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No. ~~71417-8-I~~

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

N.W. AND R.W., ON BEHALF OF B.W., A MINOR CHILD

Appellants,

v.

MERCER ISLAND SCHOOL DISTRICT,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ACLU OF WASHINGTON FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties and the advancement of civil rights. The ACLU has long advocated for equitable treatment of minority populations in education, employment, housing, and other forums, both as counsel and as amicus in this Court and others. Further, the right of equality of educational opportunity is a civil liberties concern and an issue in which the ACLU is deeply invested.

II. ISSUES PRESENTED

Whether the Administrative Law Judge and the Superior Court erroneously imposed a heightened standard of proof when requiring Appellant to prove deliberate indifference in a peer-to-peer race discrimination claim instead of applying the lesser "knew or should have known" standard.

III. STATEMENT OF THE CASE

In 2011, at the time the incidents giving rise to this litigation B.W. was a student at Islander Middle School. Resp'ts N.W. and R.W. on behalf of B.W. Br. (May 28, 2013, King Cnty. Sup. Ct.) ("Resp'ts' Sup. Ct. Br."), at 3. B.W. identifies as bi-racial, with African-American and Caucasian parents. *Id.* at 4. During the 2011-2012 school year, B.W.

notified his parents that students at school harassed him because of his race. *Id.* at 4-5. His parents notified school administrators. *Id.* at 5-6. The school eventually investigated. *Id.* at 10-11. The details and sufficiency of the investigation are at issue in this litigation. *Id.* at 2-3. Unsatisfied with the school's response, B.W.'s parents brought their concerns before an Administrative Law Judge ("ALJ").

B.W.'s parents represented themselves during the proceedings before the ALJ. Verbatim Rep. of Proceedings (Vol. I before ALJ) at 4. In briefing submitted to the ALJ, Mercer Island School District asserted that the school district would not be liable for peer-to-peer harassment unless the district acted with deliberate indifference. Pet'r Mercer Island Sch. Dist. Br. (May 6, 2013, King Cnty. Sup. Ct.) ("Pet'r's Sup. Ct. Br."), at 11. B.W.'s parents, who are not attorneys, accepted the defense's contention that deliberate indifference was the appropriate standard for reviewing school district liability. OSPI's Resp. to Pet'r's Br. (May 28, 2013, King Cnty. Sup. Ct.) ("OSPI's Sup. Ct. Resp."), at 5. Applying the heightened standard of deliberate indifference, the ALJ found that Appellants had met their burden and found Mercer Island School District liable for the discriminatory harassment B.W. experienced at Islander Middle School under RCW 29A.642. Ord. on Admin. Appeal (Dec. 9, 2014, King Cnty. Sup Ct.), at 5.

Mercer Island School District appealed to the King County Superior Court. Pet. for Judicial Rev. of Admin. Adjudicative Ord. (Nov. 9, 2012, King Cnty. Sup Ct.), at 3. On review, the King County Superior Court applied the deliberate indifference standard, found that there was insufficient evidence to support a finding of deliberate indifference by Mercer Island School District and accordingly reversed the ALJ's findings.[1] Ord. on Admin. Appeal (Dec. 9, 2013, King Cnty. Sup Ct.), at 5.

Shortly thereafter, B.W.'s parents appealed the King County Superior Court's reversal of the ALJ's finding that Mercer Island School District was liable for the racially discriminatory peer-to-peer harassment B.W. suffered while enrolled at Islander Middle School.

IV. ARGUMENT

The lower courts erroneously applied Title IX's deliberate indifference standard to Plaintiff B.W.'s claim of peer-to-peer discriminatory harassment brought under RCW 28A.642, which determines a school's liability by inquiring whether the school knew or

[1] "A conclusion of 'deliberate indifference' is an implicit finding of discrimination. It involves . . . behavior of the kind that actively discourages reporting, demeans the victim, misleads, or passively takes no action in the face of a severe and pervasive problem." Ord. on Admin. Appeal (Dec. 9, 2013, King Cnty. Sup Ct.), at 3.

should have known about the discriminatory harassment and failed to act accordingly.

A. Washington State School-Based Anti-Discrimination Laws Broadly Prohibit Discrimination

In 2010, Washington State broadened its school-based anti-discrimination laws to ensure that its scope afforded those in state public schools the most protection possible against bias and discrimination. *See generally* RCW 28A.642; RCW 28A.640. Specifically, the legislature adopted Chapter 28A.642 to supplement Chapter 28A.640, which was drafted and enacted in 1975 because it only prohibited discrimination in schools on the basis of sex and failed to prohibit discrimination based on membership in any other protected class. *See* RCW 28A.642.005. The newly adopted RCW 28A.642.010 includes prohibitions against discrimination based on "race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability" and incorporates definitions of these protected categories from the Washington Law Against Discrimination." RCW 28A.642.010 (incorporating the definitions of the protected categories in RCW 49.60). To enforce these school-based anti-

discrimination laws the legislature also created a private right of action for individuals subjected to discriminatory treatment. RCW 28A.642.040.

B. Under Federal Statutes Limit Liability for Peer-to-Peer Discriminatory Harassment to Deliberate Indifference Because of Limitations not Applicable to Washington

The lower courts erroneously applied the deliberate indifference standard appropriate for money damages under Title IX to Appellant's state law anti-discrimination claims and failed to recognize that the concerns undergirding the application of deliberate indifference to Title IX claims were irrelevant to the state law claims. Enacted pursuant to Congress' spending power, U.S. Const., Art. I, § 8, cl. 1, Titles VI and IX are enforced by federal agencies that condition receipt of federal funding upon compliance with statutory nondiscrimination mandates.[2, 3] *Gebser v. Lago Vista Indep. Sch. Dist*, 524 U.S. 274, 280-81, 118 S. Ct. 1989, 141 L. Ed. 2d 227 (1998). When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct.

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[2] Title VI of the Civil Rights Act of 1964 provides that "no person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied in the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

[3] Title IX of the Education Amendments of 1972, which was modeled closely after Title VI, provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

1531, 67 L. Ed. 2d 694 (1981).[4] Although neither Title VI nor Title IX expressly create a private right of action courts have construed both statutes to support an implied right of action to "provide effective assistance to achieving the statutory purposes." *Cannon v. University of Chi.*, 441 U.S. 677, 703, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *Guardians Ass'n* v. *Civil Serv. Comm'n of New York City*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983).

However, given the underlying contractual nature of both statutes, funding recipients of Title IX monies are generally held liable for money damages arising from a third party's action only if their response to the discrimination is deemed to be deliberately indifferent. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999); *Guardians*, 463 U.S. at 597. The United States Supreme Court required a showing of deliberate indifference for monetary damages reasoning that a judicially *implied* system of enforcement would allow for substantial liability without the recipient's knowledge or its corrective actions upon receiving notice and would run counter to the statute's *express* system of enforcement that requires notice

[4] When interpreting and applying laws enacted pursuant to Congressional spending legislation courts "'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 640, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

be given to the recipient and that the recipient have an opportunity to voluntarily come into compliance with the nondiscrimination mandates. *Gebser*, 524 U.S. at 287-88. "This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt." *Guardians Ass'n*, 463 U.S. at 596. The deliberate indifference standard in Title IX peer-to-peer discriminatory harassment cases is further supported by the Supreme Court's indication that "'make whole' remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its 'power under the Spending Clause to place conditions on the grant of federal funds.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 15). Based on all of these considerations the Court held that the "knew or should have known" standard is inappropriate for claims for money damages arising from peer-to-peer discriminatory harassment brought under Title IX. *Gebser*, 524 U.S. at 288.

The limits of Congressional authority, which were central to the Court's determination that Title IX require a showing of deliberate indifference for peer-to-peer discriminatory harassment claims, are simply *inapplicable* to similar claims brought under Washington State school-

based anti-discrimination laws. Washington State school-based anti-discrimination laws were enacted pursuant to the Washington State legislature's police powers, incorporate references to the WLAD, and were meant to broadly prohibit discrimination in schools the Court should hold that a school will be liable for discriminatory peer-to-peer harassment under the "knew of should have known" standard. RCW 28A.642.010 (modeling school-based anti-discrimination laws on the WLAD and explicitly incorporating the WLAD's definitions of prohibited discrimination).

C. Broad State Anti-Discrimination Laws Provide Greater Protections Than Their Federal Counterparts

There is nothing magical about the school setting that requires state anti-discrimination claims based on peer-to-peer discriminatory harassment to be reviewed under Title IX's restrictive deliberate indifference for money damages. Contrary to the lower court's ruling, the deliberate indifference standard of review of a school's action is not applicable to state anti-discrimination laws because, as discussed above, the heightened standard approved by the United States Supreme Court for Title IX was imposed out of specific concerns regarding the contractual nature of the Titles' antidiscrimination mandates.

Courts have found that the deliberate indifference standard applied

to claims of peer-to-peer harassment brought under Title IX is inapplicable to peer-to-peer harassment claims brought under broad state anti-discrimination laws similar to Washington State's laws. *See L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 405-06, 915 A.2d 535 (2007); *Doe ex rel. Subia v. Kansas City, Mo. Sch. Dist.*, 372 S.W.3d 43, 52-54 (Mo. Ct. App. 2012). The courts in *L.W.* and *Doe* found that the concerns that required application of a deliberate indifference standard to peer-to-peer harassment claims under Title IX do not apply to similar claims brought under state anti-discrimination laws. Both courts relied upon three factors to distinguish the concerns driving the application of deliberate indifference in peer-to-peer discriminatory harassment claims where the state laws: (1) were not enacted pursuant to legislative spending authority; (2) issued sweeping protections against discrimination to a range of groups; and (3) expressly created a private cause of action for enforcement claims.[5] *See L.W. ex rel. L.G.*, 189 N.J.

[5] "Title IX is narrower than the [NJ]LAD on three fronts. First, Title IX prohibits discrimination based on sex only. That limitation must be juxtaposed against the expansive list of characteristics protected by the LAD, including "affectional or sexual orientation"—the crux of this appeal. Second, Title IX prohibits only recipients of federal educational funds from discriminating against students based on sex. Indeed, Title IX was enacted pursuant to Congress' authority under the Spending Clause, thereby implicating contract principles. Conversely, the LAD, as does our State Constitution, enforces the guarantee of civil rights, and applies universally to "places[s] of public accommodation," a defined term that includes schools regardless of their source of funding. Third, although courts have found an implied private right of action under Title IX, the LAD

at 405-06; *Doe ex rel. Subia*, 372 S.W.3d at 52-54.

It should be noted that all three factors the *L.W.* and *Doe* courts relied upon as supporting distinctions between state school-based anti-discrimination laws and Title IX in determining the appropriate standard for peer-to-peer discriminatory harassment claims are all present in the Washington State school-based anti-discrimination laws in question in this appeal. *First*, Washington's school-based anti-discrimination laws were an act of the legislature's general police powers to "ensure that school districts comply with all civil rights laws[.]" RCW 28A.642.005. *Second*, As in *L.W.* and *Doe*, Washington State school-based anti-discrimination laws protect a wide range of classes from discrimination. RCW 28A.642.050; RCW 28A.642.010. Indeed, the Washington State school-based anti-discrimination laws, similar to the New Jersey anti-discrimination law, bars all "discrimination in Washington public schools" regardless of the identity of the person discriminating. RCW 28A.642.010. *Third*, unlike Title IX but similar to *L.W.* and *Doe*, the Washington school-based anti-discrimination laws ensure that "[a]ny person aggrieved by a violation of [RCW 28A.642] ... has a right of action in superior court for civil damages and such equitable relief as the

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expressly empowers aggrieved persons to file private causes of action seeking a full range of legal and equitable remedies." *L.W. ex rel. L.G.*, 189 N.J. at 405-06.

court determines." RCW 28A.642.040. As in *L.W.* and *Doe*, the Washington school-based anti-discrimination laws are substantively different from its federal counterparts. As such, the concerns driving federal courts to impose restrictions on liability findings for peer-to-peer discriminatory harassment simply are not relevant in determining the applicable standard for liability under Washington State school-based anti-discrimination laws. And the concerns that are present in broad state anti-discrimination laws warrant application of the knew-or-should-have-known standard to ensure that the purpose of the anti-discrimination laws are not frustrated.

D. Students Seeking Protection from Peer-to-Peer Harassment Under State Anti-Discrimination Laws Should Not Have to Meet a Higher Burden Than Employees Seeking the Same

In recognizing the right to hold employment free from discrimination, this State's legislature specifically declared that discrimination "threatens not only the rights and proper privileges of [the State's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010; *Antonius v. King Cnty.*, 153 Wn.2d 256, 268, 193 P.3d 729 (2004). Based on this Washington courts have long recognized hostile work environment claims under the WLAD because "harassment as a working condition unfairly handicaps an employee against whom it is directed in his or her work performance and

as such is a barrier to . . . equality in the workplace." *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985); *Antonius*, 153 Wn.2d at 268. To ensure equality in the workplace and to protect against harassment that would infringe on a person's ability to work an employer is liable for peer-to-peer discriminatory harassment when the employer knew-or-should-have-known of the harassment and failed to take reasonably prompt and adequate corrective action.[6,7] *Id. See also Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 838-39, 9 P.3d 948 (2000).

The State's interests in eliminating discrimination in schools and eliminating discrimination in the workplace are equally compelling: ensuring equality in its schools, protecting against barriers to meaningful participation, and protecting students who are in close proximity and regular contact with each other from being exposed to long-term

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[6] To bring a prima facie hostile work environment claim under RCW 49.60, a plaintiff must prove: that (1) the harassment was unwelcome; (2) the harassment was because of the plaintiff's membership in a protected class; (3) the harassment affected the terms and conditions of employment; and (4) the harassment is imputable to the employer. *Glasgow*, 103 Wn.2d at 406-07.

[7] Notice of harassment may be established by proof that complaints were made to management, or by proof that the harassment in the workplace was so pervasive that it created an inference of the employer's actual or constructive knowledge. *Id.*; *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061 (2002) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence.") (quoting Lindemann & P. Grossman, Employment Discrimination Law 348-349 (3d ed. 1996)).

discriminatory harassment.[8]

Indeed, the state's ability to protect a student's right to receive education in an environment free of discrimination, like the state's ability to protect employee rights at work, hinges upon the school or employer ensuring that those they are tasked with managing or educating are protected from discriminatory harassment. It should also be noted that public schools exert immense control over students in a way that employers do not. An employee may decide to switch jobs or departments or even skip work on a day they believe the harassment is likely to be emotionally difficult. However, a student can do no such thing. Students are assigned to a school and classes within that school. They have little to no control over these decisions. Also, if a student decided that they no longer wanted to be subjected to the discriminatory harassment and therefore would no longer attend school the student would be subjected to legal sanctions for truancy. RCW 28A.225.

As the underlying justifications for imposing the "knew of should have known" in the employment discrimination context apply equally, if not more forcefully, to the public education context when in assessing the

[8] Moreover, as student advocates have long since recognized, school bullying shares the same serial, pervasive qualities as harassment in the workplace. In the same way that hostile work environments deprive employees of equality in terms and conditions of employment, so too do educational environments permeated by unchecked peer harassment deprive students of equality in education.

appropriate standard for school based peer-to-peer harassment, this Court should bring the school liability standard for peer-to-peer discriminatory harassment in line with the recognized standard for employer liability for peer-to-peer harassment.

E. The Office of Superintendent of Public Instruction Interprets Its Regulations as Requiring the Application of the Knew-Or-Should-Have-Known Standard in Discriminatory Peer-to-Peer Harassment Claims

Washington State school-based anti-discrimination laws are broader than federal school-based anti-discrimination laws. However, until recently the applicable regulations were silent regarding the standard for school liability in cases involving discriminatory peer-to-peer harassment. *See* WAC 392-190-0555.[9] In February 2011, OSPI promulgated rules and guidelines concerning the adherence to RCW Chapters 28A.640 and 28A.642 and WAC 392-190. In these guidelines OSPI advises those interpreting Washington State school-based anti-discrimination laws that a school is liable for discriminatory peer-to-peer harassment when the school or any of its employees "knew or reasonably should have known" about the discriminatory harassment and failed to act appropriately. *See* Prohibiting Discrimination in Washington Public

[9] This new WAC bars discriminatory harassment and declares that schools will be held liable for peer-to-peer harassment "if a reasonable employee knew, or in the exercise of reasonable care should have known, about the harassment." This WAC becomes effective on December 19, 2014.

Schools: Guidelines for school districts to implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC, a*vailable at* http://www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf. Recently, OSPI has taken a further step to ensure that the appropriate "knew or should have known" standard is applied to state law claims of peer-to-peer discriminatory harassment and revised WAC 392-190-0555 to include a section on discriminatory harassment that adopts this standard. *See also* WAC 392-190-0555 (effective December 19, 2014).

V. CONCLUSION

For the foregoing reasons we respectfully request this Court reverse the lower court's erroneous application of the deliberate indifference standard to claims of peer-to-peer discriminatory harassment brought under state school-based anti-discrimination laws.

Respectfully submitted this 15th day of December 2014.

BY: ACLU OF WASHINGTON FOUNDATION

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DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the Motion for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae American Civil Liberties Union of Washington Foundation via email and submission to the Division II JIS Lnk system to the following addresses:

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Dated this 15th Day of December, 2014 at Seattle, King County, Washington.