UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

K.R., a minor, by and through his parent and natural guardian, Kali Proctor, and L.G., a minor, by and through her parent, and natural guardian, Desmond Gilbert,

Plaintiffs,

v.

Duluth Public Schools Academy, d/b/a Duluth Edison Charter Schools,

Defendants.

Civil No. 19-999 (DWF/LIB)

MEMORANDUM OPINION AND ORDER [FILED UNDER SEAL]

Adele P. Kimmel, Esq., and Alexandra Brodsky, Esq., Public Justice; Anna P. Prakash, Esq., Charles A. Delbridge, Esq., Laura Baures, Esq., Lucas J. Kaster, Esq., Matthew H. Morgan, Esq., Melanie April Johnson, Esq., Rebekah L. Bailey, Esq., and Robert L. Schug, Esq., Nichols Kaster PLLP, counsel for Plaintiffs.

Jordan Soderlind, Esq., Margaret A. Skelton, Esq., and Timothy A. Sullivan, Esq., Ratwik, Roszak & Maloney, P.A., counsel for Defendants.

INTRODUCTION

This matter is before the Court on Defendant Duluth Public Schools Academy d/b/a Duluth Edison Charter Schools ("Defendant" or "DECS") motion for summary judgment. (Doc. No. 106.) For the reasons below, the Court denies the motion.

BACKGROUND

DECS is a K-8 public charter school in Duluth, Minnesota with two campuses—North Star Academy and Raleigh Academy. (Doc. No. 12 (First Amended Compl.

("FAC") ¶ 30.) At all relevant times, Bonnie Jorgenson was the Head of Schools for DECS. (*Id.*; Doc. No. 110 ("Sullivan Decl.") ¶ 2, Ex. A ("Jorgenson Dep.") at 11.)[1] Each DECS academy is led by a principal (or director) and a dean of students. (Doc. No. 134 ("Bailey Decl.") ¶ 4, Ex. 1 ("Regas Dep.") at 58; *id.* ("Rackliffe Dep.") at 7-9.) The deans report to the principals and directors, the principals and directors report to Jorgenson, and Jorgenson reports to the board. (Jorgenson Dep. at 9-11, 17.)[2] During the relevant time, Kristin Regas ("Regas") was the Dean of Students at Raleigh, Steven Lindberg ("Lindberg") was the Dean of Students at North Star, and Ryan Dickinson ("Dickinson") was the Assistant Dean of Students at North Star. (FAC ¶¶ 39-41.) In addition, Danielle Perich ("Perich") was the Principal at Raleigh, Jennifer Fuchs ("Fuchs") was the Principal at North Star for grades 6-8, Tammy Rackliffe ("Rackliffe") was the Primary Academy Director for grades K-2 at North Star, and Matt Petersen ("Petersen") was the Elementary Academy Director at North Star for grades 3-5. (*Id.* ¶¶ 42-45.)

A student and parent handbook governs both DECS campuses. (Def's Ex. J.) The handbook includes, in relevant part, a code of conduct that prohibits, among other things,

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[1] The Court refers to Defendant's Exhibits attached to the Sullivan Decl. at Doc. No. 110 as "Def's Ex. XX" and to Plaintiffs' Exhibits attached to the Bailey Decl. at Doc. No. 134 as "Pls' Ex. XX." Deposition excerpts cited in Plaintiffs' memorandum are attached at Pls' Ex. 1 to the Baily Decl.

[2] Due to the sensitive nature of certain testimony and the involvement of minors, neither party submitted full deposition transcripts. Where practicable, the Court will note each party's record citation of a deposition and will thereafter refer to the deposition simply as XX Dep.

harassment, discrimination, bullying, and violence. (*Id*. at 15, 25 ("Under no circumstances will . . . harassment . . . be tolerated, condoned, or excused. Immediate steps will be taken to discipline any student involved in such behavior.").) DECS's guidance requires that "objectively offensive," "threatening, abusive or harmful" comments be investigated and documented. (Pls' Ex. 8 at DECS017268-69.) DECS has multiple, overlapping policies that expressly prohibit discrimination, harassment, and bullying on the basis of protected class, including race.

- Policy Regarding Bullying, Cyber Bullying, Harassment, Violence, and Intimidation (Policy 500-15), "protects students against bullying and harassment on the basis of actual or perceived race" and requires DECS to investigate all complaints of racial harassment, violence, or bullying, and to take appropriate remedial action against any student found to have violated the policy. (Def's Ex. F.)
- School Discipline Policy (Policy 500-9), sets forth expectations for student behavior in school, recognizes students' rights to attend school in a safe environment, establishes that the goal of student discipline is to prevent inappropriate behavior from recurring, and identifies guidelines for consequences. (Def's Ex. G.)
- Behavior/Discipline Policy/Code of Conduct for Students (Policy 500-14), contains additional statements of DECS's student conduct philosophy and summarizes the requirement that students be safe, kind, respectful, and responsible. (Def's Ex. J.)

DECS submits that it has taken steps to promote racial equity within its schools. For example, after the killing of Trayvon Martin in February 2012, a group of students asked to form a Minority Student Forum to discuss concerns related to being African American[3] in the Duluth Community. (Def's Ex. B.) In 2014-15, the Minority Student

[3] The Court uses the terms students of color, Black, and African American in this order, in an effort to reflect the various uses found in the parties' briefs and the record. The Court does not intend to comment on which use is more appropriate and notes that

Forum drafted a State of the Minority Student Report based on the results of a survey of DECS families of color. (*Id.*; Def's Ex. C.) The report was presented to the DECS board. (*Id.*) DECS subsequently hired a full-time African American Liaison for the 2015-2016 school year. (Def's Ex. B.) In addition, DECS directed its arts curriculum coordinator to increase the presence of diversity among authors and books assigned, and DECS administrators participated in a "Promoting Fairness Project" and conducted a "cultural climate assessment" which resulted in recommendations to promote cultural competency. (*Id.*; Def's Ex. D.) DECS entered into a three-year agreement with the Duluth Community Action Program's Racial Awareness Workshop ("RAW") team, and DECS staff took part in RAW training. (Def's Ex. B.) Some DECS administrators and teachers participated in other workshops, covering a range of topics including restorative practices, cultural bias, equity, and supportive discipline. (*Id.*)

Plaintiffs submit that, despite the above policies and practices, the small population of Black students at DECS has been subjected to persistent racial harassment and discrimination, including reported incidents of racial taunting, the use of racial slurs, a persistent practice of permitting race discrimination and harassment, and the use of disproportionate discipline against students of color. In addition, Plaintiffs point to the results of reports and surveys, including the Minority Student Report, detailing concerns, regarding: (1) uses of the "N-word" being ignored or going unpunished; (2) the failure to

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the terms are meant to include individuals who are biracial and those who may not have been born, or naturalized, in the United States.

include the discussion of racial issues in the broader discussion of bullying; and (3) disproportionately harsh discipline against minority students. (Def's Ex. C.)

In the fall of 2016, feedback as part of the Promoting Fairness Project from teachers, parents, and students included the belief of some that: racial taunting was frequent; staff did not recognize, minimized, or did not respond to racial taunting; and the behavior of non-Caucasian students was more likely to be singled out as disruptive. (Def's Ex. D at 10-11, 13.)

In April 2017, guardians of Black students expressed various concerns in a meeting led by Chrystal Gardner ("Gardner"), DECS's African American Cultural Liaison. (Pls' Ex. 9 at DECS007241-42.) These concerns included the belief that the uniform dress code was not applied consistently, that "non-colored students behaviors are passed over as mishaps", and that there is "[i]nflation of behavioral referrals on students of color." (*Id.*) In 2018, a parent survey revealed that guardians noted that DECS disregarded the impact of racist comments on students of color, including comments about hair, race, slavery, etc., and urged DECS to escalate comments that demonstrated disrespect towards a protected status to a major-referral status. (Pls' Ex. 14 at 2.) Also, during the 2016-17 and 2017-18 school years, Gardner expressed concerns regarding the prevalent use of racial slurs in school, disparate discipline for students of color, and her belief that there was racial discrimination. (Jorgenson Dep. at 100, 107-09, 116; Pls' Ex. 9.)

Plaintiffs point to additional evidence that Black students at DECS experienced a racially hostile climate. This evidence includes the repeated use of the N-word in

hallways, classrooms, playgrounds, and buses. (Gardner Dep. at 77-78; Lindberg Dep. at 62-65; Pls' Ex. 18; Pls' Ex. 1 ("Regas Dep.") at 26-29.) The record contains numerous examples of the use of racially offensive statements by students. (*See generally*, Pls' Exs. 18, 23, 24.) Plaintiffs also point to evidence that when the use of racial slurs and racially demeaning language was brought to the attention of school officials, the incidents were often ignored or treated as "teachable moments." (Perich Dep. at 27, 151; *see, e.g.*, Pls' Ex. 18 at 12 (deciding not to do peer mediation in a case involving bullying and a dispute over the use of the N-word because of the fear it would make the situation worse); *id*. at 22-23 (requiring a written report about the N-word and why it is offensive after using the word on a bus); *id*. at 96 (treating the use of racist language—suggesting one should avoid being around black people as they cannot be trusted and might hurt you—as a teachable moment).) Plaintiffs point to evidence that they claim shows that DECS ignored or minimized racial harassment, failed to track reports of harassment, retaliated against those who came forward,[4] and disproportionately disciplined students of color. (*See generally*, Pls' Ex. 18 at 64-66; Lindberg Dep. at 103-04; Rackliffe Dep. at 101.) Finally, Plaintiffs point to evidence that some white students believed that they had a "free pass" to use racial slurs. (Pls' Ex. 18 at 19.)[5]

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[4] Plaintiffs point to evidence that DECS disciplined some students who complained about racism or perceived unequal treatment at the school. (*See, e.g.*, Pls' Exs. 22, 41, 42, 43.)

[5] DECS challenges the reliance on facts related to non-parties in this action, and in particular, evidence that relates to parties who have settled, middle school students, and statistical data.

With this backdrop, the Court now turns to the specific experiences of Plaintiffs K.R. and L.G.[6] K.R. attended Raleigh for kindergarten (2016-2017) through the first part of second grade (2018-2019). (Pls' Ex. 1 ("K.R. Dep.") at 17-18; Pls' Ex. 50; Doc. No. 12 (FAC ¶¶ 21, 46.) K.R.'s first-grade teacher was Jennifer Ondrus ("Ondrus"). K.R. is biracial (African American and Caucasian). (Pls' Ex. 1 ("Proctor Dep.") at 68.) K.R. submits that he endured racial harassment while at Raleigh. For example, K.R. heard the N-word used at school (Pls' Ex. 51 at No. 1.); on the bus, a white student once used the N-word, mocked his hair as a "fro," and during an argument stated "at least I'm not Black" (*id.*; K.R. Dep. at 59, 61-62); and during a voting exercise in class, a classmate told K.R. that they planned to vote for Donald Trump because "Trump does not like Black people." (Pls' Ex. 51 at No. 1.)

K.R. did not report the bus incidents to the bus driver because K.R. believed that the bus driver would not help him. (Proctor Dep. at 155.) K.R. did tell his mother, Kali Proctor ("Proctor") about the bus incidents, but Proctor did not report the alleged comments to DECS. (Proctor Dep. at 208.) K.R. asserts that he did report the N-word incident to Regas and Perich. (Pls' Ex. 51 at No. 1.) K.R. states that Regas indicated that she would follow up and Perich said she would talk to the student who used the N-word, but K.R. did not believe that either Regas or Perich took action and the incident was not recorded in K.R.'s school record. (*Id.*; Def's Ex. Q.) And as for the incident in class, K.R. believes the teacher overheard the comment but did not intervene. (Pls' Ex. 51 at

[6] Plaintiffs P.K. and G.H. have settled their claims.

No. 1.) However, Defendants maintain that K.R.'s teacher, Perich, and Regas all testified that they did not have knowledge that K.R. was being called derogatory names or treated differently because of his race. (Def's Ex. M ("Perich Dep.") at 33-35; Def's Ex. N ("Ondrus Dep.") at 34; Def's Ex. O ("Regas Dep.") at 110-11.)[7]

K.R. further claims that he was disciplined differently because of his race. (K.R. Dep. at 79.) K.R. asserts that he learned not to get in fights at Raleigh because he would be punished more severely than kids "a different color than me." (*Id.*) In addition, K.R. points to an incident that occurred in April 2018, where he claims that his teacher, Ondrus, "grabbed him by the chin area with her thumb and pointer finger" and squeezed his face after he tried to retrieve a card that another student had taken from him. (Proctor Dep. at 111-12; K.R. Dep. at 44-48.) Plaintiffs claim that the teacher asked, "Does it look like she is enjoying that? Fix it, child." (Proctor Dep. at 112.) K.R. further submits that the other student involved was not disciplined for starting the interaction by taking his card. Proctor emailed Ondrus to ask about the incident, stating that she was "very concerned but would like both sides of the story." (Def's Ex. U.) Ondrus replied and explained that she had observed K.R. "get in a girls space and was shaking his body and dancing. He was really close to her and she was leaning back." (*Id.*) Ondrus claims she approached K.R. and asked him to look at the other student's face and think about how he was making her feel. (Def's Exs. U-V.) Proctor responded, stating that she had been

[7] K.R. also asserts that DECS failed to adequately respond to an incident where he was bit on the ear by a Caucasian student while playing a "zombie game" on the playground. K.R. claims that he reported this incident to the recess monitor, but that the monitor did not believe him. (Pls' Ex. 51 at No. 1.)

experiencing behaviors with K.R. at home and that K.R. "gets like this when he has not seen his dad in awhile." (Def's Exs. U-V.) Proctor then contacted Regas, requesting an investigation, and later contacted Bonnie Jorgenson. (Proctor Dep. at 119-20.) After receiving no response, Proctor called Perich to arrange a meeting. (*Id.*; Perich Dep. at 35.)

Before the meeting, Perich interviewed Ondrus. Ondrus denied touching K.R. and the only other adult in the room stated that she did not see any inappropriate interaction with Ondrus and K.R. (Perich Dep. at 35-38.) Perich, however, did not speak with any of the other students in the room. (*Id.* at 39.) Perich offered to move K.R. to another classroom. (*Id.*; Proctor Dep. at 123.) Plaintiffs submit that Perich did not report the incident, which ran counter to the District's policy on reporting. (Pls' Ex. 55 at 48-49; Ex. 56.) DECS did not investigate (*see* Jorgenson Dep. at 137) and Ondrus was not reprimanded. (Perich Dep. at 48.) Ondrus adamantly maintains that she did not grab K.R.'s face. (Ondrus Dep. at 47.)

K.R. also asserts that DECS discriminated against him by disregarding his well-being. For example, K.R. points to an incident on October 25, 2017, when K.R. was in first grade, where K.R. told a paraprofessional that he wanted to kill himself with a "sharp" woodchip he held in his hand. (K.R. Dep. at 52, 93-94; Ondrus Dep. at 19.) The paraprofessional reported this to Ondrus who believed that he was just frustrated about a soccer game. (Ondrus Dep. at 19, 21.). Ondrus does not recall reporting the incident to a social worker or the administration, and there is no record of any report. (Ondrus Dep. at 23, 29.) Later that day, in art class, K.R. seemed "off" to his teacher, who was not told

of K.R.'s earlier incident. (Ondrus Dep. at 21-23; Def's Ex. T at DECS014349-50.) K.R. was then sent to afterschool care. Ondrus alerted Proctor via email later that evening. (Ondrus Dep. at 23; Proctor Dep. at 32, 83.) In the email, Ondrus informed Proctor that another DECS employee had heard K.R. "say something about wanting to kill himself with a wood chip and wishing he would get kicked out of school," that she had spoken to K.R. about it, and that K.R. said he made the comment because he was frustrated when another student used their hands during a soccer game. (Def's Ex. T.) Proctor responded and thanked Ondrus for the information, indicated that she would speak to K.R., and noted that it had been a while since he had heard from his father, was having issues with other students "cutting in line," and "[a]s far as soccer it's the same thing. He has it in his head how it should go and deviating from that causes anxiety." (*Id.*)

K.R. believes that he was treated differently than white students at Raleigh. (K.R. Dep. at 50, 80-81, 89-92; Pl's. Ex. 51 at No. 4; Pls' Ex. 52 at PROCTOR0001340.) He told his mother he no longer wanted to be Black because he was being treated differently than white students. (K.R. Dep. at 91-92; Doc. No. 130 ("Proctor Decl.") ¶ 4.) K.R. submits that his treatment at DECS negatively impacted him by creating anxiety, lessening his self-esteem, and causing academic regression. K.R. claims that he experienced both physical and emotional symptoms.

L.G. is biracial and her father Desmond Gilbert ("Gilbert") is Black. (Doc. No. 131 ("Gilbert Decl.") ¶ 4.) L.G attended North Star for kindergarten (2016-2017) and part of first grade (2017-2018). (FAC ¶¶ 24, 49; Pls' Ex. 90.) L.G.'s kindergarten

teacher was Jill Ellison ("Ellison"). (Def's Ex. UU ("Ellison Dep.") at 7-10.) L.G. submits that she experienced racial harassment while at North Star. For example, as one of three students of color in Ellison's class (Ellison Dep. at 10), a white student threatened to stab L.G. in the eye with a toy screwdriver because she "looked different." (Pls's. Ex. 1 ("Gilbert Dep.") at 64; Pls' Ex. 93 at No. 4.) L.G. started to cry and reported it to Ellison. (Def's Ex. WW.) Ellison told the white student that the behavior was not okay and "made a plan with [student] that he would make a sorry card" for L.G. (*Id.*) The dean of students gathered both children, which involved pulling L.G. out of class to "problem solve" the behavior of the boy who threatened her. (*Id.*; Ellison Dep. at 34.) Gilbert learned of the incident from his daughter, and was eventually informed by the school, but he contends it was more than 48 hours after the incident. (Pls' Ex. 95; Def's Ex. YY; L.G. Dep. at 37; Ellison Dep. at 39.)[8] DECS points to evidence that Ellison immediately removed the other student from the classroom and issued a major referral for the behavior. (Def's Ex. VV.)

In December 2016, an older white student pushed L.G. down on the bus. (Rackliffe Dep. at 37-38.) The following week, the same student punched L.G. on the morning bus, leaving a bruise on her side. (L.G. Dep. at 43-45; Gilbert Dep. at 56, 73-75; Ex. 93 at No. 4.) There is no evidence that the student was disciplined despite the fact that school officials were aware of the incident. (Rackliffe Dep. at 37-38; Pls' Ex. 45 at DECS001242; Def's Ex. LLL.) Gilbert testified that he learned of the event after school

[8] This delay occurred despite the fact that the school had agreed to notify Gilbert any time there was an issue involving L.G. (Ellison Dep. at 39.)

and only later talked to school officials about the incident. (Gilbert Dep. at 74.)[9] DECS points out that L.G. reported to the school nurse but refused to show the nurse her ribs and to use an icepack. (Def's Ex. EEE.) DECS also maintains that there is no evidence that the incident was racial in nature.

Additional incidents occurred. In January 2017, an older student called L.G. a "freak." (L.G. Dep. at 22-23.) DECS submits that the student who called L.G. a "freak" was teasing an entire table of students and that the conduct was not directed specifically at L.G. (Ellison Dep. at 52-54.) In March 2017, three girls repeatedly pulled L.G.'s hair and pinched and scratched her. (L.G. Dep. at 22-23.) After the latter incident, during which L.G. claims she tried to stop the attack, L.G. was given a referral for "inappropriate conduct" and labeled an "offender." (*Compare* Def's Ex. WW *with* Exs. ZZ-BBB.) Plaintiffs maintain that Gilbert, again, was not notified. DECS maintains that the record shows that L.G. was part of group of girls who were unkind to each other and that all of the girls received warnings and referrals for their behavior.

Frustrated that the school was not notifying him of incidents involving his daughter, Gilbert began volunteering at DECS. (Gilbert Dep. at 45-48.) He also encouraged L.G. to reach out to Gardner and to sign up for Gardner's African American culture group. Plaintiffs submit that the school violated its own policies by failing to document racially-charged name-calling, bullying, and other unwelcome physical conduct and to notify Gilbert. (Pls' Ex. 8 at DECS017268-69.)

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[9] There is a factual issue as to when and how Gilbert learned of the incident. (Def's Ex. EEE.)

Plaintiffs also point to evidence that L.G. was accused of violating the school's dress code. On two occasions a music teacher forced L.G. to leave class and change a colorful undershirt that was purportedly in violation of the school's uniform policy. (Pls' Ex. 93 at 4; L.G. Dep. at 38-41.) Plaintiffs submit evidence that non-Black classmates wore similar clothing but were not made to leave class and change clothes for doing so. (Gilbert Dep. at 53; Gardner Dep. at 177, 191.) The teacher acknowledged that L.G. was the only student in class that she could remember sending to the nurse's office for non-compliance with the dress code. (Kinzinger Dep. at 28.)

L.G. left DECS midway through first grade. (Gilbert Dep. at 39-40.) Plaintiffs claim that L.G. experienced trauma, mental anguish, anxiety, headaches, nightmares, social isolation, anger, fear about attending certain classes and riding the bus, and distrust of others and, in particular, adults. In addition, L.G. missed out on friendships trust, dignity, and educational benefits. (Pls' Ex. 93 at Nos. 19-20.)

Plaintiffs assert the following claims against DECS: (Count I) Denial of Equal Protection, Race Discrimination and Failure to Train[10] in violation of the 14th Amendment of the United States Constitution through 42 U.S.C. § 1983; (Count II) Race Discrimination under Title VI of the Civil Rights Act of 1964 – 42 U.S.C. § 2000d; and

[10] Plaintiffs are not pursuing the failure to train claim. (Doc. No. 128 at 39, n.37.)

(Count III) Race Discrimination under the Minnesota Human Rights Act – Minn. Stat. § 363A.13 ("MHRA").[11]

DISCUSSION

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743, 747 (8th Cir. 1996). However, as the Supreme Court has stated, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank*, 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but must set

[11] Counts IV and V were asserted by Plaintiff G.H., who is no longer a party. In addition, L.G. is no longer advancing the reprisal and retaliation claims in Count VI and VII. (Doc. No. 128 at 37, n.34.)

forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Plaintiffs assert claims against DECS for race-based discriminatory discipline and harassment under Title VI, the MHRA, and the Equal Protection Clause. DECS moves for summary judgment on each of these claims.

A. Title VI and MRHA

Title VI of the Civil Rights Act of 1964 prohibits race discrimination in any program receiving federal funds:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[12]

42 U.S.C. § 2000d. Similarly, the MHRA provides, in relevant part, that: "It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered to any person because of race . . ." Minn. Stat. § 363A.13, subd. 1. Private parties may sue under Title VI for intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).[13]

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[12] There is no dispute that DECS receives federal financial assistance.

[13] The MHRA is typically construed in accordance with the law applied to analogous federal statutes. *See Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 793 (8th Cir. 2010). Plaintiffs and *amici curiae* argue that the Court should interpret the MHRA as providing more expansive protections than federal law and that its interpretation requires a divergent analysis when the MHRA is not similar to provisions of federal anti-discrimination statutes. (Doc. No. 128 at 39-41; *generally* Doc. No. 165.) The parties dispute whether the Court should look to Title VI in interpreting the MHRA's prohibition on educational discrimination. In particular, Plaintiffs contend that they are not required to establish that DECS had actual knowledge of an alleged hostile environment (under

To demonstrate a Title VI claim, Plaintiff must show that race, color, or national origin motivated the defendant's discriminatory conduct. *See Thompson v. Bd. of Spec. Sch. Dist. No. 1*, 144 F.3d 574, 581 (8th Cir. 1998). When there is no direct evidence of discrimination, a plaintiff may establish a prima facie case of discrimination through evidence giving rise to an inference of discrimination because of race. *See Lucke v. Solsvig*, 912 F.3d 1084, 1087 (8th Cir. 2019); *Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345, 355 (8th Cir. 2020) (applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). One way to do this is to show that a similarly-situated student of another race was treated more favorably. *Id*. A student can demonstrate that discipline is race-based by pointing to a comparator of a different race who was not disciplined, or disciplined less harshly, for similar conduct. *Id*.

To state a Title VI claim under a racial hostility theory, Plaintiffs must show that the defendant was "(1) deliberately indifferent, (2) to known acts of discrimination, (3) which occurred under its control." *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001) (Title IX case). "[S]uch an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cnty. Bd. of Educ*.,

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Title VI) and that they need only show constructive knowledge (under a Title VII analysis). In addition, Plaintiffs argue that the theory of disparate-impact should remain available to show educational discrimination. DECS disagrees and argues that MHRA claims are to be construed in accordance with federal precedent and that the relevant sections of the MHRA are directly analogous to Title VI. *Compare* 42 U.S.C. § 2000d to Minn. Stat. § 363A.13. The Court notes the parties' dispute but applies the Title VI standard for purposes of this motion. The Court will address this issue again, if necessary, at the pretrial hearing and during the discussion of proper jury instructions.

526 U.S. 629, 633 (1999). A school's response to an allegation of discriminatory conduct may not be "clearly unreasonable in light of the known circumstances." *Id*. at 648.

A plaintiff can prevail on this claim by showing that a school had a practice of deliberate indifference that amounts to "an official decision . . . not to remedy" a hostile environment of which the school had actual knowledge, thus permitting the severe and pervasive harassment. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); *Pruitt v. Anderson*, Civ. No. 11-2143, 2011 WL 6141084, at *2 (D. Minn. Dec. 9, 2011). Actual knowledge can be demonstrated when an appropriate person—one who has authority to address the alleged discrimination and institute corrective measures—has prior notice of a substantial risk of harassment based on previous incidents. *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (explaining that a plaintiff must allege prior notice of peer harassment based on evidence such as previous similar incidents); *Doe v. Indep. Sch. Dist. 31*, Civ. No. 20-226, 2020 WL 4735503, at *7 (D. Minn. Aug. 14, 2020) (discussing who constitutes an appropriate person).

Plaintiffs assert both theories of discrimination under Title VI and the MHRA: (1) racially discriminatory discipline; and (2) racial hostility. DECS argues that Plaintiffs' Title VI and MHRA claims fail under both.

1. Disparate Treatment

Plaintiffs assert that DECS subjected K.R. and L.G. to discriminatory discipline. In support, Plaintiffs point to evidence that on two occasions a music teacher forced L.G. to leave class and change a colorful undershirt that was purportedly in violation of the school's uniform policy. (Pls' Ex. 93 at 4; L.G. Dep. at 38-41.) Plaintiffs also submit

evidence that non-Black classmates wore similar clothing (undershirts or colorful leggings) but were not made to leave class and change clothes for doing so. (Gilbert Dep. at 53; Gardner Dep. at 177, 191; Kinzinger Dep. at 28.) Plaintiffs argue that the discipline was procedurally suspect because under school policy, the music teacher was not tasked with enforcing the dress code and the code did not allow for the teacher to order her to remove her undershirt. (Kinzinger Dep. at 22-24, 28; Def's Ex. J at 41.)

Plaintiffs also submit that K.R. was subject to discriminatory discipline when his first-grade teacher allegedly grabbed his face and told him to "fix it, child" after he tried to retrieve an item that was taken from him by a white classmate. Plaintiffs submit that this discipline was contrary to school policy and there is no evidence that the white classmate was similarly disciplined for taking the item from him in the first place. (Pls' Ex. 54 at DECS000823-24, 26.)

DECS argues that Plaintiffs have failed to demonstrate a claim of discriminatory discipline, and in particular, have failed to establish that they were disciplined differently because of their race.

After a careful review of the record, and viewing the evidence in the light most favorable to Plaintiffs, the Court finds that fact issues remain as to whether K.R. and L.G. were disciplined more severely than similarly-situated white students. As a result, Plaintiffs' Title VI and the MHRA discriminatory discipline claims survive and DECS's motion as to these claims is denied. DECS's arguments that K.R. and L.G. were not disciplined more severely relate to factual questions and credibility determinations that

will be presented to the jury. At this stage, the Court finds that the record, as a whole, contains sufficient evidence for Plaintiff's discriminatory discipline claims to proceed.

2. Hostile Environment

Plaintiffs also argue that a reasonable jury could find that DECS is liable under Title VI and the MHRA for a racially hostile environment. First, Plaintiffs argue that fact issues preclude summary judgment as to whether DECS was deliberately indifferent to race-based harassment, and in particular as to whether DECS had actual knowledge of an ongoing racially hostile environment, adopted an official policy of deliberate indifference to the hostile environment, and whether Plaintiffs were racially harassed as a result of DECS's official practice.

DECS argues that Plaintiffs have failed to demonstrate intentional discrimination because of their race. In particular, DECS disputes that it had actual knowledge of the alleged acts and was deliberately indifferent to a racially hostile environment. DECS argues that when the alleged incidents are considered independently, they do not rise to the level of actionable (severe and persistent) racial harassment, and that many of the alleged incidents were no more than juvenile behavior and acts of teasing. In addition, Defendants point to evidence of its voluntary efforts around race and equity and maintain that these efforts should be lauded and not held against DECS. And as to the particular incidents involving K.R. and L.G., DECS maintains that the record does not support a finding that DECS' responses were clearly unreasonable.

After careful consideration of the record evidence, and viewing that evidence in the light most favorable to Plaintiffs, the Court concludes that fact issues remain as to

Plaintiffs' claim of a racially hostile environment based on deliberate indifference. First, a reasonable jury could conclude that DECS had actual knowledge of an ongoing racially hostile environment. There is ample evidence in the record that could support a finding that DECS was on notice of a racially hostile environment, including the findings published in the Minority Student Report and the assessment funded by the MDE, together which detailed student and parent accounts of persistent use of the N-word by students, racial taunting, and staff reactions that minimized the racially-charged behavior or treated it less seriously than swearing or non-race-based bullying. These reports are consistent with school records that reveal numerous reports of such behavior that were received by school leadership. (*See generally* Pls' Ex. 18.)

Second, a reasonable jury could conclude that DECS adopted an official policy or custom of deliberate indifference by effectively making an official decision not to remedy that hostile environment. There is ample evidence in the record that could lead to a finding that school officials did not treat racism with appropriate seriousness, and instead downplayed, minimized, and even ignored the serious nature of the racist comments by treating them ineffectively as "learning opportunities." Indeed, there is evidence in the record suggesting that administrators avoided attempting to stop the use of racial comments. For example, on one occasion, a staff member asked a dean for guidance on how to handle a student who screamed the N-word in the presence of Black students, and the dean suggested: "The best thing to do is ignore [it]." (Pls' Ex. 18 at 64-66.) In addition, despite numerous reports of such incidents, there is no evidence that DECS attempted to track or monitor the reports. More troubling, there is evidence that DECS

may have punished students after complaining about racial harassment or perceived racial harassment. (Pls' Ex. 18 at 41; Pls' Ex. 98.) Finally, a reasonable jury could find that the alleged incidents of racial harassment endured by K.R. and L.G. (as detailed above) occurred as a result of the deliberate indifference.[14]

Therefore, based on the above reasoning, the Court denies DECS's motion for summary judgment as to this claim.[15]

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[14] DECS argues forcefully that Plaintiffs cannot prove that they were treated in an adverse manner because of their race. For example, DECS argues that there is no evidence that the incident where a student threatened to stab L.G. with a toy did so because of L.G.'s race. DECS also argues that another incident cited by L.G. involved a group of girls who were unkind to each other and that they all received the same consequence. In addition, DECS maintains that it responded to reported incidents by K.R. and L.G. appropriately and reasonably and contends that many of the incidents in the record reflect juvenile behavior that do not meet the requirements of pervasiveness or severity. These arguments and evidence in support can be presented to the jury, but at this stage, the Court finds that the record, as a whole, contains sufficient evidence for Plaintiffs' racial harassment claims to go forward.

[15] Plaintiffs argue that K.R. can show deliberate indifference to a racially hostile environment under a second theory (a "*Davis* claim") by demonstrating that DECS was deliberately indifferent to known, specific racial harassment of K.R. and that such specific harassment was so severe and persistent that it deprived K.R. of educational opportunities. The evidence relied on by Plaintiffs in support of this claims is narrower than that in support of the racial hostility theory discussed above. At the hearing on this matter, Plaintiffs' counsel explained the *Davis* claim is an "after claim", which focuses on deliberate indifference after the school attained knowledge of discrimination, as opposed to a "before claim" of deliberate indifference to a racially hostile environment before the alleged harm occurred. The Court notes that K.R.'s *Davis* claim is not the strength of his deliberate indifference claim. Instead, the Court views Plaintiffs' "before claim" to be the main focus of this case. The Court will consider whether to allow K.R.'s alternative theory to go to the jury at the pretrial conference. In addition, the Court notes that L.G. does not bring a *Davis* claim. Instead, Plaintiffs argue that L.G. has a *Davis*-like claim under the MHRA's constructive knowledge requirement. (Doc. No. 128 at 54, n.43.) The Court will also consider whether such a claim can go to the jury at the pretrial conference.

B. Section 1983—Equal Protection

The Fourteenth Amendment prohibits a school from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs' equal protection claim is analyzed under the same framework as Plaintiffs' Title VI claim. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978). Also, a school is liable if the constitutional violation in question—here, a violation of the Equal Protection Clause—was caused by a custom or practice of deliberate indifference. *See, e.g.*, *Bd. of Cty. Commrs. v. Brown*, 520 U.S. 397, 404 (1997). For DECS to be liable, Plaintiffs must show that DECS had an official policy or widespread custom that violated the law and caused their injuries. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1181-82 (8th Cir. 1998) ("For the School District to be liable, [plaintiff] must prove that the School District had an official policy or widespread custom that violated the law and caused his injury."). "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Brown*, 520 U.S. at 404.

Because the Court has already determined that fact issues remain as to Plaintiffs' Title VI and MHRA claims, the equal protection claim similarly survives. In addition, the Court notes that viewing the record in the light most favorable to Plaintiffs, a reasonable jury could conclude that DECS had a custom of deliberate indifference to racial harassment and discriminatory discipline that was the moving force behind the

constitutional injuries. In particular, the record contains evidence that could lead a reasonable jury to find that DECS staff had a custom or practice of discriminatory discipline and to responding to reports of racial harassment with inaction and indifference. A jury could also find a causal link between that custom and harm to Plaintiffs. Thus, DECS's motion as to Plaintiffs' equal protection claim is denied.

CONCLUSION

The Court denies DECS's motion for summary judgment. However, the Court cautions the parties that victory at this stage does not equal victory at trial. This is a difficult case with difficult facts and an uncertain outcome. There are also several significant issues that will need to be resolved at the pretrial hearing, including significant evidentiary issues and issues pertaining to the relevant standards of the law. Further, the jury will be tasked with difficult credibility determinations. All of these issues will add to the uncertainty at trial. The Court hopes that the parties, in their mutual interest, will consider attempting to settle the matter to avoid a costly and difficult trial.

ORDER

Based on the files, records, and proceedings herein, and for the reasons stated above, **IT IS HEREBY ORDERED** that:

1. Defendant's motion for summary judgment (Doc. No. [106]) is respectfully **DENIED**.

2. This Order is temporarily Filed Under Seal. The Parties shall have fifteen (15) days to submit proposed redactions for a publicly available version of this Order.

Dated: March 16, 2022

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge