of action to enforce Section 601 and seek damages for intentional discrimination. *Alexander v. Sandoval*, 532 U.S. at 279-80. Alternatively, a person may seek administrative relief to remedy intentional discrimination. *See* 34 C.F.R. § 100.3(a).

While Section 601 prohibits only intentional discrimination, activities that are discriminatory in effect without an obvious discriminatory intent are also prohibited, implicitly, by Section 602. Pub. L. 88-352, title VI, § 602, (July 2, 1964) (hereinafter, "Section 602"); *Alexander v. Sandoval*, 532 U.S. at 281. Section 602 prohibits "activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Alexander v.*

[5] Intentional discrimination is also known as "disparate treatment." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

Sandoval, 532 U.S. at 281. But, there is no private right of action for disparate impact claims absent discriminatory intent. *Id.* at 285.

Though disparate impact claims are not enforceable via a private right of action, the Office of Civil Rights for the U.S. Department of Education ("O.C.R.") may investigate and remedy disparate impact discrimination in schools receiving federal funds. *See Alexander v. Sandoval*, 532 U.S. at 279-92; Section 602; 34 C.F.R. § 100.3(b)(2) (Schools are prohibited from "[u]tiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishments of the objections of the program with respect to individuals of a particular race, color, or national origin[.]"). The Department of Education explains that "[s]chools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race." Discipline DCL at 11.

The District, as a Wisconsin public school, receives Federal funds by way of the U.S. Department of Education. As such, no employee, board member, or assign of the District may intentionally discriminate against its students on the basis of race, color, or national origin. *See* Section 601. A District student, group of students, or their representatives could pursue a private cause of action against the District for the District's intentional discrimination against a student; a student could also seek administrative relief from OCR to remedy the District's intentional discrimination. In addition to the prohibition of intentional discrimination, the District may not enact and implement policies or administrative practices that create a disparate impact on groups

of students based on race, color, or national origin, pursuant to Section 602. A student may seek administrative relief from via O.C.R. for the District's disparate impact discrimination.

I. THE MADISON METROPOLITAN SCHOOL DISTRICT INTENTIONALLY DISCRIMINATED AGAINST DEREIAN, IN VIOLATION OF SECTION 601 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, WHICH PROHIBITS INTENTIONAL DISCRIMINATION AGAINST PROTECTED MINORITIES.

The District intentionally discriminated against Dereian under Title VI. Title VI "prohibits . . . intentional discrimination (known as "disparate treatment")[.]" *Ricci v. DeStefano*, 557 U.S. at 577. Title VI claims for disparate treatment may occur when a federally-assisted school treats "a particular person less favorable than others because of a protected trait." 42 U.S.C. § 2000d; *Ricci v. DeStefano*, 557 U.S. at 576-78 (citations omitted); *see also Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 293 (3d Cir. 2014) (noting that Title VI analysis on disparate treatment applies to public schools).

Complainants may show discriminatory intent by providing evidence of certain factors, including "substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements" by the decision-maker, which is, in this case, the District. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-69 (1976). Complainants may offer both circumstantial and direct evidence of discriminatory intent to meet its Title VI burden. *See Arlington Heights*, 429 U.S. at 266.

Further, the Department of Education has explained that there is a three-step analysis for purposes of ascertaining whether a school has intentionally discriminated against a student. Discipline DCL. The three-step analysis is as follows:

- <u>Step one</u>: "Did the [district] limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently

from a similarly situated student or group of students of another race in the disciplinary process?"

- Step two: "Can the [district] articulate a legitimate, nondiscriminatory reason for the different treatment?"

- Step three: "Is the reason articulated a pretext for discrimination?" Discipline DCL, at 8-9.

The Department of Education adds:

> Whether the Departments find that a school has engaged in intentional discrimination will be based on the facts and circumstances surrounding the particular discipline incident. Evidence of racially discriminatory intent can be either direct or circumstantial. Direct evidence might include remarks, testimony, or admissions by school officials revealing racially discriminatory motives. Circumstantial evidence is evidence that allows the Departments to infer discriminatory intent from the facts of the investigation as a whole, or from the totality of the circumstances.

Discipline DCL, at 8.

Under this three-step analysis, the circumstantial and direct evidence, under the totality of the circumstances, demonstrate that the District acted with discriminatory intent in how it treated Dereian throughout the expulsion process.

A. **STEP ONE**: THE DISTRICT DENIED EDUCATIONAL SERVICES, BENEFITS, AND OPPORTUNITIES TO DEREIAN BY TREATING HIM DIFFERENTLY THAN OTHER SIMILARITY SITUATED STUDENTS OF OTHER RACES.

The District denied Dereian educational services, benefits, and opportunities by expelling Dereian from school 1) in such a manner that demonstrated, in several instances, animosity toward him, 2) by evincing a lack of proper decorum with him, 3) by exhibiting clear bias against him, 4) by engaging in false communication with his attorneys, 5) by using coercive communication with him, 6) by engaging in illegal communication regarding his case, and 7) by

disregarding the legal requirements associated with the expulsion proceedings brought against him.

> 1. *Certain employees and members of the Board of Education demonstrated* ***animosity*** *toward Dereian, a* ***lack of proper decorum*** *regarding Dereian, and clear bias against Dereian through their express statements to Dereian, his attorneys, and the public.*

Members of the District's Board of Education ("Board"), as well as other MMSD employees, explicitly expressed animosity toward Dereian for simply exercising the rights imbued upon him by the Wisconsin Legislature and the U.S. Constitution. Such animosity evinces a discriminatory intent upon Dereian during the expulsion process because, as those statements reveal, the District sought to deviate from substantive and procedural norms in Dereian's case. *See Arlington Heights*, 429 U.S. at 265-69.

Deriean, or any other student facing expulsion from a Wisconsin public school, has certain statutory rights that he/she may exercise during the expulsion process. *See* WIS. STAT. § 120.13(1)(c). These statutory rights derive from, and are consistent with, a student's constitutional right to due process in a school disciplinary proceeding. *See, generally, Goss v. Lopez*, 419 U.S. 565.

The District's own board members expressly stated to the media and on their own social media posts that they disagreed or disliked some of Dereian's decisions in the expulsion process, all of which he had a statutory right to make, and all of which the Board had *no* right to make for him. The public criticism of him and of his decision-making directly conflicts with the Board's ability to render a fair and unbiased decision. Not only does this criticism call into question the Board's ability to render a just decision, but such criticism constitutes a deviation from substantive and procedural norms in an expulsion proceeding. *See Arlington Heights*, 429 U.S. at 265-69. In addition to the Board members' comments, certain District employees made

statements during the expulsion proceedings that demonstrated both bias and a presumption of *guilt*, not innocence, with regard to Dereian. *See, generally,* Ex. 4. This is also a deviation of substantive and procedural norms in an expulsion proceeding. *See id.*

The Board and other District employees expressed animosity toward Dereian, evincing a deviation from substantive and procedural norms, simply because Dereian exercised his statutory and constitutional rights as follows:

a. Certain members of the MMSD board criticized Dereian for exercising his right to counsel.

Dereian has a right to be represented by counsel in an expulsion proceeding if he so chooses. *See* WIS. STAT. § 120.13(1)(c)3. This right is also consistent with Dereian's right to due process if a school seeks to deprive him of his education. *See* U.S. CONST., amend. V, XIV; *see also* Wis. Const., art 1, § 8; *see also, generally, Racine Unified School Dist. v. Thompson*, 107 Wis. 2d 657, 321 N.W.2d 334 (Ct. App. 1982). The Board expressed animosity or disfavor with Dereian's expression of this right to counsel, as follows:

- Board member Anna Moffit posted on her Facebook account that the Board "must make final recommendations on numerous occasions that require expulsion under district policy *in which many students do not have legal representation or access to public media*, so creating an equitable and just policy is a priority for our district." Ex. 18 (emphasis added). All students facing expulsion are similarly situated in that they have the right to legal counsel. *See* WIS. STAT. § 120.13(1)(c)3. Whether they choose to express that right is up to those individual students. *See id.* Ms. Moffit's statement certainly implies, if it does not expressly state, that Dereian was looked upon unfavorably or treated differently simply for exercising his right to counsel.[6]

[6] Dereian's attorneys represented him, and continue to represent him, *pro bono*, through a program to which *all* District students have access. *See* http://www.wispd.org/index.php/legal-resources/specialty-practices/juvenile-practice/stepp.

- Board president James Howard told the media that "lawyers . . . don't really affect us." Ex. 20. Mr. Howard's contention that a lawyer—who represented Dereian in this case—would not affect his decision is tantamount to claiming that he would not listen to Dereian's position in the matter at all. This further indicates a bias against Dereian for exercising his rights.

- Board member Ed Hughes posted on his personal blog that he believed that students should not use attorneys at expulsion proceedings. Ex. 21. Mr. Hughes claimed that an attorney's skills are not useful at an expulsion hearing, noting the District's non-discretionary expulsion practices. Ex. 21. Not only does this position fail to appreciate that Dereian has a *statutory* right to an attorney that should not be questioned by a Board member, it fails to consider that a student may wish to have counsel for a number of reasons, including a greater chance of victory in a contested hearing, an attorney may explain the process to a student facing expulsion; an attorney may preserve issues on appeal, and, contrary to Mr. Hughes's contention, an attorney's trial skills may come in useful if a school administrator, who may not be legally trained, fails to investigate a matter constitutionally, legally, or in a manner that actually allows a District to meet its burden of proof in an expulsion hearing.

b. <u>Certain members of the MMSD board criticized Dereian for exercising his right to open public proceedings</u>.

Dereian has the right to decide whether his expulsion hearing was closed or open to the public. See WIS. STAT. § 120.13(1)(c)3. The Board expressed animosity or disfavor with Dereian's expression of this right as follows:

- Board member Anna Moffit posted on her Facebook account that "[o]ur district has policies that need to be followed if we want to work towards consistent decisions regardless of access to external sources or public opinion." Ex. 19. This statement, with its implication that

it is less desirable for students to generate a public opinion, demonstrates Ms. Moffit's bias against Dereian because she disfavored Dereian's decision to hold the hearing open to the public.

c. <u>Certain members of the MMSD board publicly explained opinions against, and a practice to not, consider individual circumstances. Such statements also evidence a bias and presumption of guilt in the course of student conduct related proceedings</u>.

Dereian has a due process right that requires a hearing or procedure, specific to Dereian and his circumstances, before the District may suspend or expel Dereian. *See, generally, Goss v. Lopez*, 419 U.S. 565 (1975); *see also Racine Unified Sch. Dist.*, 107 Wis. 2d at 661; *see also* WIS. STAT. § 120.13(1)(c)3. Due process requires that a governmental entity consider the individual circumstances of an individual case before that entity may deprive a person of a liberty or property interest. *See, generally, Goss v. Lopez*, 419 U.S. 565. Consistent with due process, the District bears the burden of proof in expulsion cases, not the student. *See, generally, Butler v. Oak Creek-Franklin School Dist.*, 172 F. Supp. 2d 1102 (E.D. Wis. 2001). The Board expressed animosity or disfavor of this specific and individual due process right, as applied to Dereian, as follows:

- Board president James Howard's statements to a television reporter, to wit: "It was important to send a message. . . . We cannot decide this case-by-case." Ex. 23. This statement demonstrates that President Howard does not consider individual circumstances of any particular set of facts in an expulsion proceeding.

- Board member Ed Hughes's blog states that he believes that, in expulsion hearings, attorneys are unnecessary because "rarely is there a significant factual dispute about whether the student did what he or she is charged with." Ex. 21. This statement demonstrates that

Mr. Hughes does not approach each expulsion hearing without a pre-determined bias in favor of guilt.

- Board member Ed Hughes also stated in his blog that "[a]s a rule, we apply the standards set out in the [Behavior Education Plan] to the student's behavior. We don't use our consideration of an individual case as a vehicle to change the policies we've established." Ex. 21. Mr. Hughes adds, "I believe that one way to avoid unwarranted disparities is to apply our expulsion standards uniformly and consistently. The unpleasant upshot of this is that any student who commits an expellable offense will end up being expelled. While this can give rise to tough cases, . . . I don't know how any other approach could be workable at all." This statement demonstrates that Mr. Hughes, as the ultimate trier of fact, presumes that any/all information presented at an expulsion hearing is credible and admissible. This is a clear abdication of Mr. Hughes's responsibility on the school board. Further, this statement demonstrates that Mr. Hughes obviously does not appreciate or understand the racial disparities that the BEP created with regard to Black students. It is obvious that Mr. Hughes presumes the guilt of the students facing expulsion in the District, even though the *District* has the burden of proof, not the student.

d. <u>Certain employees of MMSD uttered statements also evidencing a bias and presumption of guilt in the course of student conduct related proceedings</u>.

After a hearing examiner renders a decision as to whether a student should be expelled, a school board is the ultimate adjudicator who, within 30 days of issuance of the examiner's decision, reviews that decision and accepts it, rejects it, or modifies it. *See* WIS. STAT. § 120.13(1)(e)3. Thus, until the Board reviewed the hearing examiner's decision, the case was still pending. *See id.* Despite the pending nature of the proceedings, Mr. Hong Tran, who was the District's only witness against Dereian, spoke to a television reporter about the case, stating,

"Students who have BB guns, bring them, or have them in the community, the gun could be mistaken for a real gun. . . . And the consequences could be severe, life or death sometimes." Ex. 22. Mr. Tran improperly spoke in a manner that presumed Dereian's guilt.

Not only did Mr. Tran presume Dereian's guilt, he also blamed Dereian for being a hypothetical victim. Mr. Tran's explanation of why a BB gun may be dangerous to Dereian is not that *Dereian* could hurt himself or others, but that *someone else* may hurt Dereian if that person thought Dereian had a real gun. This statement reverses blame to Dereian as a potential victim, not as a potential wrongdoer. Further, the statutory grounds for expulsion applicable to this situation provide that a student may be expelled if *the student* endangers the health, safety, or property of others. WIS. STAT. § 120.13(1)(c)1. If, hypothetically, someone else assaulted, shot, or otherwise hurt Dereian because that person thought Dereian had a real gun, the District could not legally expel Dereian. Mr. Tran seems to think otherwise.

2. *One board member* ***illegally posted personally identifiable information*** *to a personal blog, and other members of the District commented on Dereian's case to local media, in violation of the Federal Educational Rights & Privacy Act 20 U.S.C. § 1232g; 34 CFR Part 99.*[7]

Federal law generally requires written consent from a parent or eligible student before a protected educational record may be disclosed. Federal Educational Rights & Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (hereinafter, "FERPA"). That written consent must be signed and dated. FERPA. It must also specify the records that may be disclosed, the purpose of the disclosure, and the parties or class of parties to whom the disclosure may be made. 34 C.F.R Part 99.30(a)-(b). Dereian's parents did not provide the consent required by law for the type of disclosure committed by board member Ed Hughes when he posted to his personal blog. Ex. 22;

[7] Dereian is also filing a FERPA complaint with the Family Policy Compliance Office for this FERPA violation.

Giesfeldt Aff., ¶10. Thus, the District released Dereian's identifying information without following proper FERPA procedures.

Dereian's decision to hold an open expulsion hearing does not nullify the District's FERPA violations. Dereian opted to open his expulsion hearing to the public, which is permissible under WIS. STAT. § 120.13(1)(c)3. Consequently, members of the media attended Dereian's hearing to report in local media sources. *See, e.g.,* Ex. 22. Members of the school board commented on Dereian's case to members of the media who quoted those board members in media sources, and board member Ed Hughes went so far as to personally identify Dereian by name in his public blog. *See, e.g.,* Exs. 21, 22. Nothing in FERPA or WIS. STAT. § 120.13(1)(c)3. alleviates a school or any of its members of the duty to obtain proper authorization to release personally-identifiable information about a student, even if that student chooses to hold an expulsion hearing open to the public. Thus, the District violated FERPA by releasing personally-identifiable information without proper authorization to do so.

3. *The MMSD attorneys engaged in* **ex parte** ***communication*** *with the hearing examiner and with the Board -- both of whom serve as triers of fact and adjudicators in the student conduct process.*

A party may not communicate with the adjudicator without also copying and including the adverse party. WIS. STAT. § 227.50(1). Such "ex parte communication" is prohibited by the Wisconsin Statutes, the Wisconsin ethics code for lawyers, and the Wisconsin judicial code. WIS. STAT. § 227.50(1); WIS. SCR 20:3.5; WIS. SCR 60.04(1)(g). Neither hearing examiners in expulsion proceedings nor school boards—who ultimately adjudicate expulsion matters—are excluded from this prohibition on *ex parte* communication. *See* WIS. STAT. §§ 120.13(1)(c)3., 227.50(1); *see also* WIS. SCR 20:3.5; WIS. SCR 60.04(1)(g), Despite this prohibition, the

District's Board, attorneys, and the hearing examiner engaged in ex parte communication—excluding Dereian and his counsel—on multiple instances, as follows:

- The hearing examiner submitted his written decision and proposed order for expulsion to Attorneys Pauly and Bell on January 11, 2016, without simultaneously providing it to Dereian's counsel, in violation of WIS. SCR 20:3.5; WIS. SCR 60.04(1)(g). Exs. 10, 12, and 13; Giesfeldt Aff., ¶¶ 7, 8.

- The District's attorneys provided the Board with additional information and recommendations regarding Dereian's expulsion proceedings for the Board's consideration at a closed meeting without Dereian or his counsel present, in violation of WIS. SCR 20:3.5; WIS. SCR 60.04(1)(g). Giesfeldt Aff., ¶9.[8]

Both of these examples demonstrate that the District willingly and purposefully violated ethical rules to which no exceptions exist; namely, the District's attorneys knowingly and purposefully communicated *ex parte* with both the hearing examiner and the Board of Education—each of whom are adjudicators in Dereian's case.

4. *The MMSD attorneys, either purposefully or negligently, provided* ***false information*** *to Dereian's attorneys.*

Wisconsin's rules of professional conduct for attorneys prohibit any attorney from making a false statement to another, especially an opposing counsel. WIS. SCR 20:4.1. Despite this prohibition, the District's attorneys misled Dereian's attorneys, either purposefully or negligently, and in violation of WIS. SCR 20:4.1. *See* Exs. 9, 11; Giesfeldt Aff., ¶¶ 7, 8. Attorney

[8]Although the attorneys may have considered this communication at a closed Board meeting as attorney-client communication, these same attorneys also prosecuted the case against Dereian. *See, e.g.,* Ex. 2. Therefore, the District's general counsel put herself in the position as prosecutor before a tribunal while simultaneously representing that very tribunal. Hence, even if the communication to the Board could have been considered attorney-client communication, this attorney created a conflict of interest, precluding that attorney-client relationship with the Board, by prosecuting the expulsion before the Board acting as tribunal. *See* WIS. SCR 20:1.7. Either the District's attorneys engaged in ex parte communication or they unethically prosecuted a case while simultaneously representing the trier of fact in that case, both of which are improper.

Pauly (District's general counsel) told Attorney Gansner (Dereian's counsel) via email that the District did not provide Dereian's counsel with the hearing examiner's written decision when it was in the District's possession because such action was consistent with District practices to withhold a hearing examiner's decision from a student while the District reviews such written decision. Ex. 9. At the same time, Attorney Bell (District's assistant general counsel) told Attorney Giesfeldt (Dereian's counsel) that the reason that Dereian's attorneys did not receive the hearing examiner's written decision at the same time that the District received such decision was simply because Attorney Bell, whose responsibility it was to disseminate the decision to Dereian's counsel, was preoccupied in meetings that kept him away from his desk, unable to send the decision Dereian's counsel's way. Ex. 11; Giesfeldt Aff., ¶¶ 7, 8. Such statements are absolutely inconsistent and cannot be simultaneously true. Therefore, either knowingly or negligently, the District's attorneys provided false information to Dereian's attorneys, contrary to basic ethical obligations. *See* Wis. SCR 20:4.1.

5. *The MMSD attorneys attempted to* ***improperly influence the adjudicator*** *(the Board of Education) by means prohibited by law.*

After a hearing examiner renders a decision in an expulsion hearing and issues a written order, a school board must, "[w]ithin 30 days after the date on which the order is issued, . . . *review* the expulsion order and shall, upon review, approve, reverse or modify the order." WIS. STAT. § 120.13(1)(e)3. (emphasis added). The school board's only duty is to *review* the decision. *See id.* Dictionary.com defines the verb, "review," as "to go over[,]" "to view, look at, or look over again[,]" and "to inspect, especially formally or officially[.]"[9] Applying the accepted definition of "review," a school board can do nothing more than read and contemplate the

[9] http://www.dictionary.com/browse/review?s=t

hearing examiner's written decision; there is no authority for a board to accept or consider new, additional information. *See id.*

If a board accepted and considered new information, this new information would and could surely influence a board's decision, even though the applicable Wisconsin statute does not authorize such influence. Wisconsin's rules of professional conduct, which apply without exception to attorneys who represent school boards, prohibit an attorney from attempting to influence a "judge, juror, prospective juror, or other official" by any means prohibited by law. WIS. SCR 20:3.5. It is against the law to communicate *ex parte* with an adjudicator, like the Board of Education in an expulsion proceeding. *See* WIS. STAT. §§ 120.13(1)(c)3., 227.50(1).

Attorney Bell admitted to Attorney Giesfeldt that the District's legal counsel would provide the Board of Education a memorandum with additional information for the Board to consider while determining whether or not to expel Dereian from school. Ex. 11; Giesfeldt Aff., ¶¶ 7, 8. Attorney Bell admitted that the purpose of the memorandum was to assist the Board in making its decision by providing new information: namely, that the Superintendent wished to make a recommendation as to the length of a term of expulsion for Dereian. *See* Ex. 11; Giesfeldt Aff., ¶¶ 7, 8. This is a clear attempt to influence the Board's decision. This attempt to influence the adjudicator is not permissible under the law, as it is in violation of both WIS. STAT. § 120.13(1)(e)4. and WIS. SCR 20:3.5. As such, this illegal and unethical influence evinces a discriminatory intent against Dereian.

6. MMSD ***failed to provide proper notice*** *of the expulsion proceedings to Dereian and his family.*

Students facing expulsion are entitled to know the particulars for which a school district seeks to expel those students. WIS. STAT. § 120.13(1)(c)4.a. At the expulsion hearing on January 4, 2016, Dereian's counsel argued that the notice that Dereian received from the District failed to

meet this notice requirement. Ex. 4. Dictionary.com defines the noun, "particular," as "an individual or distinct part, as an item of a list or enumeration, . . . specific points, details, or circumstances[.]"[10]

The District's notice is void of any "particulars." *See* Ex. 4. The notice only states that the District believed that Dereian possessed a BB gun on school grounds. Ex. 4. The notice did not state how the District obtained the information prompting this BB gun allegation; the notice did not state what witnesses the District may call to testify about this allegation; the notice did not state what the District construed to be a "BB gun." *See* Ex. 4. The notice simply contained a conclusory statement that the District believed Dereian endangered the health, safety, or property of others, without providing any real specifics or "particulars" of this allegation, failing to meet the statutory notice requirements. *See* WIS. STAT. § 120.13(1)(c)4.a. Despite this requirement, the hearing examiner denied Dereian's motion to dismiss for the District's failure to provide proper notice. Ex. 4

7. The District-employed hearing examiner[11] *engaged in* ***coercive communication*** *with Dereian and his attorneys during the expulsion hearing.*

The rules of evidence do not strictly apply in expulsion proceedings. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 663-64, 321 N.W.2d 334, 337 (Ct. App. 1982). Specifically, hearsay statements are admissible if offered into evidence by a school district employee. *Thompson*, 107 Wis. 2d at 663-64. The *Thompson* court reasoned that such hearsay statements are admissible because 1) a "lay board cannot be expected to observe the niceties of the hearsay rule[,]" and 2) the *Thompson* court could "conceive of no reason why school staff would

[10] http://www.dictionary.com/browse/particulars.

[11] Although the hearing examiner is supposed to be "independent," the District employs and pays its hearing examiners to preside over expulsion proceedings. *See* WIS. STAT. § 120.13(1)(e). Thus, for the purposes of Part III of this Brief, Dereian considers the hearing examiner part of the District as a District employee.

fabricate or misrepresent statements of [the] sort" that would be used to determine whether to expel a student. *Id.* at 664. Other than this exception to the hearsay rule, *Thompson* did not otherwise dilute evidentiary procedure. *See, generally, id.* By custom, practice, and in the ordinary course of business related to student conduct proceedings, the MMSD's hearings observe a highly ordered court-like decorum generally mimicking the customs practices associated with adversarial judicial proceedings. Giesfeldt Aff., ¶11.

Following proper and practiced procedure, Dereian's counsel objected to the admission into evidence of a document for which the District failed to provide proper foundation and authentication. Ex. 4. Upon this objection, the examiner asked Dereian's counsel if they really wanted to force the District to call another witness simply to lay foundation for a document offered into evidence. Ex. 4. The examiner used coercive language to pressure Dereian into withdrawing his objection. Ex. 4. The examiner sustained an objection based on improper foundation and then pressured Dereian into withdrawing the objection. Ex. 4.

8. *The hearing examiner* ***knowingly admitted into evidence*** *alleged documentation of proof of mailing* ***without proper foundation*** *for such evidence.*

As stated in Part I.A.*7.*, above, expulsion hearings operate like adversarial judicial proceedings, with the exception that hearsay by school officials is admissible. *See Thompson*, 107 Wis. 2d at 663-64. Even so, the hearing examiner[12] admitted into evidence a document that he, himself, acknowledged was not admitted with proper foundation. Ex. 4. The examiner acknowledged that the District's only witness could not lay proper foundation to admit a particular exhibit. Ex. 4. Regardless, the examiner admitted the document into evidence, anyway. Ex. 4. Further, before admitting this particular document into evidence without proper

[12] *See supra,* note 11.

authentication, the examiner sustained Dereian's counsel's objections to the admission of other documentation for the District failing to provide proper foundation. Ex. 4.

9. *The hearing examiner entered an order based on a **legally-unsettled burden of proof** and failed to address the issue despite notice from Dereian's counsel.*

Neither the statutes nor applicable case law definitively clarify the standard of proof applicable in expulsion proceedings. *See, generally, Remer v. Burlington Area Sch. Dist.*, 149 F. Supp. 2d 665 (E.D. Wis. 2001); *see also* Ex. 6. Dereian's attorneys raised this issue with the hearing examiner. Ex. 6. The examiner declined to consider this legally-unsettled issue, and instead, recommended Dereian's expulsion, finding that the District met its burden; i.e., that by a "preponderance of the evidence," Dereian committed an expellable act. Exs. 2 and 6. The preponderance of the evidence standard is the easiest burden for the District to meet of all the possible burdens of proof that may apply in expulsion proceedings. *See, generally, Remer*, 149 F. Supp. 2d 665. Thus, the examiner paved the smoothest route for the District to expel Dereian despite no definitively-applicable standard.

B. **STEP TWO**: THE NATURE OF THE DISTRICT'S TREATMENT IS SUCH THAT THERE CAN BE NO LEGITIMATE, NONDISCRIMINATORY REASONS - SPECIFICALLY, THE DISTRICT'S TREATMENT WAS FREQUENTLY UNETHICAL AND ILLEGAL.

The BEP's expulsion process, as applied to Dereian's case, was illegal, unethical, antithetical to the process prescribed by Wisconsin statutes, contrary to due process, and in direct conflict with the Department's guidance. As such, the BEP cannot be reasonably or legitimately construed to actually serve an educational necessity in Dereian's case. Below is a summary of Dereian's arguments against possible explanations/excuses for the District's disparate treatment

against Dereian:[13] It is the District's burden to articulate a legitimate, nondiscriminatory reason for the treatment. Discipline DCL. Dereian preemptively argues that there is no legitimate, nondiscriminatory reason for certain treatment, as follows:

1. The District will not be able to articulate a legitimate, non-discriminatory reason for violating FERPA.

Board of Education member Ed Hughes posted, on a publically-accessible online blog, information that personally identified Dereian by name, and information that described the expulsion proceedings against Dereian. *See, supra*, Part I.A.*7.* Mr. Hughes released this personally-identifiable information without any sort of authorization from Dereian or his family. *See, supra*, *id.* Dereian's decision to exercise his right to hold the expulsion hearing open does not absolve the District of its FERPA responsibilities. *See* FERPA; *see also* WIS. STAT. § 120.13(1)(c)3. Thus, Mr. Hughes violated FERPA without a legal excuse to do so.

In addition to Mr. Hughes's blog post, several other school board members made public comments about Dereian's case to local media sources and on their own social media pages. *See, supra,* Part I.A.*1.* Although these school board members did not necessarily utter Dereian's name, they certainly commented on the particulars of the expulsion proceedings against Dereian in contexts where the reader would reasonably know that the comments were directed to Dereian. *See, supra, id.* Specifically, the board members made comments to reporters who reported about *Dereian's* case, and board members also posted comments to their social media sites that were linked to news stories or other comments that personally identified Dereian. *See, supra, id.* There can be no doubt that this collection of comments in the media and on social media speaks directly to Dereian's case.

[13]All of the circumstances described in this Section are also described in greater detail in other portions of this Brief. Therefore, this section contains only summaries of the facts essential to each argument with citations to those other portions of this Brief that describe the circumstances in greater detail.

The District cannot and will not articulate a legitimate, non-discriminatory reason for violating FERPA because no such reason exists. The only legal exceptions to FERPA's non-disclosure requirements do not apply in Dereian's case. *See* 20 U.S.C. §§ 1232g(b) and (h) (An educational agency or institution may disclose, without a student's permission, directory information, information to a school official for a legitimate educational purpose, information to be used in a study, or information to be used in an audit or evaluation). Thus, the District violated Dereian's FERPA right to confidentiality without a legitimate or non-discriminatory reason.

2. *The District will not be able to articulate a legitimate, non-discriminatory reason for engaging in unethical legal practices.*

The District's attorneys engaged in unethical legal practices when dealing with Dereian's attorneys during the expulsion proceedings against Dereian. First, the District's attorneys engaged in *ex parte* communication in two separate instances: 1) the attorneys communicated directly with the hearing examiner without simultaneously communicating with Dereian's counsel, and 2) the attorneys communicated directly with the Board of Education, providing a memorandum to the Board about Dereian's case without copying Dereian's attorneys on that communication. *See, supra,* Part I.A.*2*. *Ex parte* communication between one party and the adjudicator is prohibited without any applicable exception. WIS. STAT. § 227.50(1); WIS. SCR 20:3.5; WIS. SCR 60.04(1)(g). The District's attorneys, as well as the hearing examiner and the Board, violated this prohibition on *ex parte* communication, and without any applicable exception, the District will not be able to articulate a legitimate, non-discriminatory reason for doing so.

Second, the District's attorneys either intentionally or negligently provided false information to Dereian's attorneys. *See, supra,* Part I.A.*3*. While one MMSD attorney told

Dereian's counsel that the District would not release the hearing examiner's written order until the District reviewed it, another MMSD attorney told Dereian's counsel that the written order was not yet disseminated simply because that attorney had not been to his desk to prepare the document for sending. *See, supra, id.* Wisconsin ethical rules require honesty and fairness to opposing counsel without exception. WIS. SCR 20:3.5. The District's attorneys violated this rule requiring fairness and honesty to opposing counsel, and without any applicable exception, the District will not be able to articulate a legitimate, non-discriminatory reason for doing so.

Third, the District's attorneys attempted to influence the ultimate adjudicator—the Board of Education—by means prohibited by law. *See, supra,* Part I.A.*4.* Specifically, the District's attorneys provided the Board with additional information about Dereian's case—in the form of a memorandum—when the Board met to decide whether or not to expel Dereian. *See, supra, id.* This communication is prohibited by law because 1) it is in violation of Wis. Stat. § 120.13(1)(e)4., which only permits "review" of a hearing examiner's decision, and 2) it constitutes *ex parte* communication—the memorandum was prepared and sent to the Board without copying Dereian's attorneys. *See, supra, id.* Such attempt to influence an adjudicator is prohibited without exception under WIS. SCR 20:3.5. The District's attorneys violated this rule prohibiting attempts to influence an adjudicator, and without any application exception to the rule, the District will not be able to articulate a legitimate, non-discriminatory reason for doing so.

3. The District will not be able to articulate a legitimate, non-discriminatory reason for violating Dereian's statutory rights applicable during an expulsion proceeding.

The District violated Dereian's statutory rights by failing to provide proper notice of the proceedings. *See, supra,* Part I.A.*6.* The Wisconsin Statutes require that a student receives notice

of the "particulars" of the offense with which he is charged in an expulsion proceeding. WIS. STAT. § 120.13(1)(c)4.a. Dereian's notice contained only conclusory statements and the date of the alleged offense—no details or "particulars" whatsoever. *See, supra,* Part I.A.*6.* Obviously, the District prepared a detailed case against Dereian, as evidenced by the District's case in chief presented during the hearing. *See* Ex. 4. However, despite Dereian's requests for additional information before the hearing date, the District failed to provide detailed information describing this case, including the District's packet of exhibits presented at the expulsion hearing, until the day of the hearing itself. *See* Ex. 4. Not only did the District violate Dereian's statutory rights to understand the particulars of the charge against him, the District did so to its own advantage—depriving Dereian's counsel of the opportunity to review the information to aid in Dereian's defense. Thus, the District cannot articulate a legitimate and non-discriminatory reason for failing to provide Dereian with proper notice of the proceedings.

4. The District will not be able to articulate a legitimate, non-discriminatory reason for denying certain constitutional due process rights to Dereian.

The District violated Dereian's constitutional rights to due process in a student discipline proceeding. Students facing discipline proceedings at school are entitled to certain constitutional due process rights. *See, infra,* Part II.B.*3.* Those rights include the requirement that a governmental entity consider the *individual* circumstances of a particular case before it deprives a student of access to education. *See, infra, id.* Those rights also require that the governmental entity (here, MMSD) bears the burden of proof. *See, infra, id.* The District violated these rights in Dereian's case.

First, the District's BEP, as applied to Dereian's case, prevents the Board and the hearing examiner from considering Dereian's individual circumstances while deciding whether or not to

expel Dereian. *See, infra, id.* The BEP presumes that any student who commits one of a list of enumerated offenses must be expelled without considering whether the interest of the school demands the expulsion, and without considering the individual circumstances of a particular student. *See, infra, id.*

Second, the District's BEP, as applied to Dereian's case, forgives the District of half of its burden of proof. Under Wisconsin Statutes, a board of education must make two findings before it may expel a student: 1) that the student committed an expellable offense, and 2) that the interest of the school demands that student's expulsion. WIS. STAT. § 120.13(1)(c). Under the BEP, the hearing examiner will make a finding that the interest of the school demands a particular student's expulsion if the examiner also finds that the student committed an expellable offense. Exs. 2, 4. The District presented no evidence in Dereian's case to even attempt to prove that the interest of the school district demanded Dereian's expulsion. *See* Exs. 2, 4. Yet, the hearing examiner made an unsupported finding that the interest of the school district demanded Dereian's expulsion simply because he believed that Dereian violated the rules. Ex. 2 (The examiner wrote that "when a rule is clearly stated and is not subject to different interpretation, and when such a rule is clearly violated, the hearing examiner may not ignore the interest of the school in expelling the student."). To the hearing examiner, a finding of the first factor *necessitated* a finding in the second factor, alleviating the District of its full burden of proof. The BEP makes the District's burden easier to meet than the Wisconsin Statutes proscribe, and given that due process requires that the District bear the burden of proof, the BEP infringed on Dereian's due process rights by alleviating the District of half of that burden.

Third, the District was allowed to admit into evidence certain documents without first providing proper evidentiary basis for the documents' admission. *See, supra,* Part I.A.*8*. Given

that due process requires that the District bear the burden, this improper admission alleviated the District of its full burden and infringed on Dereian's due process rights.

Finally, the District expelled Dereian using unsettled law regarding the degree of the District's burden of proof. *See, supra,* Part I.A.*9.* Prior to the time that the hearing examiner issued his decision, Dereian's counsel raised the issue of the proper burden of proof, noting that this area of law is unsettled. *See, supra, id.* When the hearing examiner used the lower standard (preponderance of the evidence) between the two legally-possible options, he improperly aided the District in meeting its burden of proof.

In several instances throughout the expulsion process, Dereian was denied the ability to fully exercise his constitutional due process rights. These rights are absolute, fundamental, and without exception. *See, generally, Goss v. Lopez*, 419 U.S. 565 (1975). Therefore, the District cannot and will not be able to articulate a legitimate and non-discriminatory reason for depriving Dereian of the fullest extent of his due process rights.

5. The District will not be able to articulate a legitimate, non-discriminatory reason for acting contrary to OCR guidance.

The BEP is contrary to applicable OCR guidance. *See, infra,* Part II.B.*4.* OCR guidance provides that exclusionary discipline should only be used as a last resort. *See, infra, id.* The BEP renders exclusionary discipline as the *first* and *only* resort for several enumerated offenses. *See, infra, id.* The BEP does not provide for alternative means of discipline for any offense categorized as "Response Level 3," "Response Level 4," or "Response Level 5." Ex. 2. This is in direct conflict with applicable OCR guidance, and as such, the District cannot and will not articulate a legitimate, non-discriminatory reason for implementing this policy.

C. <u>**Step Three**: Is any reason articulated for the discriminatory treatment a pretext for discrimination?</u>

The District will be able to articulate legitimate, non-discriminatory reasons for the way it treated Dereian, but any reasons it may attempt to offer are actually pretext for discrimination according to applicable precedential authority. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). The *McDonnell* Court articulated that, in the face of certain circumstances, a plaintiff may prove that reasons articulated for certain discriminatory behaviors are, in fact, pretext for discrimination. *McDonnell*, 411 U.S. at 805. Those circumstances include:

- Instances in which persons outside the protected class were treated better in comparable circumstances;
- The manner in which the plaintiff was treated by the defendant;
- The defendant's reaction to "legitimate civil rights activities;" and
- Statistics concerning the defendant's policy and practice with respect to protected classes of persons insofar as it may suggest a general pattern of discrimination.

Id.

Here, all four of the sets of circumstances described above are present in Dereian's case, showing that any reason articulated for the discriminatory treatment was, in fact, just pretext for discrimination. More specifically,

- Other similarly-situated students did not suffer the same treatment as Dereian. *See, infra,* Part I.D.
- The Board of Education and certain District employees treated Dereian and his attorneys in an illegal and unethical manner in several instances. *See, supra,* Part I.A.*1*.

- Certain members of the Board of Education responded with animosity when Dereian exercised both his free speech rights and statutory rights to hold an open expulsion hearing. *See, supra,* Part I.A.*1.b.*

- A statistical analysis of the District's BEP shows that it creates a disparate impact on racial minorities, and that, under the BEP, the rate of expulsions for Black students has actually *increased. See, infra,* Part II.

Therefore, even if the District attempts to articulate a legitimate, non-discriminatory reason for its discriminatory treatment of Dereian, the surrounding circumstances reveal, under *McDonnell*, that such reasons are merely pretext for actual disparate treatment.

D. THERE IS NO EVIDENCE TO SUGGEST THAT THE MMSD HAS TREATED SIMILARLY SITUATED STUDENTS WITH THE SAME TREATMENTS (AS DESCRIBED IN PART I.A.) IT AFFORDED DEREIAN.

The Department of Education has explained "intentional discrimination could be proven even without the existence of a similarly situated student if the Departments found that teachers or administrators were acting based on racially discriminatory motives." Discipline DCL at 8. Complainants are not aware of any other District expulsion case in which the District demonstrated animosity, lack of decorum, clear bias, ex parte communication, false communication, coercive communication, illegal public communication, disregard for legal requirements associated with conduct proceedings, or disregard for notification from a student or student's attorney.

For comparison, in 2014 another student facing expulsion hired an attorney and released information to the media, much like Dereian.[14] Neither any District employee nor any Board

[14] Maia Meyer, a White student who attended Madison East High School in April 2014, hired attorney Jeff Spitzer-Resnick and released information to the media regarding her expulsion proceedings. WISC-TV, *Madison honor student spared an expulsion*, CHANNEL3000.COM (April 1, 2014), *available at* www.channel3000.com/news/madison-honor-student-spared-an-expulsion/2526340 (last visited April 27, 2016)

member criticized that pupil—a White student from Madison East High School—for hiring an attorney, for releasing information to the media, or for any other reason, even the *proven* misconduct (alcohol consumption while under the supervision of the school). *See* Exs. 29 and 30. Not only did the Board criticize Dereian for simply exercising his statutory rights, as described in Part I.A., above, District employees criticized Dereian for the *alleged* misconduct at a time when neither the hearing examiner nor the Board had made final findings of fact on that issue. *See* Ex. 22.

Similarly, Complainants are not aware of any District employee or Board member expressing any animosity, or any opinions whatsoever, regarding any other student facing expulsion or suspension. According to District data, many students face suspension and/or expulsion each year. *See* Exs. 5, 25, 27, and 28. For example, in 2015-16, there were 27 students facing expulsion as of March 8, 2016. Ex. 27. Of those 27 students, Complainants could not find any information of any statements by Board members or District employees about any students *except* for Dereian.[15] Similarly, in the 2014-15 school year, the District sought to expel 52 students and suspended 1713, and Complainants found no information or statements by Board members or District employees referring to any of those cases, with or without a student's name.[16] *See* Exs. 5, 25, 27, and 28. Again, in 2013-14, the District sought to expel 103 students and suspended 2906 students. *See* Exs. 5, 25, 27, and 28. Including Maia Meyer,[17] no District

(attached hereto as "Exhibit 29"); Judith Davidoff, *'Zero tolerance run amok': Madison honors student expelled, family fights back*, ISTHMUS (March 26, 2014), *available at* http://isthmus.com/news/news/zero-tolerance-run-amok-madison-honors-student-expelled-family-fights-back/ (last visited April 27, 2016) (attached hereto as "Exhibit 30").

[15] Complainants searched the District's website, Mr. Hughes's blog, and conducted public search engine queries using www.google.com to find statements by any District employee or Board member regarding any other students expelled or suspended from the District.

[16] *See supra,* note 15.

[17] *See supra,* note 14.

employee or Board member openly expressed animosity toward any of those students for simply exercising their statutory rights.[18]

Finally, in the last several years, 28 students have been recommended for expulsion for BB gun related incidents, including Dereian. Exs. 5, 17. Of those 28 recommendations, only four students were actually expelled. Exs. 5, 17. In this example, the similarly-situation students to Dereain are those students alleged to have engaged in conduct that endangered the health, safety, or property of others by use of a BB gun. Comparing Dereian to those similarly-situated students, even without details of the cases, it is clear that the District treated Dereian more harshly than most other students charged with a similar offense. *See* Exs. 5, 17

Just like Dereian, these students exercised their statutory and constitutional rights to either hold a closed hearing or to make their disciplinary proceedings public. However, unlike Dereian, these students did not face the public scrutiny of Board members and District employees. Similarly, over the last several years (some of which were under the BEP), the District recommended for expulsion 28 students based on BB gun allegations, only four were actually expelled. The District treated Dereian, a Black male student, differently than other similarly situated students, evincing a discriminatory intent in violation of Section 601.

II. THE MADISON METROPOLITAN SCHOOL DISTRICT ENACTED AND IMPLEMENTED POLICIES AND PRACTICES THAT CREATED A DISPARATE IMPACT ON A PROTECTED CLASS OF STUDENTS (INCLUDING DEREIAN), IN VIOLATION OF SECTION 602 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

The District's Behavior Education Plan ("BEP"), which describes its expulsion policies and procedures, creates an illegal disparate impact on minority students enrolled in the District. Title VI "prohibits both intentional discrimination (known as "disparate treatment") as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately

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[18] *See supra,* note 15.

adverse effect on minorities (known as "disparate impact"). *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). A disparate impact occurs when a facially neutral practice is "discriminatory in operation." *Ricci v. DeStefano*, 557 U.S. at 577-78 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

Courts (and O.C.R.) use the same analytical framework to review disparate impact claims in schools as they do in employment settings. *See, e.g., Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995); *see also Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *see also N.Y. Urban League, Inv.* V. N.Y., 71 F.3d 1031, 1036 (2d Cir. 1995). There are three prongs of the disparate impact analysis, as follows:

- <u>Prong One</u>: First, a court will look to see if a claimant establishes a prima facie case of discrimination through proving, by a preponderance of the evidence, that a facially neutral policy has a disproportionately adverse effect on a protected class. *See Ga. State Conference of Branches v. NAACP v. Ga.*, 775 F.3d 1403, 1417 (11th Cir. 1985). The Department of Education summarizes this prong with this question: "Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races?" *See* Discipline DCL at 11.

- <u>Prong Two</u>: Second, the burden shifts to the recipient/defendant to show that the policy is "job related for the position in question and consistent with business necessity." 42. U.S.C. § 2000e-2(k)(1)(A); *Griggs v. Duke Power CO.*, 401 U.S. 424, 431 (1973). In educational settings, schools have the burden to show that the policy has an "educational necessity," which is akin to the "business necessity" prong of the analysis in a disparate impact case arising from an employment setting. *See Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1412-13 (11th Cir. 1993). A "business necessity" or, in this case, an "educational necessity," is not something

that is absolutely "essential" or "indispensable," but the school must legitimately justify its rationale for the policy creating the disparate impact. *See Wards Cove Packing Co., Inv. V. Antonio*, 490 U.S. 642, 659 (1989). The Department of Education summarizes this prong with this question: "Is the discipline policy necessary to meet an important educational goal?" *See id.*

- Prong Three: Third and finally, the burden shifts back to the claimant to provide evidence of an equally valid, but less discriminatory alternative exists and that the educational entity failed or refused to implement such alternative. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), 2000e(2)(k)(1)(C); *Adams v. City of Chicago*, 469 F.3d 609, 613 (7th Cir. 2006). The Department of Education summarizes this prong with this question: "Are there comparably effective alternative policies or practices that would meet the [district's] stated educational goal with less of a burden or adverse impact on disproportionately affected racial group, or is the [district's] proffered justification pretext for discrimination?" *See id.*

A. **PRONG ONE**: MMSD'S BEP CREATED CIRCUMSTANCES THAT, ALONE OR TOGETHER, EVIDENCE AN ADVERSE IMPACT ON STUDENTS OF A PARTICULAR RACE AS COMPARED WITH STUDENTS OF OTHER RACES.

It is clear that the District's BEP creates a disparate impact on racial minorities. Regarding the first prong of the analysis in this case, the Department of Education Office of civil rights has explained that when statistical data indicates a "district suspends African-American students disproportionately relative to their enrollment at the school," there may be evidence of disproportionate impact. Discipline DCL at 17. The total population of students in the District has remained at approximately 27,000 over the span of time that the District has implemented the BEP, which is the 2014-15 and 2015-16 school years. *See* Exs. 25 and 29. During those two school years, the African American population in the District has been at approximately 18.17%

of the total student population.[19] However, since implementation of the BEP, Black students represent 62.41% of students suspended (more than three times the percentage of Black students District-wide); Blacks students represent, on average, 49.89%, of all students recommended for expulsion (approximately two-and-a-half times the percentage of Black students District-wide); and Black students represent, on average, 56.06% of all students actually expelled (more than two-and-a-half times the percentage of Black students District-wide).

As shown in Table 1, below, the BEP has not decreased the percentage of Black students subject to out-of-school punishment from the District. Although Black students were disproportionately suspended or expelled before implantation of the BEP, the percentage of suspensions and expulsions of Black students compared to other students remains disproportionately high after implementation of the BEP. This disproportionate trend of over-punishing Black students continued under the BEP even though the total percentage of Black students enrolled in the District dropped slightly.

Table 1: **Madison Metropolitan School District Discipline Data**[20]

BEP	Year	Black % in total school population	# of students suspended	% of students suspended who are Black	# of students recommended for expulsion	% of students rec. for expulsion who are Black	# of students expelled	% of expelled students who are Black
No	2011-2012	19.93%	4341	62.84%	189	62.96%	11	54.54%
No	2012-2013	18.64%	3863	60.13%	146	58.90%	26	65.38%
No	2013-2014	18.38%	2906	59.77%	103	59.22%	8	50.00%
Yes	2014-	17.95%	1713	62.41%	52	44.23%	22	45.45%

[19] In 2014, there were 4,998 African American students among the total student population of 27,186, which renders an 18.38% African American student population. *See* Ex. 29. In 2015, there were 4,890 African American students among the total student population of 27,237, which renders a 17.95% African American population. *See* Ex. 29. The average of 18.38% and 17.95% is 18.17%. *See* Ex. 29.

[20] The information in this table is derived from Exhibits 5, 25, 27, and 28.

	2015							
Yes	2015-2016[21]	17.83%	n/a	n/a	27	55.55%	6	66.67%

Of particular concern, in comparison to the *percentage* of suspensions and expulsions that are imposed upon Black students, is that, even with partial data current through only a portion of the 2015-2016 school year, it appears that the *rate* of expulsions for Black students is already trending toward a five-year high. Although the table above demonstrates that the BEP merely perpetuates already-discriminatory results for Black students, a closer analysis reveals that implementation of the BEP has actually worsened the disparate impact on Black students in comparison to previous school years. *See* Table 2, below.

For at least five years, the percentage of Black students expelled by the MMSD has been at least 45%.[22] However, in that time the percentage of Black students in the District has remained less than 20%.[23] While the rate of Black student enrollment in the MMSD has steadily declined over these five academic years, the percentage of students expelled overall who are Black has increased.[24]

Not only have the disciplinary racial disparities in the MMSD persisted for years but a review of the rate of expulsions through the past five years indicates the MMSD only implemented the BEP at a time when rates of Black student expulsions were already in a period of decline. *See* Table 2. That decline continued into the 2014-15 academic year. *See id.* However, now, nearing the end of the second year of the MMSD's BEP the rate of Black student

[21] This year's data are through March 8, 2016.

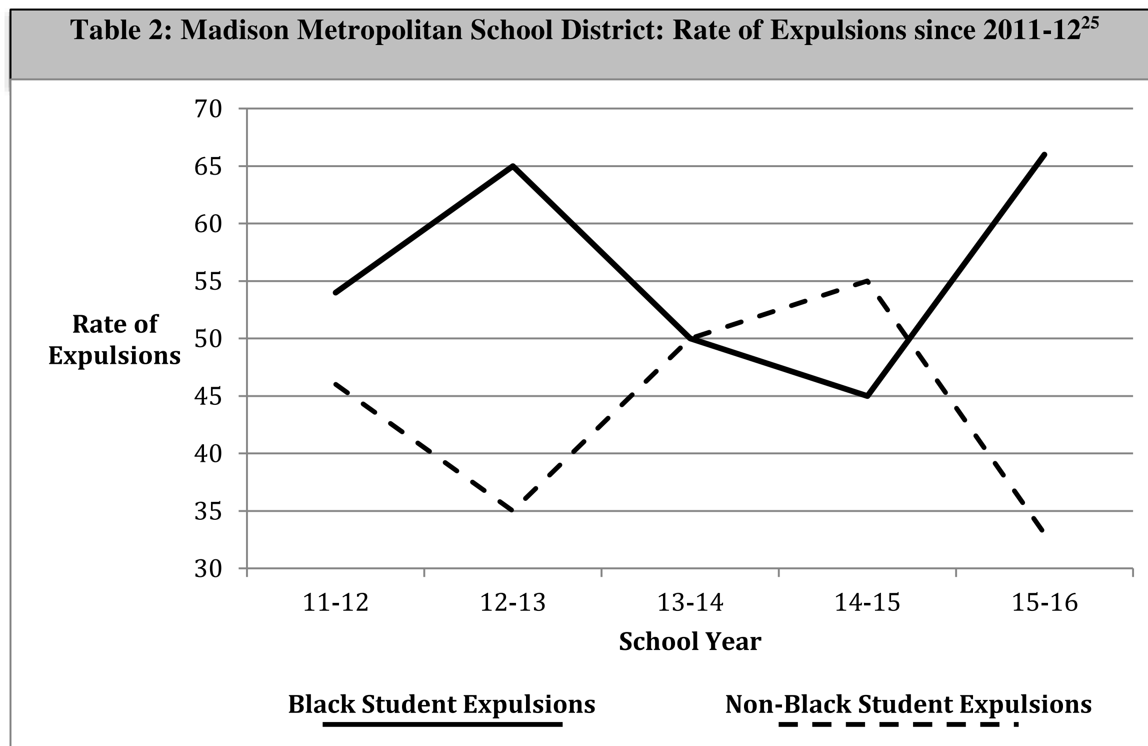
[22]*See* Exhibits 5, 25, 27, and 28; *see also* Table 2.

[23] *See* Exhibits 5, 25, 27, and 28; *see also* Table 2.

[24] *See* Exhibits 5, 25, 27, and 28; *see also* Table 2.

expulsions are poised to reach a five-year high. *See id.* With data through March 8, 2016 (leaving nearly 3.5 months of the school-year excluded from the data), the rate of Black student expulsions has already exceeded two-thirds. *See id.*

Table 2: Madison Metropolitan School District: Rate of Expulsions since 2011-12[25]



The BEP is a facially neutral policy. *See* Ex. 2. The BEP does not specifically or explicitly prescribe different treatment of students based on race, color, or national original. *See id.* However, the data in the tables above establishe a *prima facia* case of discrimination. Even though the total number of suspensions and expulsions decreased under the BEP, that facially-neutral BEP still created a disparate impact on Black students. Even though Black students do represent less than 20% of the student population, Black students are expelled or suspended at two-to-three times that *percentage* (Table 1), and at a higher *rate* overall (Table 2), than are their non-Black peers.

[25] The data described in this table are derived from Exhibits 5, 25, 27, and 28.

B. **PRONG TWO**: GIVEN THE NATURE OF THE DISTRICT'S BEP, IT CANNOT BE CONSTRUED AS NECESSARY TO MEET ANY IMPORTANT EDUCATIONAL GOAL—SPECIFICALLY, THE DISTRICT'S BEP IS CONTRARY TO WISCONSIN STATUTES, CONTRARY TO WELL-ESTABLISHED REQUIREMENTS OF DUE PROCESS, AND CONTRARY TO DEPARTMENT OF EDUCATION GUIDANCE.

The District claims that it enacted its BEP to "close gaps in opportunity that lead to disparities in achievement."[26] This is an admirable goal and the Complaints applaud the districts commitment to closing the achievement gap and recognizing the role that disparities in disciplinary outcomes have attributed to the gap. However, the BEP's decision-making process used to expel and suspend students is antithetical to the process used to expel and suspend students as described in the Wisconsin statutes, the requirements of due process, and the Department of Education guidance such that the BEP cannot be reasonably or legitimately construed to serve that educational necessity. Further, statements by MMSD board members and employees demonstrate such complete disregard and lack of care for the disparate impact associated with its disciplinary policies and practices the Department could infer from those statements along with the statistical evidence more than sufficient rationale to support a finding that MMSD has violated Section 602.

1. *In a multi-layered analysis, the Wisconsin Statutes afford school administrators with broad discretion in addressing student behavior.*

The Wisconsin Statutes dictate a decision-making framework for schools to utilize when determining whether to expel a student. The statutes prescribe, in most instances, a two-step analysis to be used in expulsion proceedings. WIS. STAT. §§ 120.13(1)(c)1., 2.[27] That two-step analysis is as follows:

[26] https://studentservices.madison.k12.wi.us/behavior-education-plan-bep

[27] The two-step analysis does not apply if the pupil is found to have possessed a firearm. WIS. STAT. § 120.13(1)(c)2m. In that instance, the school is required to commence expulsion proceedings, and the school is not allowed, by statute, to consider interest of the school. *See Id.*

- First, a school must find that the student committed an expellable offense. WIS. STAT. §§ 120.13(1)(c)1., 2. The statutes describe expellable offenses in general terms, noting types of behavior, not necessarily specific acts that could prompt expulsion. *See* WIS. STAT. §§ 120.13(1)(c)1., 2. Some examples of these general terms include "repeated refusal or neglect to obey the rules," "conduct . . . which endangered the property, health or safety of others," or, for students who are at least 16 years of age, a student can be expelled if he/she "repeatedly engaged in conduct . . . that disrupted the ability of school authorities to maintain order or an educational atmosphere[.]"

- Second, a school must find that "the interest of the school demands the pupil's expulsion." WIS. STAT. §§ 120.13(1)(c)1., 2.

Similar to the legal framework for expulsions, the Wisconsin Statutes also provide a decision-making framework for schools to utilize when determining whether to suspend a student. *See* WIS. STAT. § 120.13(1)(b). Generally, that framework requires school administrators to make a factual finding that a student committed some act that may justify suspension, such as noncompliance with school rules or endangering school property, for example. *See* WIS. STAT. § 120.13(1)(b)2. Then, the school administrator must exercise discretion to determine if the suspension is appropriate. *See* WIS. STAT. §§ 120.13(1)(b)2., 3. The statutes grant school administrators and principals that discretion as follows:

- The statutes use the discretionary "may" language when granting school administrators the authority to suspend students. *See* WIS. STAT. § 120.13(1)(b)2.; *see, e.g., Madison Metropolitan Sewerage Dist. v. Dept. of Natural Resources*, 63 Wis. 2d 175, 191, 216 N.W.2d 533, 541 (1974) (Noting the legal difference between "shall" and "may" as follows: "Having changed the statute from a mandatory 'shall' to a discretionary 'may,' the court . . .

[.]"). Thus, under no circumstances are school administrators or principals required to suspend a student.

- The statutes require that any suspension be "reasonably justified." WIS. STAT. § 120.13(1)(b)3. This requirement calls for a school administrator to exercise subjective judgment, weighing all of the evidence and circumstances, rather than substituting the findings of the investigating officer to render a decision. Inherent in this requirement is discretion—discretion to determine when out-of-school discipline is appropriate in a particular case, and discretion not to force a student removal from school without determining whether an alternative punishment would serve the student and school more effectively. *See id.*

The Wisconsin Statutes grant school districts great latitude to determine when it is appropriate to suspend a student. The Statutes do not prescribe the specific conduct that must precipitate a suspension, but rather the Statutes list categories of offenses that may lead to suspension. WIS. STAT. § 120.13(1)(b)2. Further, the Statutes require schools to determine that the suspension is reasonably justified, even when a student commits an offense that falls into a category of offenses that could cause result in suspension. Finally, the Statutes do not require schools to ever use suspension as a discipline tactic—yet another discretionary authority granted to schools with regard to suspensions.

2. *In a mere one-step perfunctory analysis, the District's BEP eliminates the discretionary authority afforded by the Wisconsin Legislature.*

The District's BEP removes, in advance of any expulsion hearing, the second prong of the statutory expulsion analysis. *See* Ex. 2. Under the BEP, if a hearing examiner finds that a student committed a certain offense, that student *will* be expelled, regardless of the individual circumstances of that student and whether such student's expulsion would, in fact, advance the "interest of the school." The District's Board of Education, in enacting its BEP, has declared that

the commission of a certain offense will *always* demand the expulsion of the pupil who committed such offense. The Board has concluded *a priori* that it serves the interest of the school that all students who have committed an expellable offense must be expelled. This decision abdicates the reasoning and ruling responsibility that has historically rested with the Board and places it in the hands of the investigating officers. The Board has precluded and disallowed consideration of any individual circumstances surrounding a particular act or a particular child, and the Board precluded consideration of the impact of the loss of any one particular child on the district. The Board created a policy that is inconsistent with Wisconsin Statutes and that treats children in an unjust manner: as a set of alleged and determined offenses, and not as individuals.

When a hearing examiner presides over an expulsion hearing, that examiner looks to see if the pupil committed the alleged offense and nothing more. The examiner does not consider the strength of the allegations brought against the student. The examiner does not consider whether there were mitigating circumstances that may have contributed to the commission of the offense. *See* Ex. 2. The examiner does not consider the good that the student may bring to his/her school. *See id.* The examiner does not consider the community-wide impact of losing another student of color to expulsion. *See id.* This is true in the District's case, as evidenced by Dereian's hearing examiner, who merely made a conclusory finding, unsupported by any facts, that the interest of the school district demanded Dereian's expulsion. *See* Ex. 17. The Board of Education precludes the examiner from considering any of these factors, even though the Wisconsin statutes do not. *See id.*

Recently, the District amended its BEP. Erickson, Doug, *Madison School Board revises expulsion process, adding more ways to halt it early on*, The Capital Times (May 24, 2016), *available at* http://host.madison.com/wsj/news/local/education/local_schools/madison-school-

board-revises-expulsion-process-adding-more-ways-to/article_8a28e824-e4d7-565f-a496-47030453a1da.html (attached hereto as "Exhibit 31"). The changes to the BEP specifically address how the District plans to deal with the "interest of the school district" factor. Ex. 31. Specifically, a three-person committee will meet to discuss a possible recommendation for expulsion prior to making such a recommendation. *Id.* Although these changes do not address, with any degree of adequacy, the issues raised in this complaint (*see AFTERWORD*), the fact that the District specifically addressed this "interest of the school district" factor is an implicit acknowledgement that the BEP currently fails to properly address this factor and, therefore, comply with applicable statutes.

Similar to expulsions, the BEP gives school employees no authority to exercise discretion with regard to issuing suspensions. *See* Ex. 2. Instead, the BEP requires school administrators to issue suspensions when those school administrators believe allegations of specific, suspension-worthy acts. *Id.* The Board pre-identified acts that are suspension-worthy in its adoption of the BEP. *See id.* Specifically, if a student commits an offense that, according to the BEP, results in a "Response Level 3," Response Level 4," or "Response Level 5," a student—seventh grade or older—will automatically be suspended. *See, e.g.,* Ex. 2, p. 31. If a student who is not yet in seventh grade commits an offense that results in a "Response Level 4" or "Response Level 5," that student will be automatically suspended. *See, e.g., id.* The BEP gives school administrators no discretion to determine individual circumstances or whether the suspension will be "reasonably justified" with regard to any specific student.

3. The District's BEP is contrary to well-established requirements of due process.

As described above, Dereian has a due process right that requires a hearing or procedure, specific to Dereian and his circumstances, before the District may suspend or expel Dereian. *See,*

generally, Goss v. Lopez, 419 U.S. 565 (1975); *see also Racine Unified Sch. Dist.*, 107 Wis. 2d at 661; *see also* WIS. STAT. § 120.13(1)(c)3. Due process requires that the government consider the individual circumstances of an individual case before a person may be deprived of a liberty or property interest. *See, generally, Goss v. Lopez*, 419 U.S. 565. Consistent with due process, the District bears the burden of proof in expulsion cases, not the student. *See, generally, Butler v. Oak Creek-Franklin School Dist.*, 172 F. Supp. 2d 1102 (E.D. Wis. 2001).

By implementing a zero tolerance policy that leaves exclusionary practices as the only resort as described below, the MMSD fails in its legal obligation to provide hearing and procedure specific to Dereian and his circumstances. Such a zero tolerance and exclusionary only disciplinary policy also infringes on the requirements of due process that places the burden of proof and persuasion upon the District by undermining or eliminating entirely the burden.

4. *The District's BEP is contrary to Department of Education guidance.*

The Department of Education repeatedly explains that exclusionary discipline should always be used as a last resort. "A school should consider incorporating wide-ranging strategies beyond exclusionary discipline, including, for example, conflict resolution, restorative practices, and counseling, to help meet its obligations under Federal civil rights laws" Discipline DCL at note 15. The Department of Education implies an assumption that exclusionary discipline may results in disparate impact by explaining that remedy for disparate impact would include "developing and implementing strategies for teaching, including the use of appropriate supports and interventions, which encourage and reinforce positive student behaviors and utilize exclusionary discipline as a *last resort*." Discipline DCL at 21 (emphasis added). Further the Department urges districts to "provide all school personnel, including teachers, administrators, support personnel, and school resource officers, with ongoing, job-embedded professional

development and training in evidence-based techniques on classroom management, conflict resolution, and de-escalation approaches that decrease classroom disruptions and utilize exclusionary disciplinary sanctions as a *last resort*." Discipline DCL at Appendix page 2. (emphasis added). The Department also encourages districts to implement policies that provide "alternatives" to both in-school and out of school exclusionary discipline. Discipline DCL at Appendix page 6.

By advancing exclusionary discipline from being a last resort and establishing it as the only resort, the MMSD's BEP is contrary to the Department of Education's guidance. Implementing exclusionary discipline as the only resort, the MMSD's BEP is also contrary to extensive research associated that strongly suggest exclusionary discipline is associated with negative student outcomes:

> Data also show that an increasing number of students are losing important instructional time due to exclusionary discipline. The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the "school to prison pipeline." Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems.

Discipline DCL at 4-5 (citations omitted).

Therefore, it is clear that the BEP is contrary to OCR guidance, and, therefore, the BEP cannot be reasonably construed to advance an educational necessity.

C. **PRONG THREE**: EVEN IF THE DISTRICT'S BEP COULD BE REASONABLY CONSTRUED AS NECESSARY TO MEET AN IMPORTANT EDUCATIONAL GOAL, THERE ARE COMPARABLY EFFECTIVE ALTERNATIVE POLICIES OR PRACTICES THAT WOULD NOT RESULT IN A DISPROPORTIONATE BURDEN OR ADVERSE IMPACT ON PROTECTED RACIAL GROUPS.

There are clear alternatives to the BEP's non-discretionary decision-making processes in expulsion hearings and suspension cases. Instead of eliminating consideration of individual circumstances, and instead of eliminating discretion, the District could utilize the statutory decision-making processes that grant schools the discretion to determine if one particular student should be suspended or expelled even if that student committed an offense that could lead to out-of-school discipline. *See* WIS. STAT. §§ 120.13(1)(b), (c)1.- 2. The discretionary analyses are not, in and of themselves, discriminatory.[28] People who exercise discretion under those analyses may make discriminatory decisions, but in such a scenario, any disparate impact would be caused by disparate *treatment*, not like the facially-neutral BEP that creates a disparate impact.

Additionally, suspension and expulsion are not the only disciplinary consequences at the District's disposal. If the District increased its use of alternative disciplinary procedures, both before and after students commit offenses that could lead to out-of-school discipline, it could also reduce the disparate impact that the District has imposed on its Black students. [29]

[28] Before the BEP was implemented, the District's discipline policies still created a disparate impact on racial minorities, but 1) that rate was decreasing at the time the BEP was implemented, and 2) that rate increased after implementation of the BEP. *See* Table 2.

[29] *Cf.* Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 Cornell J.L. & Pub. Pol'y 327, 344-45 (2005) ("[T]here are comparably effective practices that will result in less disproportionate results. Experts have suggested that a variety of alternative disciplinary practices that could achieve school goals without disproportionately burdening minority students." (citations omitted)). *See also Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* 63 American Psychologist 9, 852-3 (2008) ("Since the early 1990s, the national discourse on school discipline has been dominated by the philosophy of zero tolerance. Originally developed as an approach to drug enforcement, the term became widely adopted in schools in the early 1990s as a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context. Such policies appear to be relatively widespread in America's schools, although the lack of a single definition of zero tolerance makes it diffi- cult to estimate how prevalent such policies may be. Zero tolerance policies assume that removing students who en- gage in disruptive behavior will deter others from disruption and create an improved climate for those students who

Complainants offer the following, non-inclusive, list of suggestions of alternative disciplinary procedures that the District may employ:

- Build and Expand Capacity for Prevention Strategies: "Many of the most effective programs in the nation for dealing with student disruption are characterized by high levels of student support and community. Solutions to the zero tolerance dilemma may seek to shift the focus from swift and certain punishment to using research-supported strategies."[30]

- Build and Expand Capacity for Disciplinary Discretion: "Research suggests that effective principals work with their teachers to define which offenses should be referred to the office and which are better handled at the classroom level"[31] "One of the most effective disciplinary strategies is to prevent the occurrence of misbehavior through effective instruction and classroom management, thereby maximizing student opportunity to learn and reducing disciplinary referrals In particular, high overall and disproportionate rates of office referrals suggest a need for teacher training at all levels in elements of culturally responsive classroom management and instruction."[32]

- Positive Behavioral Intervention and Support: Positive Behavioral Intervention and Support ("PBIS") is a curriculum of resolution conflict strategies taught to students to help them effectively cope with interpersonal conflict and deescalate contentious situations. *See Positive Behavior Support Youth At-Risk and Involved in Juvenile Corrections*, Positive

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remain.Yet abundant controversy has been created in schools and communities throughout the nation in the actual implementation of zero tolerance policies and practices. For example, as reported in the St. Petersburg Times, a 10-year-old girl found a small knife in her lunchbox placed there by the mother for cutting an apple. Although she immediately handed over the knife to her teacher, she was expelled from school for possessing a weapon. In another case, an adolescent was expelled for violating school rules by talking to his mother on a cell phone while at school—his mother was on deployment as a soldier in Iraq and he had not spoken with her in 30 days." (citations omitted)).

[30] *See, supra,* note 29 at 858.

[31] *See, supra,* note 29 at 857.

[32] *See, supra,* note 29 at 859.

Behavioral Interventions and Support, *available at* http://www.pbis.org. PBIS helps reduce disciplinary interventions in schools. U.S. Dept. of Education, DEPARTMENT OF EDUCATION GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 7 (Jan. 2014). "Implement preventive measures that can improve school climate and improve the sense of school community and belongingness. Many of the most effective programs in the nation for dealing with student disruption are characterized by high levels of student support and community. Solutions to the zero tolerance dilemma may seek to shift the focus from swift and certain punishment to using research-supported strategies to improve the sense of school community and belongingness."[33]

- Restorative Justice: Restorative justice is a principle of discipline/corrective action that focuses on an entire community, not just an offender, and values accountability over shallow punishment. *See* Wisconsin Department of Corrections, *Restorative Justice*, WISCONSIN DEPARTMENT OF CORRECTIONS, *available at* doc.wi.gov/victim-resources/restorative-justice; *see also* RESTORATIVE JUSTICE COLORADO, *available at* www.rjcolorado.org/restorative-justice-in-schools.html (last visited April 26, 2016). Schools can use restorative justice teachings or dialogue, pre- or post-offense, to teach empathy and problem-solving skills with those affected by a student's actions, rendering the consequences more productive than merely punitive.

- Improve and Increase Interagency Coordination: "The complex problems faced by disruptive youth and their families often exceed the capabilities of any single agency. System coordination approaches such as wrap- around services, in which education, mental health, juvenile justice, and other com- munity youth-serving agencies collaborate to develop integrated services, can significantly increase the resources available to schools to address the most

[33] *Id* at 858.

serious and challenging behaviors."[34] Under the heading "Communicating with engaging school communities" the Department of Education provides a list describing seven strategies that could effectively achieve this purpose. Discipline DCL Appendix at Page 5-6.

- Social and Emotional Learning: Social and Emotional Learning ("SEL"), like PBIS, is a curriculum taught to students to learn self-awareness, self-management, social awareness, relationship skills, and responsible decision-making strategies. Collaborative for Academic, Social and Emotional Learning, *Frequently Asked Questions about Social and Emotional Learning (SEL), available at* http://www.casel.org/social-and-emotional-learning (last visited April 26, 2016). Students who receive SEL instruction, pre- or post-offense, are less likely to be disruptive in school. *Id.* The U.S. Department of Education endorses SEL as an effective way to reduce exclusionary discipline in schools. .S. Dept. of Education, DEPARTMENT OF EDUCATION GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 2 (Jan. 2014).

D. **BEYOND THE THREE-PRONG ANALYSIS**: MMSD BOARD MEMBERS AND EMPLOYEES DEMONSTRATE SUCH COMPLETE DISREGARD AND LACK OF CARE FOR THE RACIALLY DISPARATE IMPACT ASSOCIATED WITH ITS DISCIPLINARY POLICIES AND PRACTICES THAT O.C.R. COULD INFER FROM THOSE STATEMENTS, ALONG WITH THE STATISTICAL EVIDENCE, MORE THAN SUFFICIENT RATIONALE TO SUPPORT A FINDING THAT MMSD HAS VIOLATED SECTION 602.

The Department of Education has explained:

> Intentional discrimination also occurs when a school adopts a facially neutral policy with the intent to target students of a particular race for *invidious reasons*. This is so even if the school punishes students of other races under the policy. For example, if school officials believed that students of a particular race were likely to wear a particular style of clothing, and then, as a means of penalizing students of that race (as opposed to as a means of advancing a legitimate school objective), adopted a policy that made wearing that style of clothing a violation of the dress code, the policy would constitute unlawful intentional discrimination.

Discipline DCL at 8 (citations omitted) (emphasis added).

[34] *Id* at 859.

In his public blog, board member Ed Hughes wrote, "[a]s a rule, we apply the standards set out in the [Behavior Education Plan] to the student's behavior. We don't use our consideration of an individual case as a vehicle to change the policies we've established[,]" and, "I believe that one way to avoid unwarranted disparities is to apply our expulsion standards uniformly and consistently. The unpleasant upshot of this is that any student who commits an expellable offense will end up being expelled. While this can give rise to tough cases, . . . I don't know how any other approach could be workable at all." Ex. 21. This statement shows that Mr. Hughes demonstrates a gross lack of understanding that adjudicators must consider *individual* circumstances in each student's case as a means to protect those students' statutory and constitutional rights. *See, e.g.,* Part I.B.*4.* He also demonstrates a lack of appreciation and concern for the long tradition of racial disparities in the MMSD; as indicated above, the racial disparities in student discipline at the MMSD are now trending to reach five-year highs. *See* Table 2.

Board member Anna Moffit's comments demonstrate a similar ignorance and lack of care regarding the requirements for individual consideration discussed above. Likewise, she also demonstrates ignorance and an inhumane care or concern for the racial disparities occurring through student discipline at the MMSD when she writes "[o]ur district has policies that need to be followed if we want to work towards consistent decisions regardless of access to external sources or public opinion." Ex. 19. Board President James Howard demonstrated additional disregard for the requirements for individual consideration in his statements: "It was important to send a message. . . We cannot decide this case-by-case." Ex. 23.

Using these inflammatory comments made by Board members and data compiled by and provided by the District, O.C.R. could infer the presence of an invidious reason for implementing

the policies–specifically to target racial minorities by requiring exclusionary practices for behavior that is known to be more common among racial minorities. The District has prescribed offenses to precipitate expulsions and suspensions that Black children are more likely to commit. *See* Exs. 5, 25, 27, and 28. The District has years' worth of data to show which students are more likely to commit which offenses. *See* Ex. 5. The District knows, or should know, which offenses are more likely to be committed by Black students. *See id.* Further, these policies completely ignore the possibility that implicit or explicit bias may take place in policing of students and enforcement of school rules, as it is quite possible that people who investigate possible infractions may not be doing so through color-blind glasses.

Thus, even though the District may claim that the intent of the BEP may have been to prevent discriminatory decisions in individual expulsion and suspension cases, the effect of the BEP is that the Board of Education has preemptively made a discriminatory framework in *all* expulsion and suspension cases when it had the data to know exactly what effect the BEP would have on Black students. When the existence of this data is analyzed in complement to the Board members' comments, it demonstrates a such complete disregard and lack of care for the racially disparate impact associated with its discipline policies and practices that it is reasonable to infer that the Board described particular offences that mandate suspension or expulsion with invidious intent.

CONCLUSION

The District may not discriminate against its students on the basis of race under Title VI of the Civil Rights Act. The District may not intentionally discriminate against students on the basis of race under Section 601 of Title VI. However, it is clear, through the statements and actions by Board members and District employees, that the District *intentionally* discriminated

against Dereian throughout his expulsion proceeding. The District may not enact a policy that creates a disparate impact on a protected class under Section 602 of Title VI. However, it is also clear that 1) the District's BEP creates a disparate impact on racial minorities (specifically, Black students); 2) the BEP does not serve an educational necessity; and 3) there are other reasonable policies that the District could use without creating a disparate impact on racial minorities. The District cannot continue these intentionally-discriminatory and disparate practices, and Dereian asks O.C.R. to remedy this discrimination to the fullest extent available under law.

Respectfully submitted,

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AFTERWORD

The District recently changed its BEP, but not in a way that adequately addresses the issues presented in this Complaint. Late in the 2015-16 school year, the District's Board of Education announced changes to the BEP to be implemented upon commencement of the 2016-17 school year. Ex. 31. According to the media report, the changes to the BEP provide that a three-person team will "use 'established criteria' to determine whether 'the interest of the school' demands the student's expulsion or not." Ex. 31. These criteria are expected to include consideration of mitigating factors, such as "whether students have taken responsibility for their conduct, whether they demonstrate a willingness to meaningfully participate in a restorative process, and whether the conduct was an isolated event." *Id.* Specific language about how those mitigating factors are to be considered is not yet available. *Id.* The District appears to be responding to a BEP that, unlike the Wisconsin Statutes, eliminates any sort of discretion in the expulsion process.

Dereian appreciates that the District acknowledges that its current BEP needs changes. However, such changes do not adequately address the issues presented in this Complaint for several reasons:

- These changes do not address, in any way, the intentional discrimination that Dereian suffered as a part of the expulsion proceedings against him.
- The District knows, or should know, based on its own data, that its discipline policies are racially discriminatory, yet there is no evidence[35] that the proposed changes are being implemented for the purpose of alleviating the disparities in student discipline suffered by minority students in the District.

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[35] The media report does not indicate that any member of the Board or District employee cited racial disparity as a reason for making the changes to the BEP. *See* Ex. 31.

- The proposed changes do not address, in any way, the disparate impact on Black students with regard to suspensions and expulsions.
- The very same people who intentionally discriminated against Dereian were those who implemented these changes, so there is no evidence, or even reasonable inference, that these changes were made with the intention to help alleviate the disparate impact on racial minorities in MMSD.
- The proposed changes do not address mitigating factors related to racial difference between students.
- The proposed changes do not address mitigating factors related to socioeconomic inequalities, which are often correlated to racial differences.
- The proposed changes do not address mitigating factors related to implicit bias of certain students that likely contributes to disproportionate policing or targeting of certain students.

The District has made changes to its discipline policies in each of the past three years, yet during that time, a Black student has become more and more likely to be suspended, recommended for expulsion, or expelled. Only until the District acknowledges its intentional discrimination of Dereian, and only until the District acknowledges that its policies create a disparate impact on racial minorities, will the District effectively address the racial discrimination that it imposes on its students. Despite the proposed changes to the BEP, Dereian still asks the Office of Civil Rights to investigate and remedy MMSD's disparate treatment of him and its policies that create a disparate impact on racial minorities.