



May 31, 2022

Dr. Deborah Sixel
Principal
Kiel Middle School
416 Paine Street
Kiel, WI 53042

Sent via email

Dear Dr. Sixel:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties and promoting a common culture based on fairness, understanding, and humanity. We have more than one hundred chapters and tens of thousands of members nationwide, including in Wisconsin. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to an [incident report](#) regarding Kiel Middle School submitted to FAIR on May 16 through our transparency website, fairtransparency.org. That report states:

A Wisconsin school district has filed sexual harassment complaints against three middle schoolers for calling a classmate by a wrong pronoun. The school district in Kiel has charged the three eighth-graders at the Kiel Middle School with sexual harassment after an incident in April in which the students refused to use “they” to refer to a classmate who had switched pronouns a month before the alleged incident, according to reports.

We sympathize with schools faced with the task of educating youth while the nation is publicly grappling with controversial and divisive issues. However, initiating federal complaints against students for not using “they/them” pronouns violates those students’ First Amendment rights in numerous ways. A public school may not restrict, chill, or punish student speech unless it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). That is particularly the case where the speech touches upon a matter of public concern, such as pronoun usage, which is a topic of ongoing public debate and controversy. “[S]peech concerning matters of public concern occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

Here, there is no indication that declining to use alternative pronouns materially disrupted the classroom or created substantial disorder at Kiel. Nor does it invade the rights of any student. We are aware of no applicable law giving students the legal right to force others to use their alternative pronouns. Even the

most recent Department of Education interpretive rule on Title IX does not recognize or grant any student the right to compel their classmates to use whatever pronouns they demand. *See* 86 Fed. Reg. 32637-01 (eff. June 22, 2021). Avoiding “the discomfort and unpleasantness that always accompany an unpopular viewpoint” is an insufficient basis for restricting student speech. *Tinker*, 393 U.S. at 509. As the Supreme Court elaborated:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-9 (internal citations omitted).

Moreover, by initiating proceedings against students for not using the alternative pronouns of others, Kiel is not simply punishing them for protected speech; it is *compelling* them to affirm ideological beliefs in violation of their First Amendment rights. Pronoun declarations are not value-neutral statements such as name and age. They are politically loaded and premised on a specific set of ideological beliefs: that pronouns refer to gender and not biological sex, that one can be neither male nor female, and that gender is a matter of personal choice rather than a biological condition. The First Amendment forbids public schools from requiring students to adopt any ideological beliefs. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Oliver v. Arnold*, 3 F.4th 152, 162 (5th Cir. 2021). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. Requiring students to use preferred pronouns (and punishing them if they do not) necessarily compels them to affirm faith in a gender ideology they may not accept.

Filing charges against students for not using alternative pronouns may also violate their religious rights. The First Amendment protects against state intrusion into an individual’s sincerely-held religious beliefs. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”). Many world religions deny the existence of numerous genders and the ability of an individual to select their own gender. Requiring the affirmance of such ideas would violate the rights of students whose sincerely-held religious beliefs reject them.

It may be polite for students to use the preferred alternative pronouns of their classmates. However, punishing them if they do not disregards their First Amendment rights. “In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may

not be confined to the expression of those sentiments that are officially approved.” *Tinker*, 393 U.S. at 511.

Since receiving the incident report, we have learned of bomb threats made against the school. FAIR unequivocally condemns threats of violence. Our principles of peaceful change offer a model we hope would be followed by those who disagree with the actions Kiel has taken.

Kiel still has an opportunity to take a more tolerant and open-minded approach to the topic of gender. We urge it to do so by withdrawing the complaint and instead, fostering respectful and open dialogue that is consistent with Constitutional protections.

Very truly yours,

A handwritten signature in black ink, appearing to read 'L. Kim', with a stylized flourish at the end.

Letitia Kim
Managing Director of the Legal Network
Foundation Against Intolerance & Racism

cc: Kiel Area School District Board of Education