NO. 92009-5

(Court of Appeals No. 71419-8-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MERCER ISLAND SCHOOL DISTRICT,

Petitioner,

v.

N.W. and R.W., on behalf of B.W., a minor child, and OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, a state agency,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Mercer Island School District (the "District") requests the Court grant discretionary review of the Court of Appeals' decision in *Mercer Island School District v. N.W. and R.W. ex rel. B.W.*, No. 71419-8-I, 347 P.3d 924 (April 13, 2015) (the "Opinion") because this case involves a matter of "substantial public interest" under RAP 13.4(b)(4).[1]

Notwithstanding that this case arose during a period of transition in the Office of Superintendent of Public Instruction's ["OSPI"] administrative rules promulgated under Chapter 392-190 WAC, the Opinion's application of the judicially created "deliberate indifference" standard of liability for implied private rights of action under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Act Amendments of 1972, has significant ramifications for school districts and all other state and local government entities receiving federal funds to conduct their governmental programs or activities. The deliberate indifference standard sets a high threshold for liability of public institutions in private damages actions in court. By incorrectly ruling this standard is lower in Washington than in other federal or state jurisdictions, the Opinion improperly increases

[1] The District attaches as Appendix A to this Petition a true and correct copy of the Opinion in this matter along with the Court of Appeals' Order Denying Motion for Reconsideration (filed June 18, 2015) pursuant to RAP 13.4(c)(9).

liability risks for federally funded government entities in private damages actions. It further improperly applies this legal standard, which is unique to damage actions, to internal administrative nondiscrimination complaint procedures required or encouraged under federal and state law in a manner that will undermine the effectiveness of such procedures to identify, address, and remedy discrimination issues.

II. ISSUE PRESENTED FOR REVIEW

1. Does the Opinion involve issues of substantial public interest under RAP 13.4(b)(4) by inadvertently expanding liability for state and local government entities to damages claims in judicial actions involving allegations of "deliberate indifference" to discriminatory harassment and by impairing the effectiveness of internal administrative resolution procedures for discrimination claims?

III. STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the District's legal duties to prohibit race and other forms of discrimination in public schools and under federal and state law, including Title VI of the Civil Rights Act of 1964; Title IX of the Education Act Amendments of 1972; the Washington Equal Education Opportunity Law, Chapter 28A.642 RCW ["EEOL"]; and OSPI's implementing and enforcement rules for such statutes, Chapter 392-190

WAC. Under these enactments, in addition to nondiscrimination legal duties, the District and certain other government entities receiving federal funds have established internal complaint procedures to receive, investigate, and remedy such complaints, which in the case of school districts are subject to further OSPI requirements and review under Chapter 392-190 WAC.

In 2011, District seventh-grade student B.W. and his parents (the "Parents") filed an administrative complaint of racial harassment with the District based on allegations that the District inadequately responded to two incidents of student-on-student racial name-calling. CP 7.[2] B.W.'s mother is African-American and his father is Caucasian. *Id.*

B.W. attended the District's Islander Middle School. CP 7. He was enrolled in a language arts and social studies class along with three other boys, referred to as Students A, B, and C. CP 8. On November 1, 2011, B.W. filed a written complaint alleging that two incidents of racial/ethnic harassment had occurred in the class: First, that on October 5, 2011, while working with Student A as a pair, Student A told B.W., "Shut up, you stupid Black." *Id.* Second, that on October 25, 2011, while B.W. and Students A-C were working together as a group on a project concerning ethnic diversity and tolerance, Student A said that B.W. crossed the border from Mexico, Student B then

[2] Citations are to the ALJ's Findings of Fact, which the parties did not challenge. CP 383.

added that B.W. was "exported" from Mexico, and B.W. responded by asking Student B "[w]hy don't you make me a croissant for 25 cents, you French Jackass?" CP. at 8, 10. Student B is of French heritage. CP 10.

After B.W.'s Parents first advised the teacher and Co-Principal Mary Jo Budzius of the October 5 comment on October 11, which was the first notice to District officials that it occurred, Ms. Budzius disciplined Student A on October 12 by requiring him to sign an anti-harassment contract, and talking to him about not using race as the basis for angry comments. CP 9.

Co-Principal Aaron Miller investigated the second alleged remark on the same day it occurred, which was October 25, before the filing of the Parents' written complaint. CP 11. He interviewed each of the student witnesses, and none recalled Student A saying either remark that B.W. complained of. CP 11. Mr. Miller also talked with Ms. Budzius about the first allegation. CP 12. On October 31, 2011, he e-mailed the Parents the results of his investigation, outlining several measures intended to stop the issues between B.W. and Student A. CP 11-13. The District completed or made progress on each of these steps. *See* CP 16, 18, 20. B.W. did not experience any further alleged racial comments for the remainder of the year. CP 16.

On November 4, 2011, Superintendent Gary Plano denied a separate harassment, intimidation, and bullying complaint filed by Parents, reasoning that Mr. Miller's investigation was thorough and included appropriate

measures. CP 21. He further stated that he would assign an outside attorney to investigate the facts of both alleged incidents and deliver a written report prior to providing a response to Parents' November 1 complaint regarding discrimination. *Id.*

On November 29, 2011, the attorney released her report, concluding that the evidence did not substantiate that Student A "made a specific racially derogatory comment" to B.W. on October 5 or that any student made a racially derogatory comment to him on October 25. CP 21-22. She concluded that the District had appropriately addressed both allegations. CP 22.

After reviewing the attorney's report, Dr. Plano on November 30, 2011, issued the District's response under Policy 3210, the District's nondiscrimination policy required by Chapter 392-190 WAC, denying the allegations of District discrimination. CP 21. The Parents appealed to the Board of Directors, which denied the appeal on February 15, 2012. CP 25.

B. Procedural History

Parents appealed the Board's decision to the Office of Superintendent of Public Instruction (OSPI) pursuant to former WAC 392-190-075 (2011). The ALJ presided over four days of hearings in the summer of 2012. CP 6. On October 15, 2012, the ALJ issued her Findings of Fact, Conclusions of Law, and Order. CP 6-35. Although no students, including B.W., testified, she concluded that B.W. was the target of two "racial/ethnic" slurs. CP 20.

The ALJ also applied the judicially created "deliberate indifference" standard for student peer-on-peer discriminatory harassment private damages claims, as analyzed by the Court of Appeals in *S.S. v. Alexander*, 143 Wn. App. 75, 177 P.3d 742 (2008), CP 29-31, to find the District violated its nondiscrimination duties under the EEOL. *S.S.*, however, concerned a Title IX private damages claim against the University of Washington for monetary damages for student peer-on-peer sexual harassment. 143 Wn. App. at 83 Under WAC 392-190-080, both in 2011 and in its current version, the remedies the ALJ may impose in administrative proceedings under Chapter 392-190 WAC do not include monetary damages to complainants, only remedies such as withholding of funding or mandated training (nor are money awards available in federal compliance reviews by the Department of Education under Title VI or Title IX). The ALJ determined that the incidents of racial/ethnic discrimination "were sufficiently serious to create a hostile environment," and that the District's response was "clearly unreasonable in light of known circumstances" CP 32.

The District appealed to the King County Superior Court pursuant to Washington's Administrative Procedure Act (APA), Chapter 34.05 RCW. On December 9, 2013, the trial court issued an order holding that the ALJ erred as a matter of law by determining that the District was "deliberately indifferent" in its response to B.W.'s complaint of discrimination. CP 842.

Noting that a conclusion of deliberate indifference is an "implicit finding of discrimination," the court stated that there were no other cases in the United States addressing a fact pattern less serious than the instant facts, because the District responded "almost immediately." CP 840.

In September 2014, the Parents, now represented by an attorney, appealed the superior court decision, arguing that the more lenient liability standard used by OCR in administrative investigations governed compliance with Chapter 392-190 WAC.[3] Op. at 20. The District argued that Parents should be judicially estopped from arguing for application of the more lenient standard, Op. at 35 n.25, and that the Court should affirm the superior court's holding that the undisputed facts did not show that the District's response to the alleged discriminatory harassment was deliberately indifferent, Br. Resp'ts 19-22.

On April 13, 2015, the Court of Appeals reversed the superior court, holding that the District committed discrimination under either the *S.S.* deliberate indifference or the less-stringent OCR standards, Op. at 2, 46, even though the Opinion stated the "proper standard to apply was the OCR standard." *Id.* at 38. The Court declined to apply the doctrine of judicial

[3] The "OCR Standard" is used in administrative enforcement proceedings under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. *See* "Dear Colleague Letter" from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Oct. 26, 2010), *cited in* Op. at 29.

estoppel, reasoning that the Parents earlier had appeared *pro se*. Slip op. at 35 n.25.

The Parents have also sued the District for money damages under Title VI in federal court, claiming that the District was deliberately indifferent. Concurring Op. at 2. n.1; Complaint, *B.W. v. Mercer Island Sch. Dist.*, Case No. 2:14-cv-01532-RSL (W.D. Wash. Oct. 3, 2014).

IV. ARGUMENT

A. This case involves issues of substantial public interest, because the Opinion's misapplication of the "deliberate indifference" standard will increase liability for many public entities.

This Court should grant review under RAP 13.4(b)(4) based on the substantial public interest in the question of whether the Opinion correctly adopted and applied a "deliberate indifference" standard, derived from *S.S.*, that reduces the standard to a "reasonableness-based" approach rather than analyzing whether the District's conduct showed that it intentionally ignored its obligation to correct known discriminatory conduct occurring between students.

Quite simply, the question is whether the deliberate indifference standard, which federal and state cases have established as a high bar to liability based on inferred discriminatory intent, requires more than a showing of unreasonable action or negligence in the government's response.

The answer to this question will determine (1) whether government entities will see a dramatic increase in peer-on-peer discrimination liability in Title VI, Title IX, or other implied private right of action damages cases, or in private damage claims under the EEOL, due to a weakening of the deliberate indifference standard, and (2) whether the effectiveness of internal nondiscrimination policies of not only school districts, but state and local governments, will be impaired, because their own findings and internal remedies may expose them to implied private damages actions under a less-stringent deliberate indifference standard.

1. Federal and state case law sets a higher bar for government liability under the "deliberate indifference standard" than a "reasonableness" based test.

Federal and state cases make clear that the "deliberate indifference" standard imposes an exceedingly high bar to recovery for plaintiffs seeking monetary damages against school districts and other government entities for certain alleged discrimination or civil rights violations. Courts take great pains to distinguish deliberate indifference—which requires showing that the government had knowledge of discrimination by persons under their general supervision, such as students or non-managerial employees, and intentionally failed to take steps to address it in light of the circumstances—from a de facto negligence standard imposing liability for failure to act in the manner of a reasonable person or require elimination of every vestige of harassment. *See*

Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649, 119 S. Ct. 1161, 143 L. Ed. 2d 839 (1999) ("This is not a mere 'reasonableness' standard.'"); *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) ("[a] showing of simple or even heightened negligence will not suffice").

The reason for this distinction is the rationale underlying the deliberate indifference standard enunciated in *Davis*: protecting public agencies, and the taxpayers who support them, from monetary liability where neither the government nor its agents directly committed the alleged discrimination.

This standard for money damages applies in peer-on-peer student discrimination claims under Title VI, Title IX, and other federal laws so that, in the absence of an explicit statutory right of action for damages, a school district would only be liable in private damages actions where it had *actual knowledge* of peer-on-peer harassment, the harassment deprived a student of educational opportunities or benefits, and the district deliberately turned a blind eye to that harassment in a manner that was *clearly unreasonable* under all the circumstances. *See Davis,* 526 U.S. at 640-50; Op. at 30-34.

The Opinion below acknowledges that the *Davis* Court "adopted a stringent standard," which was "a familiar standard." Op. at 32. But it ignores that under this high bar to recovery, a public entity's response must be more

than missteps or procedural foibles based on negligence principles; instead, the response must be so deliberately indifferent to known harassment that an *intent to discriminate* can be inferred on the part of government as an entity. *See* 526 U.S. at 642-43.

The purpose of the standard is thus to prevent every action of a government entity from being scrutinized under negligence-based standards that would expose taxpayers to high, potentially uninsured awards in civil lawsuits, especially where public entities are restricted in their control over patrons (e.g., public school students, inmates, and hospital patients) by constitutional and statutory provisions. *See* 526 U.S. at 648-49.

In sharp contrast, the OCR Standard for administrative complaints under Title VI requires a school district to conduct a "prompt, thorough, and impartial" investigation and take "prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." Op. at 46. This approach closely resembles a negligence standard, so that schools districts or other government entities that receive federal funds act proactively and hold themselves accountable to prevent and remedy discrimination at an administrative level. It is distinct from the judicially created deliberate indifference standard in implied private rights of action. This administrative standard, therefore, serves a very different purpose

from the deliberate indifference test, because OCR's and OSPI's purpose under Chapter 392-190 WAC is to assist school districts in remedying harassment, rather than aiding private parties' claims for money damages.

2. Washington courts apply the stringent deliberate indifference standard to determine government liability in many contexts, including higher education and prisons.

Since *Davis*, federal and state courts—including those in Washington—have applied this deliberate indifference test to claims under Title VI, Title VII, Title IX, Section 504, and 42 U.S.C. § 1983. *See Doe A. v. Green*, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004). Washington courts have considered this standard regarding money damages claims for: (1) peer-on-peer sex discrimination under Title IX against state colleges and universities, *see S.S.*, 143 Wn. App. 75; (2) failure-to-protect prisoner claims against state prisons under the Eighth Amendment, *see State v. DeLeon*, 185 Wn. App. 171, 203, 341 P.3d 315 (2014) (published in part); (3) violation of constitutional rights by county and city law enforcement agencies under 42 U.S.C. § 1983, *see, e.g., Hontz v. State*, 105 Wn.2d 302, 313, 714 P.2d 1176 (1986); *Strange v. Spokane Cnty.*, 171 Wn. App. 585, 287 P.3d 710, 712 (Oct. 30, 2012); *Tortes v. King Cnty.*, 119 Wn. App. 1, 9-11, 84 P.3d 252 (2003); (4) student claims against public employees under § 1983, such as teachers, *see Taylor v. Enumclaw Sch. Dist. No. 216*, 132 Wn. App. 688, 695-96, 133 P.3d 492 (2011);

and (5) claims against caseworkers employed by the Department of Social and Health Services, *see Lesley v. Dep't of Soc. and Health Servs.*, 83 Wn. App. 263, 278, 921 P.2d 1066 (1996).

In applying the deliberate indifference standard in these myriad contexts, Washington courts have previously recognized that this standard is intended to set a very high bar for government liability. For example, in *Hontz*, the Court stated that there "generally must be a showing of widespread abuse or a pervasive pattern of police misconduct to give rise to liability under § 1983 for failure to supervise." 105 Wn.2d at 313. Likewise, in *Tortes*, the court stated that "[i]t has been held that proof of simple or even gross negligence is insufficient to satisfy the requirement of 'deliberate indifference.' It must be more." 119 Wn. App. at 10.

3. The Court of Appeals' purported application of the deliberate indifference standard invites confusion about whether it is more than a negligence-based standard.

Despite this use of the term "deliberate indifference" and references to a summary of federal decisions on that standard in *S.S. v. Alexander*, 143 Wn. App. 75, the Opinion's analysis of the deliberate indifference standard under Chapter 392-190 WAC, like that of the ALJ's opinion, mirrors the lenient OCR Standard. *See* Op. at 38-43; ALJ Decision, CP at 31-34. This analysis of the undisputed findings diverges from those cases applying the deliberate indifference standard cited by the parties and even in the Opinion

by reducing the analysis to a "reasonableness-based" test, not one of whether the District had knowledge of and intentionally ignored alleged discriminatory conduct.

First, the Opinion concluded that the "District failed to conform in a timely manner to both the mandates of [Chapter 28A.642 RCW] and the OSPI's May 2011 regulations," on the rationale that the District neglected to amend certain policies and procedures and to appoint a nondiscrimination compliance coordinator, Op. at 40-41, and that the District's investigation was "fraught with inadequacies," *id.* at 42, notwithstanding the immediate investigative efforts and student discipline actions undertaken by school officials once they became aware of the two incidents, CP at 8-11. What the Opinion determined to be failings are more akin to procedural errors that do not support a finding of deliberate indifference, rather than a total lack of investigation or response by an agency to the discriminatory conduct found in cases cited by the *S.S.* Court. *See* 143 Wn. App. at 104; *see also Douglas v. Brookville Area Sch. Dist.*, 836 F. Supp. 2d 329 (W.D. Pa. 2011) (district's alleged failure to conform conduct to state law and policy did not constitute actionable discrimination for purposes of Title IX)). These "inadequacies," as the trial judge concluded, are insufficient to support a deliberate indifference finding.

Second, the Opinion further stressed that the District failed to "meaningfully and appropriately discipline Student A." Op. at 42. As described in the District's briefing before the Court of Appeals, courts normally recognize the unique complexity of handling student discipline in schools, which is perhaps most complex at the middle-school level, and defer to the expertise of trained educators, rather than substituting their own judgment for what constitutes appropriate punishment for students involved in peer-on-peer racial harassment. *See Zeno v. Pine Plains Central Sch. Dist.*, 702 F.3d 655, 668 (2d Cir. 2012) (a court "must accord sufficient deference to the decisions of school disciplinarians"). Six of the eight cases cited by the Court from *S.S.* are ones in which there was *no* punishment in response to severe incidents of harassment, not that disciplinary measures were not merely "meaningful" or "appropriate."[4] As the Sixth Circuit pointed out in *Vance*, one of the cases cited in *S.S.*, "courts should not second guess the disciplinary decisions that school administrators make." 231 F.3d at 260.

Third, the Opinion concluded that the name-calling in this case "went beyond simple teasing or name calling." None of the cases cited by the Court regarding "reviled epithet[s]," Op. at 43-44, involved name-

[4] *See Davis*, 526 U.S. at 635; *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999); *Seiwert v. Spencer-Owen Comm. Sch. Corp.*, 497 F. Sup. 2d 942 (S.D. Ind. 2007); *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 473 (D.N.H. 1997).

calling of the nature that occurred here. The name-calling by middle school boys in this case, while hurtful and inappropriate, was not akin to the physically violent and outrageous nature of the harassing conduct in similar cases where peer-on-peer conduct was sufficiently severe and pervasive to result in liability for monetary damages.

Most significantly, the Opinion does not address the superior court's determination that "there are no cases in the United States that address a fact pattern that frankly, is less serious than the facts of the other cases cited, and where the funded authority responds almost immediately." CP 840.

The above examples are illustrative, rather than exhaustive. Read as a whole, the Opinion creates a less stringent "deliberate indifference" test for the State of Washington, and improperly substitutes a negligence-based reasonableness-based standard that ignores the requirement that the public agency's conduct must rise to the level of intentional discrimination. If that is the case, state taxpayers may be liable for many instances of schoolyard name-calling between children even when educators act swiftly to investigate and attempt to remedy the incident, yet the response has procedural flaws or appears inadequate to a jury or judge(s).

The Court should grant review in order to apply the law *de novo* to the undisputed facts. Upon review, the Court should conclude, as the superior court correctly held, that even assuming that two incidents of racial

name-calling by middle school boys constituted "severe and pervasive" harassment, the District's response was not clearly unreasonable under the circumstances where the District promptly and thoroughly investigated, disciplined the harasser, and took other steps—even if the District's response contained procedural flaws.

4. Dilution of the deliberate indifference standard into a reasonableness test would dramatically increase state and local governments' exposure to monetary liability and hinder efficient resolution of internal complaints.

This case has a unique posture, given that the ALJ ruled on the standard to apply in adversary proceedings under former Chapter 392-190 WAC, a process that OSPI in 2014 amendments replaced with an administrative investigation by OSPI using standards that mirror the OCR Standard. *See* Op. at 26. Nonetheless, the Court's analysis of the deliberate indifference standard—which weakens the standard—will have ramifications in future matters for three reasons.

First, RCW 28A.640.040 and RCW 28A.642.040 create private rights of action for civil damages in superior court based on violations of the state's school anti-discrimination statutes. *See* Op. at 35 n.27. Neither statute sets forth a standard for liability, nor have Washington courts addressed that question. Any application and interpretation of the deliberate indifference standard, which is unique to money damages claims, should

await a case involving a civil action for money damages, because it has no relevance to internal administrative procedures. *Cf.* Op. at 36-38. In such a money-damages case, the Opinion's very low bar to liability, assuming the standard applies, would expose even the most well-meaning school districts to potentially uninsured awards for inadvertent procedural flaws in their investigations.[5]

Second, the Opinion's reduction of the deliberate indifference analysis to a reasonableness-based standard opens the door to increased monetary liability under Washington law for all federally supported state and local government entities, ranging from police departments to social service agencies, under Title VI and Title IX implied private right of action damages claims, or civil rights claims under 42 U.S.C. § 1983.

Third, interjecting the deliberate indifference standard into agency administrative proceedings may have the unintended result of discouraging effective agency responses to discrimination complaints. The complaint process in Chapter 392-190 WAC allows school districts to address students' and parents' concerns about discriminatory harassment at early stages—to nip issues in the bud before they rise to the level of severe and pervasive

[5] Under Washington law, "intentional," illegal discriminatory conduct is not insurable. *See generally E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986).

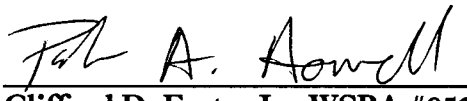
harassment denying educational benefits. Rejecting application of the deliberate indifference standard to agency administrative proceedings will assist the preventive and remedial statutory purpose of allowing school districts and other government entities to effectively respond and address incidents as they arise, without interjecting legal standards applicable only to damage claims in in judicial actions.

V. CONCLUSION

For the reasons stated above, the Court should grant review under RAP 13.4(b)(4) and reverse the Court of Appeals' decision by determining that the District was not deliberately indifferent, review the District's appeal of the ALJ's order, and reinstate the trial court's judgment.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

PORTER FOSTER RORICK LLP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent the **Mercer Island School District's Petition for Review** to the following:

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Dated this 20th day of July, 2015.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MERCER ISLAND SCHOOL DISTRICT, Respondent, v. OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, a state agency, Defendant, N.W. and R.W., on behalf of B.W., a minor child, Appellants.	)	DIVISION ONE No. 71419-8-I PUBLISHED OPINION FILED: April 13, 2015

DWYER, J. — In 2010, our legislature passed a law prohibiting racial discrimination in Washington public schools. In doing so, the legislature directed the Office of Superintendent of Public Instruction (OSPI) to enforce and obtain compliance with its nondiscrimination mandate. Subsequently, in May 2011, the OSPI engaged in formal rulemaking pursuant to this directive. As part of this, the OSPI authorized an administrative enforcement procedure and indicated that compliance with relevant federal civil rights law would constitute compliance with the legislature's nondiscrimination mandate. Shortly thereafter, in February 2012, the OSPI articulated a specific compliance standard without reference to

federal law. Our task is to determine the proper compliance standard in administrative enforcement proceedings in this interim period.

This task is set against the backdrop of an administrative enforcement proceeding against the Mercer Island School District, initiated as a result of its allegedly improper response to several incidents of student-on-student peer racial harassment. Following an administrative hearing, the OSPI—through its designee administrative law judge—concluded that the District had displayed "deliberate indifference" to the incidents of racial harassment and had, thereby, failed to comply with the legislature's 2010 nondiscrimination mandate. The District filed an administrative appeal in King County Superior Court, which resulted in reversal of the OSPI's decision. We now reverse the superior court and reinstate the OSPI's decision.

I

During the 2011-12 school year, B.W. was subjected, on two occasions, to peer racial harassment.[1] At the time, B.W. was in seventh grade at Islander Middle School—a public school within the Mercer Island School District (the District). It was B.W.'s first year attending school in the District. His parents, N.W. and R.W. (collectively Parents), had relocated their family to Mercer Island from out of state. B.W.'s father, N.W., is white; B.W.'s mother, R.W., is black.

B.W. had been diagnosed with Asperger's syndrome and Attention Deficit Hyperactivity Disorder. Because of these diagnoses, B.W. had, in his previous

[1] Our factual account is based, almost exclusively, on the thorough and comprehensive factual findings entered by Michelle Mentzer, the administrative law judge who presided over the administrative hearing in this matter.

school district, participated in an individualized education program. However, after a one week trial period with a similar program in the District, the Parents chose to discontinue B.W.'s participation. They did so because the program offered by the District required B.W. to leave the general education classroom in order to participate.

The two incidents of racial harassment took place in October 2011. Both occurred in B.W.'s social studies class, which was taught by Jan Brousseau.

The first incident occurred on October 5. On that day, B.W. was working on a group project—referred to as "Rock Around Washington"—with three other boys—Students A, B, and C. Student A was "saying cruel things" directly to B.W. and was whispering "in hushed tones to [Student B]." When B.W. "offered an idea about the project," Student A told him, "Shut up, you stupid Black."

Once class had ended, B.W., who was in tears, told Brousseau that "[Student A] was being mean." Brousseau "said that she would handle it." Brousseau had noted a great deal of conflict in the group, including between B.W. and Student A. In fact, she considered it to be the most dysfunctional group she had ever educated. Brousseau placed most of the blame for the conflict on B.W.

Later that day, B.W. and Student A were seen by a teacher, Brody LaRock, throwing crab apples at one another while waiting for the school bus. B.W. told LaRock that he had thrown the crab apple because Student A had not listened to his ideas in class that day. LaRock directed the boys to report to his office the following day. Student A filled out an incident report and was

disciplined with a one-day in-school suspension. B.W., however, was out of town with his family, and so LaRock referred the matter to Mary Jo Budzius, a co-principal, for further action.

On October 10, B.W. told his Parents that Student A had told him, "Shut up, you stupid Black." The Parents had previously scheduled a meeting with Brousseau and Budzius for October 11; yet, upon hearing what Student A had said to B.W., R.W. e-mailed both Brousseau and Budzius to inform them that she had an additional issue to discuss with them. At the October 11 meeting, the Parents told Brousseau and Budzius what Student A had said to their son.

Although Budzius believed that B.W. had heard the word "Black," she did "not know whether he heard it with his ears, or only in his own mind." Despite her skepticism, Budzius spoke with Student A the day after meeting with the Parents. Student A admitted calling B.W. "stupid" but denied calling him "stupid Black." Budzius talked to Student A about not using race as the basis for angry comments and had him sign an "anti-harassment contract." Budzius also distributed a behavior contract to Student A's teachers concerning inappropriate interactions with his peers.

Budzius decided not to question Students B or C.[2] She made this decision for several reasons. First, she "reasoned [that Student A] would not lie about calling [B.W.] 'stupid Black'" because Student A had already admitted to calling B.W. "stupid." Second, she believed that, owing to Asperger's syndrome,

[2] By choosing not to question Students B and C, Budzius failed to meet the District's minimum investigative requirements.

B.W. struggled to read social cues. In fact, Budzius believed that the source of conflict between B.W. and Student A was attributable to B.W.'s social deficits.

Like B.W., Student A was new to the District. In his brief time in the District, Student A had, on multiple occasions, engaged in disruptive behavior. In fact, when District staff contacted Student A's mother concerning the crab apple incident, it was the third time in that week alone that she had been contacted regarding her son's behavioral issues. Indeed, his behavior had been sufficiently troubling that he was the subject, on October 12, of a Building Guidance Team meeting—a group composed of various educators, administrators, and mental health professionals that meets to plan support for students in need of support, whether academic or otherwise. Notably, the meeting was unrelated to the allegation of racial harassment.

The second incident took place on October 25. On that day, the class was studying ethnic diversity and tolerance. B.W.'s group was discussing "people from Mexico," Mexican culture, and Mexican food. "[Student A] again began saying cruel and derisive things to [B.W.]." B.W. ignored Student A's remarks until Student A said that B.W. "crossed the border from Mexico" and Student B said that B.W. was "'exported' from Mexico." B.W. responded by asking Student B, "'Why don't you make me a croissant for 25 cents, you French jackass?'" Student B is of French heritage.

Following class, LaRock noticed B.W. crying in the lunch room. LaRock invited B.W. to talk in LaRock's office. After being told by B.W. what had happened, LaRock had B.W. fill out an incident report. LaRock then asked

building administrators to address the matter.

Aaron Miller,[3] a co-principal, investigated the second incident on the day it occurred. He conducted brief interviews of all five students, including B.W., who had been in the same small group. Each interview lasted around 10 minutes. While none of the other four students mentioned the remarks made by Students A and B to B.W., all four said that they heard B.W.'s remark to Student B. Nearly two months later, Student A revealed that the group had been discussing "people from Mexico," Mexican culture, and Mexican food. However, he did not disclose that information to Mr. Miller. When Mr. Miller finished these interviews, he e-mailed the Parents to inform them of the incident and his investigation.

R.W. responded to Mr. Miller's message the following day. She reminded Mr. Miller that this incident was the second time that Student A had targeted her son on the basis of race. She also asked to file a formal complaint.

In response to R.W.'s request to file a formal complaint, Mr. Miller sent her a "Harassment/Bullying Report Form." This form, which was no longer used by the District, directed the complainant to select either an "informal" complaint, which would be investigated by Islander Middle School, or a "formal" complaint, which called for an investigation by the District. Yet, Mr. Miller was already conducting an informal investigation.

On October 27, Budzius wrote to all of B.W.'s teachers, inquiring whether they had experienced problems with B.W.'s behavior in their classrooms. Two of

[3] We refer herein to Aaron Miller as Mr. Miller and Rachel Miller (an attorney retained by the District) as Ms. Miller, in an effort to avoid the confusion that would follow from referring to them only by their common surname.

B.W.'s teachers responded to say that, while B.W. did have some behavioral issues, they did not raise significant concerns. Budzius did not similarly inquire about Student A's behavior. This was in spite of the fact that, in his first two months in the District, Student A had displayed significant behavioral problems on multiple occasions, which prompted District staff to respond by holding a Building Guidance Team meeting. As previously noted, Budzius believed that the source of conflict between B.W. and Student A was attributable to B.W.'s social deficits.

Also on October 27, Budzius asked Harry Brown, a counselor, to provide assistance to B.W. with social skills. However, Budzius did not ask Brown to provide counseling to B.W. regarding the incidents of racial harassment or a disturbing essay, written by B.W., that she had received two days earlier. Brown contacted R.W. for the purpose of inviting B.W. to join "Boys' Council"—a program for students in need of assistance developing social skills. Brown did not share with the Parents the reason for the invitation. Subsequently, the Parents asked Brown not to have further contact with B.W. because he had not been forthcoming with regard to his reasons for inviting B.W. to participate in "Boys' Council."

Between October 25 and 28, District Superintendent Dr. Gary Plano made his monthly site visit to Islander Middle School. The focus of this particular visit was B.W. During his visit, Plano observed B.W. in order to assess his interactions with others. Plano did not, however, observe Student A. Plano also did not observe the class in which both alleged incidents had taken place.

Following his observation of B.W., Plano asked the District's director of special education to prepare a letter for him concerning B.W.'s initial special education status in the District and the Parents' subsequent withdrawal of consent for special education.

On October 31, Mr. Miller sent a report of his investigation to the Parents. Although he did not find support for B.W.'s allegations, he nonetheless outlined a series of "Next Steps" that the school would take in order to prevent future discrimination: (1) a paraeducator would be placed in Brousseau's class; (2) Brousseau and Brown would develop a curriculum on diversity and multiculturalism for Brousseau's class; (3) the school would begin its annual anti-bullying and anti-harassment program for all students in November 2011;[4] (4) the school administration would contact all parents and work with families to clarify its expectations with regard to appropriate interactions between students; and (5) Brown would work with B.W. and Student A individually.[5] Mr. Miller e-mailed his report to the Parents and attached the obsolete "Harassment/Bullying Report Form" that he had previously sent to R.W. on October 26.[6]

Omitted from Mr. Miller's report was any mention of a troubling sequence of events. On October 25, B.W. had submitted an essay (hereinafter Moment Essay) for the "Rock Around Washington" project. Therein, B.W. described a

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[4] This presentation did not occur until the end of February 2012. The focus of the presentation was harassment based on sexual orientation.

[5] Brown, as previously noted, contacted B.W.'s Parents on October 27. There is no evidence that Brown worked with Student A.

[6] By failing to consider the two incidents together, Mr. Miller failed to meet the District's minimum investigative requirements.

violent accident occurring to Student A: "[Student A] was ranting at me as usual, then, a Fed Ex truck squealed into the driveway and hit [Student A] just as he turned around." As a result of the accident, B.W. wrote that Student A "'would be mentally challenged for the rest of his short life.'" B.W. concluded the essay by saying, "Today was the best day of my life."

When Brousseau received the Moment Essay, she immediately shared it with Budzius, who then shared it with Mr. Miller. However, none of them informed the Parents of the essay's disquieting contents; nor did they discuss it with B.W. Instead, Brousseau returned the Moment Essay to B.W. with the following notation: "THE CONTENT OF THIS PAPER IS NOT IN KEEPING W/ THE NATURE OF THIS PROJECT WHERE BAND MEMBERS ARE TO RESPECT, SUPPORT & ENCOURAGE OTHER BAND MEMBERS[.]"[7]

Subsequently, on November 7, Brousseau corrected another "Rock Around Washington" essay (hereinafter Kennewick Essay) submitted by B.W. Although Brousseau corrected the Moment Essay before the Kennewick Essay, B.W. had, in fact, submitted the Kennewick Essay prior to the Moment Essay. In the earlier Kennewick Essay, B.W. described a violent accident occurring to Student A, which left him hospitalized for 24 hours. The nature of the accident in both essays was quite similar, though the consequences were more severe in the second essay. Rather than informing the Parents of the Kennewick Essay's disturbing contents or speaking with B.W., Brousseau gave the essay 8 out of 20

[7] The ALJ noted that "Brousseau often writes in all capital letters when correcting papers."

possible points for failing to include many of the required elements for the assignment. Although Brousseau e-mailed the Parents on November 7 and asked them to encourage B.W. to rewrite the Kennewick Essay, she still did not provide them with a copy of the essay or inform them that it had included a discussion of a violent accident involving Student A, who had allegedly targeted B.W. twice on the basis of race.

On November 15, the Parents met with Brousseau and the co-principals regarding the incidents of racial harassment and B.W.'s progress in Brousseau's class. At that meeting, Brousseau insisted that the dysfunction within the "Rock Around Washington" group had not affected B.W.'s grades in her class. Additionally, the Parents were not informed of the two disturbing essays written by B.W.

That night, B.W. brought the Kennewick Essay home and the Parents read it. The next day, R.W. e-mailed Brousseau, the co-principals, and Plano. She wrote that the Kennewick Essay was "disturbing" and "read like a cry for help." She stated that B.W.'s failure to observe the assignment's scoring rubric, as well as his resultant low grade on the essay, contradicted Brousseau's insistence at the previous day's meeting that B.W.'s grades had not suffered as a result of the discord within his "Rock Around Washington" group. R.W. also questioned how Mr. Miller's report could have failed to mention the Kennewick Essay, given that the essay was used as a vehicle to express B.W.'s aversion to his alleged harasser.

Instead of responding to R.W., Brousseau e-mailed Budzius and Mr. Miller

the following:

> Just so you know all the facts. What [the Mother] and [the Father] are reacting to is the . . . expository paragraph in which [Student A] gets hurt. This is NOT the . . . narrative that I gave to you which was way worse and had [Student A] mentally retarded at the end. What the [Parents] have in their hands was supposed to be an expository paragraph on a city in WA. I corrected his "moment" paper first by about a week and only realized that in the expository paragraph he was revisiting the same issue. [The Student] would have written the expository paragraph first and then the "moment" paper which is the exact opposite of how I corrected them. Therefore, my reaction to the second writing was probably stronger because I had already read the first, nastier paper. The [Parents] have NOT seen the "moment" paper. They will probably think that it is double the evidence of his harassment, but I see it as double the meanness. I will put a copy of both papers in your box today.
>
> Do I bring this up with the [attorney] investigator?

Budzius was surprised to learn that Brousseau had not provided the Parents with a copy of the Moment Essay. Nonetheless, Budzius still did not disclose to the Parents the existence of the Moment Essay. Budzius chose not to reveal this information to the Parents because she was concerned that they would make the conversation about her, as had happened in the past, rather than focusing on B.W.

In Mr. Miller's two responses to Brousseau's November 16 e-mail, he acknowledged that, contrary to Brousseau's assertions, B.W.'s negative relationship with Student A may have affected B.W.'s performance, including his grades, in Brousseau's class. In fact, B.W. earned his lowest grades in Brousseau's class. Shortly after the two incidents of racial harassment, Brousseau reported that B.W. was testing in the "C" and "D" range. By the end of the first trimester, he received a "C" in her social studies class. He earned

"A's" and "B's" in his other classes.

On November 1, after receiving Mr. Miller's report, the Parents filed a complaint on behalf of B.W. Plano issued a decision on November 4 under the District's Harassment, Intimidation, and Bullying policy. Plano concluded that Mr. Miller's investigation of the October 25 incident was "sufficiently thorough in its scope and intensity" and included appropriate preventative measures, despite finding no corroboration of B.W.'s allegations. However, because the Parents wanted an investigation to be conducted under the District's Nondiscrimination Policy and Procedure, and because their complaint included two incidents, Plano stated his desire to have an attorney conduct the investigation.

Plano represented to the Parents that Rachel Miller, the attorney chosen to conduct the investigation, was an "outside attorney" and an "unbiased observer" who would work on behalf of all those involved. However, Plano did not inform the Parents that Ms. Miller was a partner in a law firm that regularly served as the District's legal representative. Plano also did not inform the Parents that, in the event that they appealed his decision, that law firm would represent the District.

On November 4, the Parents contacted the OSPI's Equity and Civil Rights Office and learned of their rights under Washington law, which the District had failed to include in its Nondiscrimination Policy and Procedure. The Parents then appealed Plano's November 4 decision to the District board of directors. However, noting the existence of Ms. Miller's ongoing investigation under the Nondiscrimination Policy and Procedure, the board of directors denied the

Parents' appeal.

On November 29, Ms. Miller issued a report on her investigation, in which she found no support for B.W.'s allegations. On November 30, Plano adopted Ms. Miller's report as the basis for finding against the Parents under the District's Nondiscrimination Policy and Procedure.

While Ms. Miller's interviews were significantly more thorough than those that were conducted by Budzius and Mr. Miller, Ms. Miller still omitted significant facts from her report and failed to consider important matters in her conclusions.

- Ms. Miller's report did not address the fact that three students involved in the first incident had said that Student A had used racial slurs in reference to B.W., including "stupid Black," "Brownie," and "Indian." Ms. Miller had, herself, elicited statements from Students B and C that Student A had referred to B.W. as "Brownie" and "Indian."
- Ms. Miller's report contained no analysis of the two disturbing essays and did not reference them in the conclusions.[8] Despite interviewing B.W., Ms. Miller, did not ask him why he wrote about the injuries to Student A. Despite speaking with both Budzius and Mr. Miller, Ms. Miller did not ask why they failed to speak with B.W. about the essays or offer him counseling. Furthermore, she did not consider whether the essays tended to corroborate B.W.'s allegations or tended to show a substantial interference with B.W.'s educational environment. Finally, she failed to

[8] The essays were, however, appended to Ms. Miller's report. In fact, the Parents first learned of the Moment Essay by reviewing Ms. Miller's report.

consider whether the District's decision not to disclose the existence of the essays to the Parents tended to show that the District improperly handled their complaint.

- Ms. Miller's report failed to consider whether the precipitous drop in B.W.'s grades in Brousseau's class constituted evidence that the racial harassment had had an adverse effect on his educational environment.
- Ms. Miller's report did not address the contextual connection between the discussion of Mexico and Mexican food in Brousseau's class on the day of the second incident (a fact that had come to light as a result of her interview with Student A) and B.W.'s version of the events that followed.
- Ms. Miller did not measure the District's actions against the standards imposed by statute and regulation. She also failed to observe that the District's Nondiscrimination Policy and Procedure, which purportedly governed her investigation, was not in compliance with applicable law. Thus, she also did not address whether the District's failure to comply with applicable law affected its handling of B.W.'s complaint, or the Parents' ability to pursue their grievance promptly and properly.

In a later attempt to explain the aforesaid omissions, Ms. Miller characterized the scope of her inquiry as being limited to fact finding. Yet, in her report, Ms. Miller went beyond fact finding: indeed, she drew conclusions as to whether the evidence of racial slurs was substantial and consistent; whether there was a severe or persistent effect on B.W.'s educational environment; and

whether the District's actions in response to the Parents' complaint were adequate to ensure a positive educational environment.

It was also so that, even during the course of Ms. Miller's investigation, members of the District staff continued to focus on B.W. as the source of the problem. For instance, when Mr. Miller was interviewed by Ms. Miller, he told her about B.W.'s special education history and his "behavioral challenges." Mr. Miller did not, however, tell Ms. Miller about Student A's behavioral issues. Additionally, Mr. Miller selected one teacher—in addition to Brousseau—for Ms. Miller to interview. This teacher, Natasha Robsen, had had negative experiences with B.W. Yet, Mr. Miller did not direct Ms. Miller to any of B.W.'s other teachers with whom he had had more positive experiences. Moreover, Mr. Miller did not direct Ms. Miller to any of Student A's teachers—some of whom had had negative experiences with Student A.

Upon reading Ms. Miller's report—including an attached written statement from Brousseau containing negative comments about B.W.—the Parents immediately transferred B.W. out of Brousseau's class. The Parents had previously asked Miller and the board of directors whether Student A could be transferred rather than having to transfer B.W. Although Mr. Miller had told the Parents that he would follow up with them regarding their request, he did not do so.

After transferring out of Brousseau's class, B.W. earned "A's" throughout the school year. His new teacher, Alexis Guerriero, who was unaware of the harassment complaint throughout her time teaching B.W., reported that he turned

his work in on time, showed an eagerness to learn, and behaved well in general. The few behavioral issues that arose were quickly corrected and were not thereafter repeated.

On December 16, the Parents appealed Plano's November 30 decision to the District board of directors. The board of directors found that the District's policies and procedures had not been violated and that there was no significant evidence that B.W. had been subject to harassment or discrimination. It therefore ruled against the Parents.

On February 2, 2012, the Parents filed an appeal with the OSPI pursuant to former WAC 392-190-075 (2011).[9] The OSPI, in turn, designated the Office of Administrative Hearings (OAH) to hear and issue a final decision. The OAH appointed Administrative Law Judge (ALJ) Michelle Mentzer to hear the appeal.

A hearing was held over the course of several days in the summer of 2012.[10] The Parents did not retain counsel. The District was represented by Ms. Miller's law firm.

During the hearing, the District focused on B.W.'s behavioral problems and history of receiving special education. In fact, the District sought to offer into evidence 18 exhibits concerning B.W.'s special education history.[11] The District's strategy was consistent with the response of its staff to B.W.'s allegations, which had been to attribute responsibility for any discord to B.W.'s social deficits.

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[9] This provision required the OSPI to conduct a formal administrative hearing.

[10] In May 2012, the District brought its Nondiscrimination Policy and Procedure into compliance with chapters 28A.642 RCW and 392-190 WAC. It also appointed a nondiscrimination compliance coordinator, as required by chapter 392-190 WAC.

[11] Only two were admitted.

On October 15, 2012, ALJ Mentzer issued an order, in which she made findings of fact and drew conclusions of law. The ALJ found it more likely than not that B.W. was the target of racial slurs in both reported incidents. The ALJ further found that the District had failed, during the course of its investigations, to consider numerous facts relevant to B.W.'s allegations. The ALJ also found that, although the District had outlined a series of "Next Steps" in response to B.W.'s allegations, the District had failed to implement them all.

The ALJ proceeded to consider the effects of the District's failure to comply with chapters 28A.642 RCW and 392-190 WAC. In doing so, the ALJ made the following pertinent findings:

> Based on the formal and tenacious manner in which the [Parents] have approached this case, it is found that they may have pursued the following steps if District policies and procedures had complied with the law. The District's non-compliance with the law deprived them of these opportunities. They may have immediately contacted the District's nondiscrimination compliance coordinator upon hearing their son's reports and requested a District-level, rather than a building-level investigation. If the District had truthfully informed them of its relationship with [its law firm], the [Parents] may have requested that either the compliance coordinator or an unaffiliated law firm conduct the investigation; and may have declined to allow their son to be interviewed by [the District's law firm]. A District-level investigation—whether by the nondiscrimination compliance coordinator or an attorney investigator—would likely have been more thorough than Ms. Budzius' and Mr. Miller's quick and inadequate investigations. A District-level investigation would more likely have included interviews of Students B and C. The racial slurs they disclosed might have come to light during the two weeks that intervened between October 11th (when the first incident was reported) and the second incident on October 25th. Much of the turmoil [B.W.] experienced during the month of October, as evidenced by his disturbing essays and poor LASS grades, and the further turmoil of experiencing the second incident, might have been avoided had the District adequately investigated the first incident and taken

> appropriate steps to discipline Student A, instead of taking steps based on the assumption that [B.W.] heard a racial slur in his mind, but not necessarily with his ears.

ALJ Mentzer then reflected upon the appropriate standard for assessing the District's response to B.W.'s allegations. In doing so, she noted that this court had, in the case of S.S. v. Alexander, 143 Wn. App. 75, 177 P.3d 742 (2008), "provided guidance on the legal standard to be used in cases of student-on-student discriminatory harassment." After examining our decision in S.S., which involved a private action for the recovery of money damages under Title IX of the Education Amendments of 1972, the ALJ adopted the standard applied in that case, which extends liability to instances wherein a school district in receipt of federal funds has actual notice of peer sex discrimination and yet responds with "deliberate indifference." See S.S., 143 Wn. App. 75.

Applying the "deliberate indifference" standard, the ALJ concluded that "the District's actions were clearly unreasonable in light of known circumstances" and, thus, constituted deliberate indifference. These actions included the following: failing to update the District's Nondiscrimination Policy and Procedure as required by law; failing to appoint a nondiscrimination compliance coordinator as required by law; inadequately investigating each incident; inadequately disciplining Student A for his role in each incident; failing to complete the "Next Steps" listed in Mr. Miller's report; failing to disclose the Moment Essay to the Parents; failing to consider either the Moment Essay or the Kennewick Essay in any of the investigations; focusing on B.W. and his social deficits as the reason for his conflict with Student A; disregarding evidence that corroborated B.W.'s

allegations; misrepresenting to the Parents that Ms. Miller was an outside attorney working for all parties involved; and adopting Ms. Miller's report, which omitted relevant facts and reached unjustified conclusions.

By way of relief, the ALJ ordered the District to provide at least six hours of training to its nondiscrimination compliance coordinator and at least three hours of training to all District principals and assistant principals concerning the requirements of chapters 28A.640 RCW, 28A.642 RCW, and 392-190 WAC.[12] The ALJ also ordered the District to continue its annual presentations to middle schools students regarding harassment, intimidation, and bullying, and to ensure that harassment on the basis of race and ethnic origin would be addressed.

The District exercised its right of appeal to the King County Superior Court. It did not, however, challenge the factual findings of ALJ Mentzer. Instead, the District maintained that the facts found did not support the legal conclusion that it had been deliberately indifferent to the incidents of racial harassment. In opposing the District's superior court appeal, the Parents were again without counsel.

The superior court agreed with the District and, on December 9, 2013, reversed ALJ Mentzer's decision.

The Parents now appeal from the superior court's order.

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[12] Set forth in these chapters are rules and regulations meant to eradicate discrimination in Washington public schools on the basis of sex, race, and other characteristics.

II

The "deliberate indifference" standard was applied both in the administrative hearing and on administrative appeal in superior court. Represented by counsel, the Parents now assert that this standard was inappropriate. The proper standard, they contend, was that which is used by the United States Department of Education's Office of Civil Rights in administrative enforcement proceedings under Title VI of the Civil Rights Act of 1964[13] (hereinafter OCR Standard). We agree. Because the Parents elected to pursue relief through an administrative enforcement process, the OCR Standard—as the federal counterpart of the procedure chosen by the Parents—was the proper standard.

A

We review the ALJ's decision under the standards set forth in chapter 34.05 RCW, the Washington Administrative Procedure Act (WAPA). Gradinaru v. Dep't of Soc. & Health Servs., 181 Wn. App. 18, 21, 325 P.3d 209, review denied, 181 Wn.2d 1010 (2014). "In reviewing an agency's order, the appellate court sits in the same position as the superior court." City of Seattle v. Pub. Emp't Relations Comm'n, 160 Wn. App. 382, 388, 249 P.3d 650 (2011). Accordingly, our review is "limited to the record of the administrative tribunal, not that of the trial court." City of Seattle, 160 Wn. App. at 388. Because the parties have not challenged the facts as found by the ALJ, we treat those findings as

[13] 42 U.S.C. §§ 2000d to 2000d-7.

verities on appeal. Dep't of Labor & Indus. v. Allen, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

"The process of applying the law to the facts . . . is a question of law and is subject to de novo review." Tapper v. State Emp't Sec. Dep't, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). "Where an administrative decision involves a mixed question of law and fact, 'the court does not try the facts de novo but it determines the law independently of the agency's decision and applies it to facts as found by the agency.'" City of Seattle, 160 Wn. App. at 388 (quoting Renton Educ. Ass'n v. Pub. Emp't Relations Comm'n, 101 Wn.2d 435, 441, 680 P.2d 40 (1984)). In reviewing questions of law, we may substitute our own determination for that of the agency. City of Seattle, 160 Wn. App. at 388. "We will reverse if the [agency] 'erroneously interpreted or applied the law.'" Gradinaru, 181 Wn. App. at 21 (quoting RCW 34.05.570(3)(d)).

B

In 2010, our legislature passed the equal education opportunity law (EEOL). LAWS OF 2010, ch. 240. The EEOL forbids discrimination in Washington public schools on the basis of "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." RCW 28A.642.010. The EEOL was necessary, the legislature found, because although "numerous state and federal laws prohibit discrimination on other bases in addition to sex, the common school provisions in Title 28A RCW

do not include specific acknowledgement of the right to be free from discrimination because of race . . . ." RCW 28A.642.005.

The EEOL was not conceived in a void—rather, its enactment came in the wake of two prior legislative undertakings. The first was the formation of an advisory committee "to craft a strategic plan to address the achievement gap for African-American students." LAWS OF 2008, ch. 298, § 2. The second was the formation of the Achievement Gap Oversight and Accountability Committee, the purpose of which was "to synthesize the findings and recommendations from the 2008 achievement gap studies into an implementation plan, and to recommend policies and strategies to the superintendent of public instruction, the professional educator standards board, and the state board of education to close the achievement gap." LAWS OF 2009, ch. 468, § 2.

The legislature found "that one of the recommendations made to the legislature by the [Achievement Gap Oversight and Accountability Committee] . . . was that the [OSPI] should be specifically authorized to take affirmative steps to ensure that school districts comply with all civil rights laws, similar to what has already been authorized in chapter 28A.640 RCW with respect to discrimination on the basis of sex." RCW 28A.642.005. Heeding this recommendation, the legislature delegated to the OSPI the power to enforce and obtain compliance with the EEOL "by appropriate order made pursuant to chapter 34.05 RCW." RCW 28A.642.050. The OSPI was also authorized to enforce and obtain compliance with any rules and guidelines that it adopted under the EEOL. RCW 28A.642.050. As a means of obtaining compliance, the OSPI was permitted to

terminate funding, eliminate programs, institute corrective action, and impose sanctions.[14] RCW 28A.642.050. The legislature did not set forth a standard for compliance with the EEOL but, rather, directed the OSPI to "establish a compliance timetable, rules, and guidelines for enforcement of this chapter." RCW 28A.642.030.

i

In May 2011, the OSPI promulgated rules pursuant to this directive. See former ch. 392-190 WAC (2011). Significantly, though, the OSPI did not articulate its own standard for compliance with the EEOL. Instead, it made known that "compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter . . . ." Former WAC 392-190-005 (2011).

In February 2012, the OSPI issued guidelines interpreting both the EEOL and its own rules. This time, the OSPI articulated a specific standard for compliance with the EEOL. "A school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known." OSPI, Prohibiting Discrimination in Washington Public Schools at 32 (Feb. 2012).[15] "A school district must take prompt and appropriate action to investigate or otherwise determine what occurred." OSPI, supra, at 33. "If an investigation reveals that discriminatory harassment has occurred, the school

[14] These enforcement mechanisms were illustrative, rather than enumerative. See RCW 28A.642.050.

[15] Available at http://www.k12.wa.us/Equity/pubdocs/ProhibitingDiscriminationInPublicSchools.pdf#cover.

district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." OSPI, supra, at 33. "Discriminatory harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school district." OSPI, supra, at 32.

In October 2014, the OSPI amended its own rules. In doing so, it embraced the compliance standard set forth in its 2012 guidelines.

> (1) For purposes of administrative enforcement of this chapter . . . a school district or public charter school violates a student's rights regarding discriminatory harassment . . . when the following conditions are met:
>
> . . .
>
> (b) The alleged conduct is sufficiently severe, persistent, or pervasive that it limits or denies a student's ability to participate in or benefit from the school district's or public charter school's course offerings, including any educational program or activity (i.e., creates a hostile environment); and
>
> (c) The school district or public charter school, upon notice, fails to take prompt and appropriate action to investigate or fails to take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.
>
> (2) For purposes of administrative enforcement of this chapter . . . the [OSPI] deems a school district or public charter school to have notice of discriminatory harassment if a reasonable employee knew, or in the exercise of reasonable care should have known, about the harassment.

WAC 392-190-0555.

ii

Following the OSPI's initial engagement in formal rulemaking in 2011, individuals seeking to enforce the EEOL's nondiscrimination mandate had at their disposal two distinct remedial processes: a judicial enforcement process and an administrative enforcement process.

The judicial enforcement process was constructed by the legislature. In the EEOL, the legislature expressly included a private right of action and authorized relief in the form of damages: "Any person aggrieved by a violation of" the EEOL or the OSPI's rules or guidelines "has a right of action in superior court for civil damages and such equitable relief as the court determines." RCW 28A.642.040.

The administrative enforcement process, on the other hand, was a product of agency rule. As part of its original rulemaking, the OSPI authorized an administrative complaint procedure. See former WAC 392-190-065, -070, -075 (2011). This procedure provided: "Anyone may file a complaint with a school district alleging that the district has violated this chapter." Former WAC 392-190-065.[16] Complainants were given the right to appeal a school district decision to a school district board of directors. Former WAC 392-190-070. If still unsatisfied, complainants could appeal to the OSPI. Former WAC 392-190-075. The OSPI

[16] In May 2011, the OSPI also mandated that the superintendent of each school district "immediately" designate a nondiscrimination compliance coordinator. Former WAC 392-190-060 (2011). A compliance coordinator was to be responsible for investigating any complaints filed pursuant to former WAC 392-190-065 (2011). However, as found by ALJ Metzner, the District did not appoint a compliance coordinator until May 2012—after the Parents initiated administrative enforcement proceedings.

would then be required to conduct a formal administrative hearing in conformance with the WAPA.[17, 18] Former WAC 392-190-075.

iii

What are we to make of this flurry of legislative and regulatory activity? Unfortunately, the regulatory activity that would be of most use in determining the proper standard for compliance with the EEOL in administrative enforcement proceedings postdated the events in dispute, leaving us with limited guidance in resolving an issue that is unlikely to resurface, given that the OSPI has since interpreted, and then amended, its own regulations. Nonetheless, because the events occurred at the time that they did, we are left with the task of determining the proper standard in the intervening months between the OSPI's original rulemaking in May 2011 and the guidelines it subsequently issued in February 2012. During this period, the OSPI's guidance was limited to the following: "compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter . . . ." Former WAC 392-190-005. Accordingly, we turn our attention to federal civil rights law: namely, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 to 1688.

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[17] The OSPI could delegate its authority to render a final decision to an ALJ, which it did in this matter. Former WAC 392-190-075.

[18] This procedure was altered in 2014. As a result, the OSPI is no longer required to conduct a formal administrative hearing and can no longer delegate its authority to render a final decision. Instead, the OSPI, upon receipt of an appeal, is permitted—but not required—to investigate the matter itself. WAC 392-190-075. Following an investigation, the OSPI must make an independent determination of compliance or noncompliance and must issue a written decision to the parties that addresses the allegations in the complaint and any other noncompliance issues uncovered during the investigation. WAC 392-190-075.

C

Title VI provides that "[n]o person . . . shall, on the grounds 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." 42 U.S.C. § 2000d. Similarly, Title IX provides that "[n]o 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). Notwithstanding the fact that only racial harassment has been alleged in this matter, both Titles VI and IX are significant to our analysis because the United States Supreme Court "has interpreted Title IX consistently with Title VI." Barnes v. Gorman, 536 U.S. 181, 185, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002).

Titles VI and IX, both of which were enacted pursuant to Congress's power under the Spending Clause,[19] "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286, 118 S. Ct. 1989, 141 L. Ed. 2d. 277 (1998); see generally Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005); Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983). "When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: in

[19] U.S. CONST. art. I, § 8, cl. 1.

return for federal funds, the States agree to comply with federally imposed conditions.'" Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 640, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)); see also Guardians, 463 U.S. at 599 ("The mandate of Title VI is '[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money.'" (alteration in original) (quoting 110 Cong. Rec. 1542 (1964) (Rep. Lindsay))). "In interpreting language in spending legislation," the Supreme Court "insis[t][s] 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 Congress] or is unable to ascertain what is expected of it.'" Davis, 526 U.S. at 640 (some alterations in original) (quoting Pennhurst, 451 U.S. at 17).

i

"The *express* statutory means of enforcement [of Titles VI and IX] is administrative," Gebser, 524 U.S. at 280 (emphasis added), which is to say that both statutes are enforced by federal departments and agencies that condition receipt of federal funding upon compliance with statutory nondiscrimination mandates. See 42 U.S.C. § 2000d-1 (authorizing certain federal departments and agencies to enforce the nondiscrimination mandate of Title VI); 20 U.S.C. § 1682 (authorizing certain federal departments and agencies to enforce the nondiscrimination mandate of Title IX).

The United States Department of Education is one such department. The task of ensuring that recipients of United States Department of Education funding are in compliance with Titles VI and IX has been left to that department's Office of Civil Rights (OCR). To that end, the OCR has set forth detailed standards for compliance with Titles VI and IX. Failure to comply with these standards may trigger administrative enforcement proceedings, which may result in a cessation of United States Department of Education funding.

Generally speaking, the OCR will find a school district to be in violation of Title VI when it fails to respond appropriately to instances of peer racial harassment—of which it had actual or constructive notice—that are sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.[20] See "Dear Colleague Letter"[21] from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Oct. 26, 2010) (hereinafter Racial Harassment Letter).[22]

In more specific terms, a school receives notice of peer racial harassment "if a responsible employee knew, or in the exercise of reasonable care should

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[20] A similar standard is used in the Title IX context: "If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." "Dear Colleague Letter" from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., at 4 (April 4, 2011). Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[21] "Dear colleague letters are guidance documents written to educational administrators that explain the OCR's legal positions and enforcement priorities." Matthew R. Triplett, Note, Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection, 62 DUKE L.J. 487, 488 n.5 (2012).

[22] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

have known, about the harassment." Racial Harassment Letter at 2 n.9.[23] "Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school." Racial Harassment Letter at 2. Once a school has actual or constructive notice of peer racial harassment, "it must take immediate and appropriate action to investigate or otherwise determine what occurred." Racial Harassment Letter at 2. While "specific steps in a school's investigation will vary depending" on a number of factors, every investigation "should be prompt, thorough, and impartial." Racial Harassment Letter at 2. "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." Racial Harassment Letter at 2-3.

ii

While there is evidence that Congress assumed a private right of action could be brought under both statutes, Cannon v. Univ. of Chicago, 441 U.S. 677, 699-701, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), Congress did not, in either statute, expressly supplement the administrative enforcement apparatus with a

[23] The OCR has used the actual or constructive notice inquiry for some time. See, e.g., Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11448, 11450 (March 10, 1994) ("If discriminatory conduct causes a racially hostile environment to develop that affects the enjoyment of the educational program for the student(s) being harassed, and if the recipient has actual or constructive notice of the hostile environment, the recipient is required to take appropriate responsive action.")

private right of action. Nevertheless, the Supreme Court has held that both statutes are enforceable through an implied private right of action. See Cannon, 441 U.S. at 703; see generally Alexander v. Sandoval, 532 U.S. 275, 279-80, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (observing that "[t]he reasoning of [Cannon] embraced the existence of a private right to enforce Title VI as well" as Title IX). In judicially implying a private right of action, the Court recognized that the administrative procedure for terminating federal financial support is "severe and often may not provide an appropriate means of" protecting individual citizens against discriminatory practices "if merely an isolated violation has occurred." Cannon, 441 U.S. at 704-05. Hence, the Court determined that an implied right of action was "fully consistent with—and in some cases even necessary to—the orderly enforcement" of Titles VI and IX. Cannon, 441 U.S. at 705-06.

Subsequently, in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 73-76, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), the Supreme Court "clarif[ied] that damages were available as a Title IX private action remedy." S.S., 143 Wn. App. at 94; cf. Barnes, 536 U.S. at 185 (observing that "monetary damages were available" under Title IX "[a]nd the Court has interpreted Title IX consistently with Title VI").

In summary, the Supreme Court implied a private right of action under both statutes in Cannon and subsequently authorized relief in the form of damages in Franklin. And yet, in Franklin, the Court recognized that liability under both statutes could be constrained by the source of the power pursuant to which they had been enacted. See 503 U.S. at 74 (considering whether

Spending Clause statutes authorize monetary awards for intentional violations); accord S.S., 143 Wn. App. at 95. Above all, the Court was troubled by the prospect of a recipient of federal funds being held liable for the payment of damages without receiving the requisite notice. See Franklin, 503 U.S. at 74 ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."); accord S.S., 143 Wn. App. at 95. However, because the "notice problem" did not arise in Franklin—which involved teacher-student sexual harassment—the Court did not, at that time, "purport to define the contours" of a school district's liability for teacher-student sexual harassment. Gebser, 524 U.S. at 281.

"The Supreme Court revisited the relationship between Title IX and teacher-student sexual harassment six years later [in Gebser]." S.S., 143 Wn. App. at 95. The Gebser Court refused to hold a school district liable for teacher-student sexual harassment on the basis of traditional tort theories of liability: namely, those of constructive notice and respondeat superior. In doing so, the Court adopted a stringent standard for imposing liability on school districts in receipt of federal funds, which is often referred to as the "deliberate indifference" standard.[24]

[24] This was a familiar standard. It was introduced by the Supreme Court in the context of claims for cruel and unusual punishment in violation of the Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). It was subsequently adopted "for claims under [42 U.S.C.] § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." Gebser, 524 U.S. at 291.

> In Gebser, the Court determined that it would be inconsistent with the Spending Clause origins of Title IX to impose damages liability on funding recipients based on principles of constructive notice or respondeat superior liability. Gebser, 524 U.S. at 285. Instead, the Court concluded, "that damages may not be recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." Gebser, 524 U.S. at 277. The Court stated this rule more broadly later in the opinion:
>
> > [A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to initiate corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> Gebser, 524 U.S. at 290.

S.S., 143 Wn. App. at 95-96.

The effect of Gebser was to establish the liability standard in private actions for the recovery of damages predicated upon teacher-student sexual harassment and brought pursuant to Title IX. The Court did not at that time, however, determine whether the same standard would be applicable to instances of peer sexual harassment.

The following year, the Court examined "the interplay between peer (student-on-student) sexual harassment and Title IX [in Davis]." S.S., 143 Wn. App. at 96. In Davis, the Court extended the "deliberate indifference" standard to instances of peer sexual harassment, concluding that "recipients may be liable for their deliberate indifference to known acts of peer sexual harassment." 526 U.S. at 648. In reaching this conclusion, the Court made clear that "funding recipients are deemed 'deliberately indifferent' to acts of student-on-student

harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648.

D

Although, admittedly, our lengthy explication of state and federal authority suggests that the task of determining the proper standard in this matter will be equally laborious, the truth is much more agreeable: all that remains is to identify the federal analog to the means of recourse pursued by the Parents in this matter. See former WAC 392-190-005 ("compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter . . ."). More to the point, we must determine whether the means of recourse pursued by the Parents finds its Title VI analog in the judicially implied right of action for the recovery of damages or the administrative remedial scheme expressly authorized by statute. In doing so, we consider not only the facially distinctive features of these federal schemes, but also the underlying policy considerations that gave rise to their existence.

Even though the proceedings before the ALJ and in superior court yielded contrary results, they were reached through application of the same standard: "deliberate indifference." Now, on appeal, the Parents contend that the deliberate indifference standard was inapt. Given that these were administrative enforcement proceedings, the Parents assert, the proper standard was that

which is used by the OCR in administrative enforcement proceedings.[25] We agree.

The Parents had a choice: pursue enforcement of the EEOL's nondiscrimination mandate through either judicial or administrative means. They chose the latter.[26] The District does not dispute this. Moreover, the Parents did not seek—and, indeed, could not have obtained—an award of monetary damages as a result of their administrative enforcement efforts.[27] The District does not dispute this. Consequently, it would seem that the federal analog to the

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[25] The District contends that the Parents should be judicially estopped from arguing for reinstatement of the ALJ's order on the basis of the OCR Standard. The District maintains that, were the Parents permitted to argue for a more lenient standard, the District would be unfairly prejudiced and the Parents would be unfairly benefited. We disagree.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). The doctrine is meant to preserve respect for judicial proceedings and to avoid "inconsistency, duplicity, and waste of time." Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 861, 281 P.3d 289 (2012). However, "[a]pplication of the doctrine may be inappropriate '"when a party's prior position was based on inadvertence or mistake."'" Arkison, 160 Wn.2d at 539 (quoting New Hampshire v. Maine, 532 U.S. 742, 753, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting John S. Clark Co. v. Faggert & Frieden, PC, 65 F.3d 26, 29 (4th Cir. 1995))). Moreover, "judicial estoppel may be applied only in the event that a litigant's prior inconsistent position benefited the litigant or was accepted by the court." Taylor v. Bell, __ Wn. App. __, 340 P.3d 951, 958 (2014).

Judicial estoppel was not designed as a trap for the unwary. In both proceedings, the Parents, without the assistance of counsel, argued that the District had been deliberately indifferent to the racial harassment suffered by their son. More to the point, the Parents argued that they had satisfied a more demanding burden of proof than that which they now, with the assistance of counsel, propose. The District does not explain what benefit the Parents could have unfairly gained from having to meet a more demanding burden of proof.

In all likelihood, the Parents' prior position was a byproduct of inadvertence or mistake—influenced, perhaps, by the manner in which the District, which has been represented by counsel throughout these proceedings, argued its position. In recognition of this, in recognition of the fact that we are applying a remedial statute, and because the Parents did not benefit from their prior position, we decline to apply the doctrine of judicial estoppel.

[26] The Parents followed the administrative procedure prescribed by the OSPI. Initially, they filed a complaint with the school district. They then appealed to the school district's board of directors. Finally, they appealed to the OSPI, which conducted a *"formal administrative hearing"* as required by former WAC 392-190-075 (emphasis added).

[27] In order to obtain monetary damages, the Parents would have had to bring a private action against the District in superior court, as expressly authorized by the legislature in the EEOL. RCW 28A.642.040.

Parents' administrative enforcement efforts lies in the Title VI administrative enforcement apparatus, meaning the OCR Standard would apply.

The District, however, argues that the OCR Standard is unsuitable. This is so, it asserts, because the administrative hearing over which ALJ Mentzer presided constituted a "quasi-judicial review" of the District's decision. The District does not dispute that the Parents availed themselves of the administrative enforcement procedure authorized by the OSPI; however, it maintains that the adversarial nature of the administrative hearing is akin to the judicially implied private right of action for the recovery of money damages under Title VI, rather than its administrative enforcement apparatus. The District overplays the significance of the ALJ's involvement.

As a consequence of its preoccupation with the adversarial trappings of the administrative hearing, the District fails to perceive or, perhaps, fully appreciate, the genesis of the deliberate indifference standard. The concerns that moved the Supreme Court to adopt the stringent standard of "deliberate indifference" are not present here. In fashioning a remedy for the implied private right of action for the recovery of money damages, the Court perceived the need for a standard that would ensure that recipients of federal funds would be held liable for money damages only upon receiving proper notice, given that "the receipt of federal funds under typical Spending Clause legislation is a consensual matter." Guardians, 463 U.S. at 596. Thus, in Gebser, the Court required "that 'the receiving entity of federal funds [have] notice that it will be liable for a monetary award'" before it could be subjected to liability for damages. 524 U.S.

at 287 (quoting Franklin, 503 U.S. at 74). Nevertheless, where a "funding recipient engages in intentional conduct that violates the clear terms of the statute," the Court has held that damages may be awarded. Davis, 526 U.S. at 642. However, liability must arise as a result of "'an official decision by the recipient not to remedy the violation.'" Davis, 526 U.S. at 642 (quoting Gebser, 524 U.S. at 290). An official decision not to remedy the violation presupposes that the recipient had actual knowledge that the violation existed, meaning that liability may not be imputed to the recipient as a result of actions taken by its charges or employees. See Davis, 526 U.S. 629; Gebser, 524 U.S. 274.

Notwithstanding the absence of support for the District's position, we wish, before proceeding further, to dispel any lingering confusion regarding the erstwhile enforcement procedure availed of by the Parents. In enacting the EEOL, the legislature directed the OSPI to enforce and obtain compliance with the EEOL. The legislature did not, however, restrict the means by which the OSPI could accomplish this directive; presumably, it was left to the OSPI's discretion. Hence, the OSPI's decision to enlist the aid of individuals and the OAH in discharging its statutorily mandated duty constituted an unremarkable exercise of its discretion.[28] The OSPI's exercise of its discretion did not, however, transform an administrative complaint procedure into a private right of action and it did not transmute administrative recourse into money damages. To

[28] The adversarial features of the administrative hearing, in all likelihood, signified a belief held by the OSPI that such features would promote its objective. While the OSPI may no longer hold this belief, as evidenced by its recent amendments, the fact that it can alter its enforcement procedure is further indication that the "quasi-judicial" review with which the District takes issue owed its existence to the OSPI's favor.

suggest otherwise is to misapprehend the division of labor between the legislature and the OSPI.

Still, the District warns that, in the event that the OCR Standard is applied herein, the Parents could argue for res judicata in a civil suit based on the ALJ's findings. While the District's desire to avoid a money judgment based on collateral estoppel is no doubt understandable, it is not germane to our inquiry. The question of what standard applies in an administrative enforcement proceeding is not resolved by reference to a conceivable litigation strategy in a hypothetical lawsuit.

In brief, we conclude that the OCR Standard was the proper standard to apply. Nevertheless, we consider and apply both standards herein.

III

We begin with the standard of deliberate indifference. The Parents contend that the superior court erred in reversing the ALJ's order. They maintain that, in addition to violating the OCR Standard, the District's response constituted deliberate indifference. We agree.

In order to satisfy the deliberate indifference standard, the Parents were required to establish the following: (1) racial discrimination; (2) knowledge by an appropriate person of the discrimination; (3) deliberate indifference by the District; and (4) discrimination that was sufficiently severe, pervasive, and objectively offensive that it can be said to have deprived the victim of access to the educational opportunities or benefits provided by the school. See S.S, 143 Wn. App. at 98-117.

The District does not dispute that B.W. was subjected to peer racial discrimination and it does not dispute that an appropriate person knew of the discrimination. Instead, the District maintains that its response to the discrimination was not deliberately indifferent and that the discrimination was not sufficiently severe, pervasive, and offensive that it can be said to have deprived B.W. of access to the educational opportunities or benefits provided by the District.

A

The District, in asserting that its response was not deliberately indifferent, adopts a misguided methodology, which we characterize as a "divide and conquer" approach. Rather than considering the circumstances as a whole, the District considers facts in isolation and asserts that they do not rise to the level of deliberate indifference. This approach is at odds with S.S., wherein we stated that "[a] funding recipient acts with deliberate indifference when it responds to a report of a discriminatory act in a manner that is clearly unreasonable *in light of all of the known circumstances*." 143 Wn. App. at 103 (emphasis added) (citing Davis, 526 U.S. at 629). Stated differently, in considering whether the District's response constituted deliberate indifference, we "unite and consider."

In S.S., we amassed an array of decisions in which other courts have found responses to constitute deliberate indifference. The following observations are based on those decisions. Initially, "An institution's failure to properly investigate a claim of discrimination is frequently seen as an indication of deliberate indifference." S.S., 143 Wn. App. at 104. Yet, "Conducting an

investigation and then doing nothing more may also constitute deliberate indifference." S.S., 143 Wn. App. at 105. Indeed, the "failure to meaningfully and appropriately discipline the student-harasser is frequently seen as an indication of deliberate indifference." S.S., 143 Wn. App. at 104. Along the same lines, "treating the abuser and the abused equally has been seen as being deliberately indifferent to the discriminatory acts." S.S., 143 Wn. App. at 105.

We begin with the District's informal investigations. As an initial matter, the District failed to conform in a timely manner to both the mandates of the EEOL and the OSPI's May 2011 regulations. Specifically, it neglected both to amend its Nondiscrimination Policy and Procedure to extend coverage to racial discrimination and to appoint a nondiscrimination compliance coordinator. As a result of the District's failure to amend its Nondiscrimination Policy and Procedure, the Parents were not aware of their rights at the time that they filed their initial complaint on behalf of B.W. As a result of the District's failure to appoint a compliance coordinator, the co-principals were not informed of the District's obligations under the EEOL and the OSPI's May 2011 regulations.

The co-principals conducted inadequate investigations. While the District's failure to appoint a compliance coordinator may, perhaps, be partially to blame, both Budzius and Mr. Miller failed to follow the procedure under which they were purporting to investigate. For example, following the first incident, Budzius interviewed only two of the four students working together on the same group project. While Mr. Miller did manage to interview all of the students involved in the second incident, he failed to consider the two incidents in concert.

Thus, as found by ALJ Mentzer, both failed to meet the minimum investigative requirements imposed by the District's procedure on "Prohibition of Harassment, Intimidation, and Bullying."

To make matters worse, the reasons Budzius provided for not interviewing two of the four students were found by the ALJ to be not credible. Budzius stated that she believed that Student A was telling the truth and had no reason to lie, whereas she believed that B.W., who has Asperger's syndrome and who, according to Budzius, had difficulty reading social cues, heard the word "stupid" but added "Black" in his own mind. However, Budzius could not explain how B.W.'s condition would affect his ability to hear a racial epithet and accurately report that which was said.

In addition, Mr. Miller's brief interviews failed to reveal critical facts that Ms. Miller later uncovered—specifically, that the group had been discussing Mexico, which, as found by the ALJ, contextualized the remark made by B.W. to Student B, and gave further credence to B.W.'s allegations. Even more troubling is the fact that Mr. Miller continued to informally investigate the incident, despite the fact that R.W. had told him she wished to file a formal complaint, which would have been handled by the District, as opposed to the school. Although he continued with his informal investigation, Mr. Miller failed, ultimately, to include in his report any mention of the Moment Essay. The Moment Essay undeniably constituted corroborating evidence of B.W.'s allegations. Yet, Mr. Miller did not address it in his report and the school's staff proceeded to shield it from the Parents until its existence was disclosed by Ms. Miller.

As with the informal investigations, the formal investigation was fraught with inadequacies. Ms. Miller did not ask B.W. about the two disturbing essays he had written; she did not ask Brousseau, Budzius, or Mr. Miller to explain why they had withheld the existence of the essays from the Parents; in fact, she made no mention of B.W.'s two disturbing essays in her report;[29] she did not account for the conspicuous discrepancy between B.W.'s grades in other classes and his grades in the class he shared with his harasser; and she did not address the ostensible connection between the discussion of Mexico and Mexican food and the racially charged comments between Student A, Student B, and B.W.

In addition to its failure to conduct an adequate investigation, the District failed to meaningfully and appropriately discipline Student A. In fact, it appears that the only discipline Student A received as a consequence of his acts of racial harassment was a reminder from Brousseau not to use race as the basis for angry comments and a request that he sign an "anti-harassment contract."[30] Whether this can be characterized as "discipline" is debatable; whether the response was proportional to the harassment is not.

Furthermore, the District refused to consider any scenario in which B.W. was not to blame for the conflict with Student A. As found by ALJ Mentzer, the District's staff believed that the conflict was due to B.W.'s social deficits. They were frustrated that, because B.W.'s Parents had withdrawn their consent to

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[29] She did append the essays to her report. Upon reading the report, the Parents learned, for the first time, of the existence of the second essay.

[30] The District suggests that it also disciplined Student A by suspending him for one day. The record rebuts this suggestion. Student A was suspended as a consequence of his role in the crab apple incident.

allow B.W. access to special education, they were unable to provide B.W. with assistance in overcoming his perceived social deficits. As a result, they refused to consider the possibility that B.W.'s claims of harassment could be legitimate, despite knowing that Student A had had a slew of serious behavior problems.

Considered together, these facts establish that the District's response to the harassment suffered by B.W was clearly unreasonable. Thus, ALJ Mentzer did not err in concluding that the District was deliberately indifferent. Yet, we must also consider whether the harassment was sufficiently severe, pervasive, and objectively offensive so that it can be said to have deprived B.W. of access to the educational opportunities or benefits provided by the school.

B

The District contends that, even in the event that its response to the harassment was deliberately indifferent, the Parents failed to show that the harassment was sufficiently severe, pervasive, and objectively offensive so that it can be said to have deprived B.W. of access to the educational opportunities or benefits provided by the school. According to the District, "The type of harassing comments Student A made are the type of remarks that—while likely hurtful—were the type of non-physical, immature name-calling and teasing that the Davis Court held to be insufficient to be actionable harassment . . . ." Br. of Resp't at 42. We disagree.

Federal courts have distinguished use of "reviled epithet[s]" from the "simple teasing and name-calling among school children" that the Davis Court suggested would not be actionable in the context of a Title IX claim. See Zeno v.

Pine Plains Cent. Sch. Dist., 702 F.3d 655, 659, 666-67 (2d Cir. 2012) (concluding that a jury could have found actionable harassment where high school student attending "a racially homogenous school" was subjected to "frequent pejorative references to his skin tone"); DiStiso v. Cook, 691 F.3d 226, 242-43 (2d Cir. 2012) (where kindergarten student allegedly called "blackie" and "nigger" by peers, "such conduct, particularly use of the reviled epithet 'nigger,' raises a question of severe harassment going beyond simple teasing and name-calling"); see also Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998) (where African-American ninth grade student called "nigger" by white children and where that epithet was written on the walls in civics and social studies classrooms, court ruled that complaint set forth sufficient allegations of a racially hostile environment).

That which occurred here went beyond simple teasing or name calling. Student A made it clear to B.W. not only that his skin color made him look physically different from his peers, but that it also was the basis for a lack of intelligence. "Shut up, you stupid Black" leaves no doubt as to the perceived cause of a lack of intelligence. Furthermore, because both incidents took place in the context of a group setting, B.W. was repeatedly humiliated in front of his peers and reduced to tears. In fact, during the second incident, Student B joined Student A in taunting B.W. It is not difficult to imagine the emotional toll that these instances of harassment could take on a seventh grade boy in an unfamiliar environment. Yet, there is no need to imagine: the emotional stress suffered by B.W. was evidenced by crying in front of his peers, submitting

disturbing essays to his teacher who blamed him for the conflict with Student A, and receiving uncharacteristically low grades. Based on the foregoing, we determine that the ALJ did not err in concluding that the harassment experienced by B.W. subjected him to a hostile environment. Nevertheless, we must still consider whether the hostile environment deprived B.W. of equal access to educational opportunities or benefits.

"Under the rule announced in Davis," we observed, "a total bar or exclusion from educational opportunities need not be demonstrated." S.S., 143 Wn. App. at 114. Instead, "It is the denial of 'equal access to an institution's resources and opportunities' that is the key." S.S., 143 Wn. App. at 114 (quoting Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1168 (N.D. Cal. 2000)). "Educational benefits include an academic environment free from racial hostility." Zeno, 702 F.3d at 666. A "dropoff" in grades can provide "necessary evidence of a potential link between" a student's diminished educational opportunities and harassment experienced. Davis, 526 U.S. at 652.

The ALJ did not err in concluding that B.W. was denied equal access to his school's educational opportunities or benefits. B.W. was forced to remain in the same class with his harasser for a period of time, which, unsurprisingly, coincided with B.W.'s poor performance in that class. Indeed, part of B.W.'s poor performance stemmed from his submission of two essays in which he described Student A suffering terrible injuries; in one of these essays, the injury to Student A occurred immediately following an instance of Student A verbally harassing B.W. B.W.'s poor performance stood in stark contrast to his high achievement in

his other classes. When B.W. was transferred to a different class, his grades promptly went up to match his high achievement in his other classes.

In conclusion, the ALJ did not err in holding that the District acted with deliberate indifference to B.W.'s reports of discriminatory harassment, and thereby discriminated against him in violation of the EEOL. Yet, unlike the ALJ, we proceed to consider whether, under the OCR Standard, the Parents have also established a violation of the EEOL.

IV

Unlike the deliberate indifference standard, the OCR Standard requires that, upon receiving actual or constructive notice of racial harassment, the school "take immediate and appropriate action to investigate or otherwise determine what occurred." Racial Harassment Letter at 2. It further requires that every investigation "should be prompt, thorough, and impartial." Racial Harassment Letter at 2. Finally, it imposes upon a school the duty to "take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." Racial Harassment Letter at 2-3.

As noted by the District, the OCR Standard is more lenient than the deliberate indifference standard. Rather than obligating the Parents to show that the District's response was "clearly unreasonable," the OCR Standard demands that the District take "immediate and appropriate action to investigate" and "prompt and effective steps" to "end the harassment."

Under this more lenient standard, and applying the ALJ's factual findings

to the requirements of this standard, it is abundantly clear that the District's response violated the EEOL. The District's many missteps, which have been chronicled herein, need not be revisited in order to conclude not only that the District failed to take immediate and appropriate action to investigate but that it failed to take prompt and effective steps to end the harassment, eliminate the hostile environment, and prevent the harassment from recurring. Therefore, although we conclude that the District violated the EEOL under both standards, we hold that its failure to abide by the OCR Standard—which is the proper standard for this administrative enforcement proceeding—was the source of its EEOL violation. Consequently, we reverse the superior court's order on administrative appeal and reinstate the decision of the Office of Superintendent of Public Instruction, as entered by its designee administrative law judge.

Dwyer, J.

We concur:

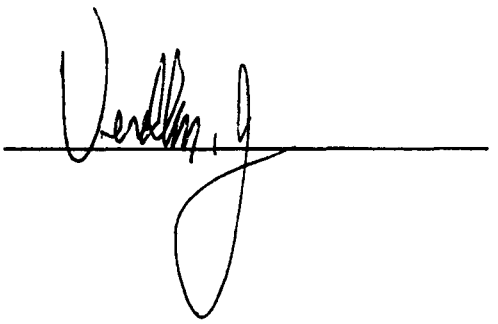
Leach, J.

No. 71419-8-I, Mercer Island School District v. Office of the Superintendant of Public Instruction, N.W. and R.W. on behalf of R.W.

VERELLEN, A.C.J. (concurring). I concur in part. I agree that even under the deliberate indifference standard advocated by the Mercer Island School District (the District), the Office of Superintendent of Public Instruction's (OSPI) decision should be affirmed. Specifically, the undisputed findings of fact support deliberate indifference in the form of the vice principals' incomplete investigations, the failure of teachers and administrators to meaningfully acknowledge and responsibly act upon B.W.'s troublesome reaction to the peer-on-peer harassment, and the District's failure to timely provide important information to B.W.'s parents. Consistent with the undisputed findings of fact, I also agree these were not merely incidents of teasing and name calling, and B.W.'s access to educational opportunities was severely impacted.

I write separately because I would end the analysis at this point. For three reasons, I would not further explore the Office of Civil Rights (OCR) standard and how or whether it applies during this interim period. First, there is a minimal opportunity to provide helpful guidance. As detailed in the lead opinion, OSPI guidelines and regulations went into effect after this administrative hearing. The new OSPI regulation likely governs any pending case. Second, the legislature and OSPI remain free to dramatically alter or fine tune the enforcement standards applicable to future cases. Future standards may or may not include a similar OCR standard discussed in this appeal. Finally, and most importantly, not far below the surface lurks a potentially troubling question. Case law in this arena distinguishes between an administrative action that does not seek money damages and an implied cause of action under Title VI or Title XI for money damages implicating the federal spending clause. But what is the

impact if a student and the student's parents undertake a "purely" administrative action as a first step, and if successful, then pursue the second step of a claim for money damages under Title VI or XI asserting that the administrative determination of discrimination is res judicata in the action for money damages? Would such a two-step process implicate the spending clause and call into question the standard used to determine discrimination at the administrative level?[1] If this question unfolds in a future appeal, I would prefer to address it under the then-applicable enforcement standards without any possible misunderstandings or unintended consequences arising from the alternative arguments the parents have raised in this appeal. Because this appeal may be resolved narrowly on the deliberate indifference standard, I would save any additional discussion for another day.



[1] The question is not purely academic. At oral argument, counsel for the parents and B.W. acknowledged that they have filed a Title VI claim for money damages.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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State of Washington

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CASE #: 71419-8-I
Mercer Island School District, Res. v. N.W. and R.W., on behalf of B.W., Apps.
King County No. 12-2-36529-6 SEA

Counsel:

Enclosed please find a copy of the Order Denying Respondent's Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. James E. Rogers
Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

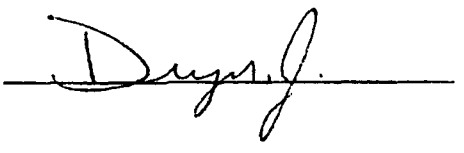
MERCER ISLAND SCHOOL DISTRICT, Respondent, v. OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, a state agency, Defendant, N.W. and R.W., on behalf of B.W., a minor child, Appellants.	)	DIVISION ONE No. 71419-8-I ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

The respondent, Mercer Island School District, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 18th day of June, 2015.

FOR THE COURT:



APPENDIX B

Chapter 392-190 WAC

EQUAL EDUCATIONAL OPPORTUNITY—UNLAWFUL DISCRIMINATION PROHIBITED

WAC

WAC 392-190-005 Purpose—Elimination of unlawful discrimination in public schools. The purpose of this chapter is to establish rules and regulations which implement chapters 28A.640 and 28A.642 RCW. The referenced enactments prohibit discrimination on the basis of sex, 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 in Washington public schools. Broad federal regulations implementing Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Titles VI and VII of the Civil Rights Act of 1964 similarly prohibit discrimination based on sex, race, creed, religion, color, national origin, and disability, in federally assisted education programs or activities. As a result, several substantive areas have been similarly identified and addressed by both state and federal enactments.

It is the intent of this chapter to encompass those similar substantive areas addressed by federal civil rights authorities and in some aspects extend beyond those authorities. Accordingly, compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter, but school districts should be aware that compliance with federal civil rights laws alone may not constitute compliance with this chapter.

In accordance with chapters 28A.640 and 28A.642 RCW, it is unlawful for any public school district to discriminate on the basis of sex, 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 with regard to any activity conducted by or on behalf of a school district including, but not limited to, preschool, adult education, community education and vocational-technical program activities.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-005, filed 4/13/11, effective 5/14/11. Statutory Authority: 1990 c 33. WSR 90-16-002 (Order 18), § 392-190-005, filed 7/19/90, effective 8/19/90. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-005, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-005, filed 5/17/76.]

WAC 392-190-010 Counseling and guidance services—Career opportunities—Internal procedures. (1) No school district shall engage in discrimination against any person on the basis of sex, 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 in the counseling or guidance of students in grades K-12.

(2) Each school district must devise and use materials, orientation programs, and counseling techniques that will encourage participation in all school programs and courses of study based on factors other than sex, 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. School districts must encourage students to explore subjects and activities not traditional for their sex.

(3) Each school district which uses testing and other materials for counseling students must not use different materials for students based on their sex, 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. A school district may use different materials for students on the basis of their sex, 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 if:

(a) Such different materials cover the same occupations and interest areas; and

(b) The use of such different materials is demonstrated to be essential to eliminate bias based on sex, 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.

(4) Each school district must develop and use internal procedures for ensuring that all tests and appraisal instruments related to guidance counseling, career and vocational guidance materials, work/study programs and opportunities, and educational scheduling and/or placement do not discriminate on the basis of sex, 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.

(5) If a school district concludes that the use of such instruments, materials, or programs results in a substantially disproportionate number of students who are members of one of the groups identified in WAC 392-190-005 to be placed in any particular course of study or classification, the school district must take such immediate action as is necessary to assure that such disproportion is not the result of discrimination in the instrument, material, or its application.

(6) Where a school district finds that a particular class contains a substantially disproportionate number of students who are members of any one of the groups identified in WAC 392-190-005, the district must take such immediate action as is necessary to assure that such disproportion is not the result of discrimination on the basis of sex, 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 in tests and appraisal instruments, career and vocational guidance materials, work/study programs and opportunities, and educational scheduling and/or placement by counselors.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-010, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-010, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-010, filed 7/9/80; Order 6-76, § 392-190-010, filed 5/17/76.]

WAC 392-190-015 Counseling and guidance—Sex discrimination—Duty of certificated and classroom personnel—Coordination of effort. (1) All certificated and classroom personnel must encourage students to explore and develop their individual interests in career and vocational technical programs and employment opportunities without regard to sex, including reasonable efforts encouraging students to consider and explore "nontraditional" occupations for men and women. All certificated and classroom personnel within each local school district must have access to an educational staff associate (ESA) certificated school counselor(s) or such other appropriate person(s), designated by the school district superintendent to coordinate compliance with the requirements of this section.

(2) All certificated and classroom personnel must comply fully and immediately with the requirements of this section. The superintendent of each school district shall make the designation(s) required by this section immediately.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-015, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-015, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-015, filed 5/17/76.]

WAC 392-190-020 In-service training—Bias awareness. Each school district must, where appropriate, include sex, 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, bias awareness and elimination training sessions in such in-service training programs as are conducted or provided for certificated and/or classroom personnel.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-020, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-020, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-020, filed 5/17/76.]

WAC 392-190-025 Recreational and athletic activities. No person shall, on the basis of sex, 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, be excluded from participation in, be denied the benefits of, or otherwise be discriminated against in any interscholastic, club or intramural athletics or recreational activity offered by a school district, and no school district shall provide any such athletics or recreational activity separately on such basis.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-025, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-025, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-025, filed 5/17/76.]

WAC 392-190-026 Recreational and athletic—Sex discrimination—Equal opportunities—Separate teams. (1) Sports teams and programs offered by a school district must be equally open to participation by qualified members of both sexes. For sports and recreational activities offered for students, a school district may maintain separate teams for members of each sex if:

(a) It can clearly be shown, under the factual circumstances involved in the particular case, that the maintenance of separate teams for boys and girls truly constitutes the best method of providing both sexes, as a whole, with an equal opportunity to participate in the sports or games of their choice; and

(b) At the same time, a test of substantial equality between the two programs has been met.

(2) For the purpose of this section and WAC 392-190-050(2) "substantial equality" must be determined by considering factors including, but not limited to, the following:

(a) The relationship between the skill and compensation of coaching staffs;

(b) The size of their budgets;

(c) The quality of competition and game schedule;

(d) Uniforms;

(e) Equipment and facilities; and

(f) Sufficient numbers of participants to warrant separate teams.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 13-12-027, § 392-190-026, filed 5/29/13, effective 6/29/13; WSR 11-09-024, § 392-190-026, filed 4/13/11, effective 5/14/11.]

WAC 392-190-030 General—Recreational and athletic activities—Sex discrimination—Equal opportunity factors considered. Each school district must evaluate its recreational and athletic program at least once each year to ensure that equal opportunities are available to members of both sexes with respect to interscholastic, club or intramural athletics which are operated, sponsored, or otherwise provided by the school district.

In determining whether equal opportunities are available to members of both sexes with respect to interscholastic, club or intramural athletics, each school district conducting an evaluation required by this section, and the office of superintendent of public instruction upon receipt of a complaint pursuant to WAC 392-190-075, must consider several factors, including but not limited to the following where provided by a school district:

(1) Whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) The scheduling of games and practice times including the use of playfields, courts, gyms, and pools;

(4) Transportation and per diem allowances, if any;

(5) The opportunity to receive coaching and academic tutoring;

(6) The assignment and compensation of coaches, tutors, and game officials;

(7) The provision of medical and training facilities and services including the availability of insurance;

(8) The provision of housing, laundry, and dining facilities and services, if any; and

(9) Publicity and awards.

Unequal aggregate expenditures within a school district for members of each sex or unequal expenditures for separate male and female teams will not alone constitute noncompliance with this chapter, but the failure to provide the necessary funds for recreational and athletic activities for members of one sex may be considered in assessing the equality of opportunity for members of each sex.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-030, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-030, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-030, filed 5/17/76.]

WAC 392-190-035 Recreational and athletic activities—Elementary and secondary level. (1) Each school district which operates, sponsors, or otherwise provides interscholastic, club or intramural athletics at the elementary school level (K-6) must provide equal opportunity and encouragement for physical and skill development to all students in the elementary grades consistent with this chapter.

(2) Each school district which operates, sponsors, or otherwise provides interscholastic, club or intramural athletics at the secondary school level (7-12) must provide equal opportunity and encouragement for physical and skill development to all students in the secondary grades consistent with this chapter.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-035, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-035, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-035, filed 7/9/80; Order 6-76, § 392-190-035, filed 5/17/76.]

WAC 392-190-040 Recreational and athletic activities—Sex discrimination—Student interest—Required survey instrument. (1) The superintendent of public instruction must develop a survey instrument to assist each school district in the determination of student interest for male/female participation in specific sports.

(2) A survey instrument must be administered by each school district at all grade levels where interscholastic, intramural and other sports and recreational activities are conducted. The results of the survey must be considered in the program planning and development in the area of recreational and athletic activities offered within the school district.

(3) A survey instrument developed pursuant to this section must be administered at least once every three years within each school district. School districts may modify or amend the content of the survey instrument if the district deems it necessary to clarify and assist in the evaluation of student interest. If a school district intends to modify or amend the instrument, the district must provide the office of superintendent of public instruction with a copy of the proposal for approval prior to its administration.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-040, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-040, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-040, filed 7/9/80; Order 6-76, § 392-190-040, filed 5/17/76.]

WAC 392-190-045 Recreational and athletic activities—Sex discrimination—Facilities. A school district which provides athletic facilities for members of one sex including showers, toilets, and training room facilities for athletic purposes must provide comparable facilities for members of the opposite sex. Such facilities may be provided as either separate facilities or must be scheduled and used

separately by members of each sex. This section shall not be interpreted to require the construction of additional facilities.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-045, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-045, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-045, filed 7/9/80; Order 6-76, § 392-190-045, filed 5/17/76.]

WAC 392-190-050 Course offerings—Generally—Separate sessions or groups—When permissible. No school district shall provide any course or otherwise carry out any of its education programs or activities separately on the basis of sex, 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 or require or refuse participation therein by any of its students on such basis. This section shall not be construed to prohibit:

(1) The grouping of students in physical education classes and activities by demonstrated ability as assessed by objective standards of individual performance developed and applied without regard to sex. Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the school district must immediately implement appropriate standards which do not have such effect;

(2) The separation of students by sex within physical education classes or activities offered for students in grades 7 through 12 if:

(a) It can clearly be shown under the factual circumstances involved in the particular case, that the maintenance of a separate physical education class or activity for boys and girls truly constitutes the best method of providing both sexes, as a whole, with an equal opportunity to participate in such class or activity; and

(b) At the same time, a test of substantial equality between the two classes or activities can be found to have been met;

(3) Separate sessions for boys and girls with respect to those portions of classes which deal exclusively with human sexuality;

(4) Classes and/or activities which a school district may establish or maintain requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex; and

(5) Classes, courses or placement of students based on the student's individual language skill development and/or based on the student's needs as identified in the student's individualized education program.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-050, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-050, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-050, filed 7/9/80; Order 6-76, § 392-190-050, filed 5/17/76.]

WAC 392-190-055 Textbooks and instructional materials—Scope—Elimination of bias. (1) It is the intent of this section to eliminate bias pertaining to sex, 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 in connection with any form of instruction provided by a school district.

(2) The instructional materials policy of each school district required by RCW 28A.320.230 must incorporate therein, as part of the selection criteria, a specific statement requiring the elimination of bias pertaining to sex, 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 in all textbooks and instructional materials including reference materials and audio-visual materials.

(3) The instructional materials committee of each school district must establish and maintain appropriate screening criteria designed to identify and eliminate bias pertaining to sex, 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 trained dog guide or service animal in all textbooks and instructional materials including reference materials and audio-visual materials. Such selection criteria must be consistent with the selection criteria identified in chapter 392-204 WAC, as now or hereafter amended. One of the aids to identification of bias in instructional materials is the *Washington Models for the Evaluation of Bias Content in Instructional Materials* published by the superintendent of public instruction.

(4) In recognition of the fact that current instructional materials which contain bias may not be replaced immediately, each school district should acquire supplemental instructional materials or aids to be used concurrent with existing materials for the purpose of countering the bias content thereof.

(5) Nothing in this section is intended to prohibit the use or assignment of supplemental instructional materials such as classic and contemporary literary works, periodicals and technical journals which, although they contain bias, are educationally necessary or advisable.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-055, filed 4/13/11, effective 5/14/11. Statutory Authority: 1990 c 33. WSR 90-16-002 (Order 18), § 392-190-055, filed 7/19/90, effective 8/19/90. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-055, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-055, filed 7/9/80; Order 6-76, § 392-190-055, filed 5/17/76.]

WAC 392-190-056 Sexual harassment—Definitions. (1) As used in this chapter, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature between two or more individuals if:

(a) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;

(b) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(c) That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

(2) For the purpose of this definition, sexual harassment may include conduct or communication that involves adult to student, student to adult, student to student, adult to adult, male to female, female to male, male to male, and female to female.

(3) School districts must be guided by federal and state case law in their interpretation of sexual harassment complaints and will need to determine sexual harassment on a case-by-case basis. Nothing in this chapter should be construed as diminishing or otherwise modifying an individual's right to bring an action under state or federal law alleging that the individual has been harmed by conduct or communication related to the individual's sex, race, creed, 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 that creates a hostile or abusive educational or workplace environment.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-056, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-056, filed 11/10/94, effective 12/11/94.]

WAC 392-190-057 Sexual harassment policy—Adoption date—Required criteria. In order to eliminate sexual harassment in connection with any responsibility, function or activity within the jurisdiction of a school district, a sexual harassment policy must be adopted and implemented by each district no later than June 30, 1995. This policy must apply to all school district employees, volunteers, parents, and students, including but not limited to, conduct between students. This policy must incorporate the following criteria:

(1) Definitions consistent with the categories in RCW 28A.640.020 (2)(f);

(2) District and staff responsibilities;

(3) Informal grievance procedures;

(4) Grievance procedures consistent with WAC 392-190-065 through 392-190-075 of this chapter;

(5) Investigative procedures and reasonable and prompt timelines;

(6) Remedies available to victims of sexual harassment;

(7) Disciplinary actions against violators which must conform with collective bargaining agreements and state and federal laws;

(8) Reprisal, retaliation and false accusations prohibition;

(9) Dissemination and implementation; and

(10) Internal review.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-057, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-057, filed 11/10/94, effective 12/11/94.]

WAC 392-190-058 Sexual harassment—Procedures. (1) School district policies on sexual harassment must be reviewed by the superintendent of public instruction considering the criteria established under WAC 392-190-057 as part of the monitoring process established in RCW 28A.640.030. The superintendent of public instruction must supply upon request sample sexual harassment policies to school districts.

(2) The school district's sexual harassment policy must be easily understood and conspicuously posted throughout each school building, and provided to each employee, volunteer and student.

(3) Reasonable efforts must be made to inform all students and their parents about the district's sexual harassment policy and procedures.

(4) A copy of the policy must appear in any publication of the school or school district setting forth the rules, regulations, procedures, and standards of conduct for the school or school district.

(5) Each school must develop a process for discussing the district's sexual harassment policy. The process must ensure the discussion addresses the definition of sexual harassment and issues covered in the sexual harassment policy.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-058, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-058, filed 11/10/94, effective 12/11/94.]

WAC 392-190-059 Harassment, intimidation, and bullying prevention policy and procedure—Adoption date. (1) By August 1, 2011, each school district must adopt or amend if necessary a harassment, intimidation, and bullying prevention policy and procedure as provided for in RCW 28A.300.285.

(2) When monitoring school districts' compliance with this chapter pursuant to WAC 392-190-076, the office of superintendent of public instruction will review such policies and procedures to ensure that they provide that students will not be harassed, intimidated, or bullied because of their sex, race, creed, religion, color, national origin, 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.

(3) This section is not intended to limit the scope of RCW 28A.300.285.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-059, filed 4/13/11, effective 5/14/11.]

WAC 392-190-0591 Public school employment and contract practices—Nondiscrimination. (1) No school district shall, on the basis of sex, 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, exclude any person from participation in, deny any person the benefit of, or subject any person to discrimination in employment, recruitment, promotion or advancement, consideration or selection, whether full time or part time, in connection with employment by a school district.

(2) Each school district must make all employment decisions in a nondiscriminatory manner and shall not limit, segregate, or classify any person in any way which could adversely affect a person's employment opportunities or sta-

tus on the basis of sex, race, creed, 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.

(3) No school district shall enter into any contractual or other relationship that directly or indirectly has the effect of subjecting any person to discrimination in connection with employment on the basis of sex, 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 including, but not limited to, relationships with employment and referral agencies, with labor unions, and with organizations providing or administrating fringe benefits to employees.

(4) No school district shall grant preferential treatment to applications for employment on the basis of enrollment at any education institution or entity which admits as students only or predominately individuals or groups on the basis of sex, race, color or national origin, if the giving of such preferences has the effect of discriminating on the basis of sex, race, color, or national origin.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-0591, filed 4/13/11, effective 5/14/11.]

WAC 392-190-0592 Public school employment—Affirmative action program. (1) Each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions which are consistent with the intent of chapters 28A.640 and 28A.642 RCW. Each school district's affirmative action employment program must include at least the following provisions respecting discrimination on the basis of sex:

(a) Maintain credential requirements for all personnel;

(b) Make no differentiation in pay scale;

(c) Make no differentiation in the assignment of school duties except where such assignment would involve duty areas or situations such as, but not limited to, shower rooms, where persons might be disrobed;

(d) Provide the same opportunities for advancement;

(e) Make no difference in conditions of employment including, but not limited to, hiring practices, leaves of absence, hours of employment and assignment of, or pay for, instructional and noninstructional duties; and

(f) Such other provisions as may be required by the superintendent of public instruction designed to facilitate the effective achievement of all reasonable affirmative action goals and objectives in public school employment respecting the elimination of discrimination on the basis of sex.

(2) Notwithstanding the requirements of this chapter respecting discrimination on the basis of sex, each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions to eliminate discrimination on the basis of 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.

(3) Each affirmative action employment program of a school district must be filed with the office of superintendent of public instruction.

(4) The board of directors of each school district must adopt and implement an affirmative action employment program required by this section as expeditiously as possible but in no event later than September 30, 2011.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-0592, filed 4/13/11, effective 5/14/11.]

WAC 392-190-060 Compliance—Local school district—Designation of responsible employee—Notification. (1) The superintendent of each school district must immediately designate at least one employee who shall be responsible directly to the superintendent for monitoring and coordinating the district's compliance with this chapter. The employee designated pursuant to this section shall also be charged with the responsibility to investigate any complaint(s) communicated to the school district pursuant to WAC 392-190-065.

(2) Each school district must, once each year or more often as deemed necessary, publish notice in a manner which is reasonably calculated to inform all students, students' parents, and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this section and the complaint and appeal procedure set forth in WAC 392-190-065, 392-190-070 and 392-190-075 as now or hereafter amended.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-060, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-060, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-060, filed 5/17/76.]

WAC 392-190-065 Compliance—Complaint procedure—District superintendent. (1) Anyone may file a complaint with a school district alleging that the district has violated this chapter. The complaint must be:

(a) Written;

(b) Signed by the complainant; and

(c) Set forth specific acts, conditions, or circumstances alleged to violate this chapter or the specific acts, conditions, or circumstances that would be prohibited by this chapter. Upon receipt of the complaint, the employee or employees designated pursuant to WAC 392-190-060 must investigate the allegations and effect a prompt resolution of the complaint.

(2) Following the completion of the investigation, the designated employee or employees must provide the district superintendent with a full written report of the complaint and the results of the investigation. The district superintendent must respond in writing to the complaining party as expeditiously as possible but in no event later than thirty calendar days following receipt of such complaint by the school district, unless otherwise agreed to by the complainant.

(3) The response of the school district superintendent required by this section must include notice of the complainant's right to appeal to the school board, as set forth in WAC 392-190-070, and must identify where and to whom

the appeal must be filed. The superintendent's response must also clearly state either:

(a) That the school district denies the allegations contained in the complaint received; or

(b) The reasonable corrective measures deemed necessary to eliminate any such act, condition, or circumstance within the school district. Any such corrective measures deemed necessary must be instituted as expeditiously as possible but in no event later than thirty calendar days following the school district superintendent's mailing of a written response to the complainant required by this section, unless otherwise agreed to by the complainant.

(4) The complaint procedure required by this section must not prohibit the processing of grievances by an employee bargaining representative and/or a member of a bargaining unit pursuant to grievance procedures established at the school district level by local bargaining agreement.

(5) The school district and complainant may agree to resolve the complaint in lieu of an investigation.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-065, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-065, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-065, filed 5/17/76.]

WAC 392-190-070 Compliance—Appeal procedure—Local school board. (1) A complainant has a right to appeal the school district superintendent's response provided in WAC 392-190-065(2), to the school district board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the date upon which the complainant received the superintendent's response.

(2) In the event a school district superintendent fails to timely respond to a complaint communicated pursuant to WAC 392-190-065, a complainant has a right to an appeal to the board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the expiration of the response period provided by WAC 392-190-065(2).

(3) An appeal to the board of directors pursuant to this section shall require the board of directors to schedule a hearing to commence on or before the twentieth calendar day following the filing of the written notice of appeal, unless otherwise agreed to by the complainant and the school district superintendent, or for good cause. The complainant and the school district superintendent must be allowed to present such witnesses and testimony as the board deems relevant and material. Unless otherwise agreed to by the complainant and the school district superintendent, or for good cause, the board of directors must render a written decision on or before the tenth calendar day following the termination of the hearing, and must provide a copy to all parties involved. The written decision must include notice of the complainant's right to appeal to the superintendent of public instruction as set forth in WAC 392-190-075, and must identify where and to whom the appeal must be filed.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-070, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-070, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-070, filed 5/17/76.]

WAC 392-190-075 Compliance—Contested case—Duty of the superintendent of public instruction. (1) In the event a complainant disagrees with the decision of a school district board of directors rendered pursuant to WAC 392-190-070, the complainant may appeal the board's decision to the superintendent of public instruction. For purpose of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal. Decisions in cases appealed pursuant to this section may be made by an administrative law judge selected by the chief administrative law judge if the superintendent of public instruction delegates this authority pursuant to RCW 28A.300.120.

(2) A notice of appeal must be received by the superintendent on or before the twentieth calendar day following the date upon which the complainant received written notice of the school board's decision. The notice is deemed received when the notice is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, to the superintendent of public instruction. The notice must be in writing and must set forth (a) a concise statement of the portion or portions of the school board's decision which is appealed from, and (b) the relief requested by the complainant/appellant.

(3) Appeals to the superintendent shall be conducted de novo. The complainant/appellant must have the responsibility for prosecuting the appeal and the school district/respondent shall have the duty of defending the school district's decision or the portion of the decision appealed.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-075, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-075, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-075, filed 7/9/80; Order 6-76, § 392-190-075, filed 5/17/76.]

WAC 392-190-076 Monitoring—Duty of the superintendent of public instruction. (1) The office of superintendent of public instruction must monitor school districts' compliance with chapters 28A.640 and 28A.642 RCW and the rules and guidelines adopted in furtherance thereof.

(2) Procedures for monitoring school districts may include:

(a) Collection, review, and analysis of data and other information;

(b) Conduct of on-site visits and interviews; and

(c) Review of any compliance issues, including reviews by those agencies referenced in WAC 392-190-077.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-076, filed 4/13/11, effective 5/14/11.]

WAC 392-190-077 Monitoring results—Compliance. (1) Following its monitoring of a school district pursuant to WAC 392-190-076, the office of superintendent of public instruction must notify districts of any findings of identified noncompliance with chapters 28A.640 and 28A.642 RCW and the rules and guidelines adopted in furtherance thereof. This notification of noncompliance must initiate a process of

correction, verification, and validation to ensure that the noncompliance is corrected within a compliance period identified by the office of superintendent of public instruction. The compliance period must be no longer than one year from the identification of noncompliance. If noncompliance is systemic in nature, a systemic corrective action plan is required. The school district will have thirty calendar days after its receipt of the notice of noncompliance to:

(a) Accept the findings contained in the notification of noncompliance; or

(b) Provide the office of superintendent of public instruction with supplemental information that may serve as a basis for amending the notification of noncompliance; or

(c) Provide any revisions to the proposed corrective action plan.

(2) If the school district provides the office of superintendent of public instruction with supplemental information, the office of superintendent of public instruction must respond to the school district with a final monitoring report within thirty calendar days after receipt of the supplemental information.

(3) If the school district does not timely address the identified noncompliance with corrective actions, the superintendent of public instruction may, at his or her discretion, undertake actions to ensure school district compliance. Such actions may include, but are not limited to, referring the school district to appropriate state or federal agencies empowered to order compliance with the law, or the initiation of an office of superintendent of public instruction complaint against the school district.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-077, filed 4/13/11, effective 5/14/11.]

WAC 392-190-078 Monitoring results—Complaints issued by superintendent of public instruction. (1) In the event the office of superintendent of public instruction initiates a complaint against a school district, the superintendent of public instruction must send a copy of the complaint to the school district superintendent. The complaint must include written allegations of fact and proposed corrective actions. The school district must provide a written response to the complaint no later than twenty calendar days after the complaint is sent to the school district, unless otherwise agreed to, or for good cause.

(2) The school district's response to the superintendent of public instruction must clearly state either:

(a) That the school district denies the allegations contained in the complaint and the basis of such denial; or

(b) That the school district admits the allegations and proposes reasonable corrective action(s) deemed necessary to correct the violation.

(3) Upon review of the school district's response and all other relevant information, the superintendent of public instruction must make an independent determination as to whether the school district is in violation of chapters 28A.640, 28A.642 RCW, or the rules of this chapter.

(4) The superintendent of public instruction must issue a written decision to the school district that addresses each allegation in the complaint including findings of fact, conclusions, and the reasonable corrective measures deemed necessary to correct any violation. The superintendent of public instruction may provide technical assistance necessary to resolve a complaint. All actions must be instituted as soon as possible but in no event later than thirty calendar days following the date of the decision, unless otherwise agreed to, or for good cause.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-078, filed 4/13/11, effective 5/14/11.]

WAC 392-190-079 Complaints issued by superintendent of public instruction—Appeal procedure. (1) A school district that desires to appeal the written decision of the superintendent of public instruction issued pursuant to WAC 392-190-078 may file an appeal with the superintendent of public instruction in accordance with the adjudicative proceedings in RCW 34.05.413 through 34.05.494, and the administrative practices and procedures of the superintendent of public instruction in chapter 392-101 WAC. To initiate review under this section, a school district must file a written notice with the superintendent of public instruction within thirty calendar days following the date of receipt of the superintendent of public instruction's written decision.

(2) For purposes of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with the office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-079, filed 4/13/11, effective 5/14/11.]

WAC 392-190-080 Compliance—Violations—Permissible sanctions. In the event a school district is found to be in violation of the requirements of this chapter, the superintendent of public instruction may, by appropriate order pursuant to chapter 34.05 RCW, impose an appropriate sanction or institute appropriate corrective measures including, but not limited to:

(1) The termination of all or part of state apportionment or categorical moneys to the offending school district;

(2) The termination of specified programs wherein such violation or violations are found to be flagrant in nature;

(3) The institution of a mandatory affirmative action program within the offending school district; and

(4) The placement of the offending school district on probation with appropriate sanctions until such time as compliance is achieved or is assured, whichever is deemed appropriate in the particular case by the superintendent of public instruction.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-080, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-080, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-080, filed 5/17/76.]

WAC 392-190-081 Concurrent remedies—Other remedies. (1) Except as provided in subsections (2) and (3) of this section, nothing in this chapter shall be construed as denying an aggrieved person from simultaneously pursuing other available administrative, civil or criminal remedies for an alleged violation of the law.

(2) A complaint made pursuant to WAC 392-190-065 or 392-190-075 will be held in abeyance during the pendency of any proceeding in state or federal court or before a local, state or federal agency in which the same claim or claims are at issue, whether under RCW 28A.640.040, 28A.642.040, or any other law.

(3) Where the complainant elects to pursue simultaneous claims in more than one forum, the factual and legal determinations issued by the first tribunal to rule on the claims may, in some circumstances, be binding on all or portions of the claims pending before other tribunals.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-081, filed 4/13/11, effective 5/14/11.]

WAC 392-190-082 Informing citizens about complaint procedures. The superintendent of public instruction must inform parents and other interested individuals about the complaint procedures in this chapter. Specific actions to be taken by the superintendent of public instruction include:

(1) Disseminating copies of the state's procedures to parents, advocacy agencies, professional organizations, and other appropriate entities; and

(2) Conducting in-service training sessions on the complaint process through educational service districts or in statewide conferences.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-082, filed 4/13/11, effective 5/14/11.]

Chapter 392-190 WAC
EQUAL EDUCATIONAL OPPORTUNITY—UNLAWFUL DISCRIMINATION PROHIBITED

WAC 392-190-005 Purpose—Elimination of unlawful discrimination in public schools. The purpose of this chapter is to establish rules and regulations which implement chapters 28A.640 and 28A.642 RCW. The referenced enactments prohibit discrimination on the basis of sex, 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 in Washington public schools. Broad federal regulations implementing Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Titles VI and VII of the Civil Rights Act of 1964 similarly prohibit discrimination based on sex, race, creed, religion, color, national origin, and disability, in federally assisted education programs or activities. As a result, several substantive areas have been similarly identified and addressed by both state and federal enactments.

It is the intent of this chapter to encompass those similar substantive areas addressed by federal civil rights authorities and in some aspects extend beyond those authorities. Accordingly, compliance with relevant federal civil rights law should constitute compliance with those similar substantive areas treated in this chapter, but school districts should be aware that compliance with federal civil rights laws alone may not constitute compliance with this chapter.

In accordance with chapters 28A.640 and 28A.642 RCW, it is unlawful for any public school district to discriminate on the basis of sex, 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 with regard to any activity conducted by or on behalf of a school district including, but not limited to, preschool, adult education, community education and vocational-technical program activities.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-005, filed 4/13/11, effective 5/14/11. Statutory Authority: 1990 c 33. WSR 90-16-002 (Order 18), § 392-190-005, filed 7/19/90, effective 8/19/90. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-005, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-005, filed 5/17/76.]

WAC 392-190-010 Counseling and guidance services—Career opportunities—Internal procedures. (1) No school district shall engage in discrimination against any person on the basis of sex, 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 in the counseling or guidance of students in grades K-12.

(2) Each school district must devise and use materials, orientation programs, and counseling techniques that will encourage participation in all school programs and courses of study based on factors other than sex, 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. School districts must encourage students to explore subjects and activities not traditional for their sex.

(3) Each school district which uses testing and other materials for counseling students must not use different materials for students based on their sex, 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. A school district may use different materials for students on the basis of their sex, 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 if:

(a) Such different materials cover the same occupations and interest areas; and

(b) The use of such different materials is demonstrated to be essential to eliminate bias based on sex, 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.

(4) Each school district must develop and use internal procedures for ensuring that all tests and appraisal instruments related to guidance counseling, career and vocational guidance materials, work/study programs and opportunities, and educational scheduling and/or placement do not discriminate on the basis of sex, 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.

(5) If a school district concludes that the use of such instruments, materials, or programs results in a substantially disproportionate number of students who are members of one of the groups identified in WAC 392-190-005 to be placed in any particular course of study or classification, the school district must take such immediate action as is necessary to assure that such disproportion is not the result of discrimination in the instrument, material, or its application.

(6) Where a school district finds that a particular class contains a substantially disproportionate number of students who are members of any one of the groups identified in WAC 392-190-005, the district must take such immediate action as is necessary to assure that such disproportion is not the result of discrimination on the basis of sex, 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 in tests and appraisal instruments, career and vocational guidance materials, work/study programs and opportunities, and educational scheduling and/or placement by counselors.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-010, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-010, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-010, filed 7/9/80; Order 6-76, § 392-190-010, filed 5/17/76.]

WAC 392-190-015 Counseling and guidance—Sex discrimination—Duty of certificated and classroom personnel—Coordination of effort. (1) All certificated and classroom personnel must encourage students to explore and develop their individual interests in career and vocational technical programs and employment opportunities without regard to sex, including reasonable efforts encouraging students to consider and explore "nontraditional" occupations for men and women. All certificated and classroom personnel within each local school district must have access to an educational staff associate (ESA) certificated school counselor(s) or such other appropriate person(s), designated by the school district superintendent to coordinate compliance with the requirements of this section.

(2) All certificated and classroom personnel must comply fully and immediately with the requirements of this section. The superintendent of each school district shall make the designation(s) required by this section immediately.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-015, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-015, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-015, filed 5/17/76.]

WAC 392-190-020 In-service training—Bias awareness. Each school district must, where appropriate, include sex, 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, bias awareness and elimination training sessions in such in-service training programs as are conducted or provided for certificated and/or classroom personnel.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-020, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-020, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-020, filed 5/17/76.]

WAC 392-190-025 Recreational and athletic activities. No person shall, on the basis of sex, 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, be excluded from participation in, be denied the benefits of, or otherwise be discriminated against in any interscholastic, club or intramural athletics or recreational activity offered by a school district, and no school district shall provide any such athletics or recreational activity separately on such basis.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-025, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-025, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-025, filed 5/17/76.]

WAC 392-190-026 Recreational and athletic—Sex discrimination—Equal opportunities—Separate teams. (1) Sports teams and programs offered by a school district must be equally open to participation by qualified members of both sexes. For sports and recreational activities offered for students in grades 7 through 12, a school district may maintain separate teams for members of each sex if:

(a) It can clearly be shown, under the factual circumstances involved in the particular case, that the maintenance of separate teams for boys and girls truly constitutes the best method of providing both sexes, as a whole, with an equal opportunity to participate in the sports or games of their choice; and

(b) At the same time, a test of substantial equality between the two programs has been met.

(2) For the purpose of this section and WAC 392-190-050(2) "substantial equality" must be determined by considering factors including, but not limited to, the following:

(a) The relationship between the skill and compensation of coaching staffs;

(b) The size of their budgets;

(c) The quality of competition and game schedule;

(d) Uniforms;

(e) Equipment and facilities; and

(f) Sufficient numbers of participants to warrant separate teams.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-026, filed 4/13/11, effective 5/14/11.]

WAC 392-190-030 General—Recreational and athletic activities—Sex discrimination—Equal opportunity factors considered. Each school district must evaluate its recreational and athletic program at least once each year to ensure that equal opportunities are available to members of both sexes with respect to interscholastic, club or intramural athletics which are operated, sponsored, or otherwise provided by the school district.

In determining whether equal opportunities are available to members of both sexes with respect to interscholastic, club or intramural athletics, each school district conducting an evaluation required by this section, and the office of superintendent of public instruction upon receipt of a complaint pursuant to WAC 392-190-075, must consider several factors, including but not limited to the following where provided by a school district:

(1) Whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) The scheduling of games and practice times including the use of playfields, courts, gyms, and pools;

(4) Transportation and per diem allowances, if any;

(5) The opportunity to receive coaching and academic tutoring;

(6) The assignment and compensation of coaches, tutors, and game officials;

(7) The provision of medical and training facilities and services including the availability of insurance;

(8) The provision of housing, laundry, and dining facilities and services, if any; and

(9) Publicity and awards.

Unequal aggregate expenditures within a school district for members of each sex or unequal expenditures for separate male and female teams will not alone constitute noncompliance with this chapter, but the failure to provide the necessary funds for recreational and athletic activities for members of one sex may be considered in assessing the equality of opportunity for members of each sex.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-030, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-030, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-030, filed 5/17/76.]

WAC 392-190-035 Recreational and athletic activities—Elementary and secondary level. (1) Each school district which operates, sponsors, or otherwise provides interscholastic, club or intramural athletics at the elementary school level (K-6) must provide equal opportunity and encouragement for physical and skill development to all students in the elementary grades consistent with this chapter.

(2) Each school district which operates, sponsors, or otherwise provides interscholastic, club or intramural athletics at the secondary school level (7-12) must provide equal opportunity and encouragement for physical and skill development to all students in the secondary grades consistent with this chapter.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-035, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-035, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-035, filed 7/9/80; Order 6-76, § 392-190-035, filed 5/17/76.]

WAC 392-190-040 Recreational and athletic activities—Sex discrimination—Student interest—Required survey instrument. (1) The superintendent of public instruction must develop a survey instrument to assist each school district in the determination of student interest for male/female participation in specific sports.

(2) A survey instrument must be administered by each school district at all grade levels where interscholastic, intramural and other sports and recreational activities are conducted. The results of the survey must be considered in the program planning and development in the area of recreational and athletic activities offered within the school district.

(3) A survey instrument developed pursuant to this section must be administered at least once every three years within each school district. School districts may modify or amend the content of the survey instrument if the district deems it necessary to clarify and assist in the evaluation of student interest. If a school district intends to modify or amend the instrument, the district must provide the office of superintendent of public instruction with a copy of the proposal for approval prior to its administration.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-040, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-040, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-040, filed 7/9/80; Order 6-76, § 392-190-040, filed 5/17/76.]

WAC 392-190-045 Recreational and athletic activities—Sex discrimination—Facilities. A school district which provides athletic facilities for members of one sex including showers, toilets, and training room facilities for athletic purposes must provide comparable facilities for members of the opposite sex. Such facilities may be provided as either separate facilities or must be scheduled and used separately by members of each sex. This section shall not be interpreted to require the construction of additional facilities.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-045, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-045, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-045, filed 7/9/80; Order 6-76, § 392-190-045, filed 5/17/76.]

WAC 392-190-050 Course offerings—Generally—Separate sessions or groups—When permissible. No school district shall provide any course or otherwise carry out any of its education programs or activities separately on the basis of sex, 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 or require or refuse participation therein by any of its students on such basis. This section shall not be construed to prohibit:

(1) The grouping of students in physical education classes and activities by demonstrated ability as assessed by objective standards of individual performance developed and applied without regard to sex. Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the school district must immediately implement appropriate standards which do not have such effect;

(2) The separation of students by sex within physical education classes or activities offered for students in grades 7 through 12 if:

(a) It can clearly be shown under the factual circumstances involved in the particular case, that the maintenance of a separate physical education class or activity for boys and girls truly constitutes the best method of providing both sexes, as a whole, with an equal opportunity to participate in such class or activity; and

(b) At the same time, a test of substantial equality between the two classes or activities can be found to have been met;

(3) Separate sessions for boys and girls with respect to those portions of classes which deal exclusively with human sexuality;

(4) Classes and/or activities which a school district may establish or maintain requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex; and

(5) Classes, courses or placement of students based on the student's individual language skill development and/or based on the student's needs as identified in the student's individualized education program.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-050, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-050, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-050, filed 7/9/80; Order 6-76, § 392-190-050, filed 5/17/76.]

WAC 392-190-055 Textbooks and instructional materials—Scope—Elimination of bias. (1) It is the intent of this section to eliminate bias pertaining to sex, 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 in connection with any form of instruction provided by a school district.

(2) The instructional materials policy of each school district required by RCW 28A.320.230 must incorporate therein, as part of the selection criteria, a specific statement requiring the elimination of bias pertaining to sex, 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 in all textbooks and instructional materials including reference materials and audio-visual materials.

(3) The instructional materials committee of each school district must establish and maintain appropriate screening criteria designed to identify and eliminate bias pertaining to sex, 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 trained dog guide or service animal in all textbooks and instructional materials including reference materials and audio-visual materials. Such selection criteria must be consistent with the selection criteria identified in chapter 392-204 WAC, as now or hereafter amended. One of the aids to identification of bias in instructional materials is the *Washington Models for the Evaluation of Bias Content in Instructional Materials* published by the superintendent of public instruction.

(4) In recognition of the fact that current instructional materials which contain bias may not be replaced immediately, each school district should acquire supplemental instructional materials or aids to be used concurrent with existing materials for the purpose of countering the bias content thereof.

(5) Nothing in this section is intended to prohibit the use or assignment of supplemental instructional materials such as classic and contemporary literary works, periodicals and technical journals which, although they contain bias, are educationally necessary or advisable.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-055, filed 4/13/11, effective 5/14/11. Statutory Authority: 1990 c 33. WSR 90-16-002 (Order 18), § 392-190-055, filed 7/19/90, effective 8/19/90. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-055, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-055, filed 7/9/80; Order 6-76, § 392-190-055, filed 5/17/76.]

WAC 392-190-056 Sexual harassment—Definitions. (1) As used in this chapter, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature between two or more individuals if:

(a) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;

(b) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(c) That conduct or communication has the purpose or effect of substantially interfering with an individual's educa-

tional or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

(2) For the purpose of this definition, sexual harassment may include conduct or communication that involves adult to student, student to adult, student to student, adult to adult, male to female, female to male, male to male, and female to female.

(3) School districts must be guided by federal and state case law in their interpretation of sexual harassment complaints and will need to determine sexual harassment on a case-by-case basis. Nothing in this chapter should be construed as diminishing or otherwise modifying an individual's right to bring an action under state or federal law alleging that the individual has been harmed by conduct or communication related to the individual's sex, race, creed, 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 that creates a hostile or abusive educational or workplace environment.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-056, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-056, filed 11/10/94, effective 12/11/94.]

WAC 392-190-057 Sexual harassment policy—Adoption date—Required criteria. In order to eliminate sexual harassment in connection with any responsibility, function or activity within the jurisdiction of a school district, a sexual harassment policy must be adopted and implemented by each district no later than June 30, 1995. This policy must apply to all school district employees, volunteers, parents, and students, including but not limited to, conduct between students. This policy must incorporate the following criteria:

(1) Definitions consistent with the categories in RCW 28A.640.020 (2)(f);

(2) District and staff responsibilities;

(3) Informal grievance procedures;

(4) Grievance procedures consistent with WAC 392-190-065 through 392-190-075 of this chapter;

(5) Investigative procedures and reasonable and prompt timelines;

(6) Remedies available to victims of sexual harassment;

(7) Disciplinary actions against violators which must conform with collective bargaining agreements and state and federal laws;

(8) Reprisal, retaliation and false accusations prohibition;

(9) Dissemination and implementation; and

(10) Internal review.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-057, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-057, filed 11/10/94, effective 12/11/94.]

WAC 392-190-058 Sexual harassment—Procedures. (1) School district policies on sexual harassment must be reviewed by the superintendent of public instruction considering the criteria established under WAC 392-190-057 as part of the monitoring process established in RCW 28A.640.030. The superintendent of public instruction must supply upon request sample sexual harassment policies to school districts.

(2) The school district's sexual harassment policy must be easily understood and conspicuously posted throughout each school building, and provided to each employee, volunteer and student.

(3) Reasonable efforts must be made to inform all students and their parents about the district's sexual harassment policy and procedures.

(4) A copy of the policy must appear in any publication of the school or school district setting forth the rules, regulations, procedures, and standards of conduct for the school or school district.

(5) Each school must develop a process for discussing the district's sexual harassment policy. The process must ensure the discussion addresses the definition of sexual harassment and issues covered in the sexual harassment policy.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-058, filed 4/13/11, effective 5/14/11. Statutory Authority: 1994 c 213. WSR 94-23-043 (Order 94-14), § 392-190-058, filed 11/10/94, effective 12/11/94.]

WAC 392-190-059 Harassment, intimidation, and bullying prevention policy and procedure—Adoption date. (1) By August 1, 2011, each school district must adopt or amend if necessary a harassment, intimidation, and bullying prevention policy and procedure as provided for in RCW 28A.300.285.

(2) When monitoring school districts' compliance with this chapter pursuant to WAC 392-190-076, the office of superintendent of public instruction will review such policies and procedures to ensure that they provide that students will not be harassed, intimidated, or bullied because of their sex, race, creed, religion, color, national origin, 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.

(3) This section is not intended to limit the scope of RCW 28A.300.285.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-059, filed 4/13/11, effective 5/14/11.]

WAC 392-190-0591 Public school employment and contract practices—Nondiscrimination. (1) No school district shall, on the basis of sex, 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, exclude any person from participation in, deny any person the benefit of, or subject any person to discrimination in employment, recruitment, promotion or advancement, consideration or selection, whether full time or part time, in connection with employment by a school district.

(2) Each school district must make all employment decisions in a nondiscriminatory manner and shall not limit, segregate, or classify any person in any way which could adversely affect a person's employment opportunities or status on the basis of sex, race, creed, color, national origin, hon-

orably 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.

(3) No school district shall enter into any contractual or other relationship that directly or indirectly has the effect of subjecting any person to discrimination in connection with employment on the basis of sex, 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 including, but not limited to, relationships with employment and referral agencies, with labor unions, and with organizations providing or administrating fringe benefits to employees.

(4) No school district shall grant preferential treatment to applications for employment on the basis of enrollment at any education institution or entity which admits as students only or predominately individuals or groups on the basis of sex, race, color or national origin, if the giving of such preferences has the effect of discriminating on the basis of sex, race, color, or national origin.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-0591, filed 4/13/11, effective 5/14/11.]

WAC 392-190-0592 Public school employment—Affirmative action program. (1) Each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions which are consistent with the intent of chapters 28A.640 and 28A.642 RCW. Each school district's affirmative action employment program must include at least the following provisions respecting discrimination on the basis of sex:

(a) Maintain credential requirements for all personnel;

(b) Make no differentiation in pay scale;

(c) Make no differentiation in the assignment of school duties except where such assignment would involve duty areas or situations such as, but not limited to, shower rooms, where persons might be disrobed;

(d) Provide the same opportunities for advancement;

(e) Make no difference in conditions of employment including, but not limited to, hiring practices, leaves of absence, hours of employment and assignment of, or pay for, instructional and noninstructional duties; and

(f) Such other provisions as may be required by the superintendent of public instruction designed to facilitate the effective achievement of all reasonable affirmative action goals and objectives in public school employment respecting the elimination of discrimination on the basis of sex.

(2) Notwithstanding the requirements of this chapter respecting discrimination on the basis of sex, each school district must develop and/or incorporate within any existing affirmative action employment program appropriate provisions to eliminate discrimination on the basis of 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.

(3) Each affirmative action employment program of a school district must be filed with the office of superintendent of public instruction.

(4) The board of directors of each school district must adopt and implement an affirmative action employment program required by this section as expeditiously as possible but in no event later than September 30, 2011.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-0592, filed 4/13/11, effective 5/14/11.]

WAC 392-190-060 Compliance—Local school district—Designation of responsible employee—Notification. (1) The superintendent of each school district must immediately designate at least one employee who shall be responsible directly to the superintendent for monitoring and coordinating the district's compliance with this chapter. The employee designated pursuant to this section shall also be charged with the responsibility to investigate any complaint(s) communicated to the school district pursuant to WAC 392-190-065.

(2) Each school district must, once each year or more often as deemed necessary, publish notice in a manner which is reasonably calculated to inform all students, students' parents, and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this section and the complaint and appeal procedure set forth in WAC 392-190-065, 392-190-070 and 392-190-075 as now or hereafter amended.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-060, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-060, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-060, filed 5/17/76.]

WAC 392-190-065 Compliance—Complaint procedure—District superintendent. (1) Anyone may file a complaint with a school district alleging that the district has violated this chapter. The complaint must be:

(a) Written;

(b) Signed by the complainant; and

(c) Set forth specific acts, conditions, or circumstances alleged to violate this chapter or the specific acts, conditions, or circumstances that would be prohibited by this chapter. Upon receipt of the complaint, the employee or employees designated pursuant to WAC 392-190-060 must investigate the allegations and effect a prompt resolution of the complaint.

(2) Following the completion of the investigation, the designated employee or employees must provide the district superintendent with a full written report of the complaint and the results of the investigation. The district superintendent must respond in writing to the complaining party as expeditiously as possible but in no event later than thirty calendar days following receipt of such complaint by the school district, unless otherwise agreed to by the complainant.

(3) The response of the school district superintendent required by this section must include notice of the complainant's right to appeal to the school board, as set forth in WAC 392-190-070, and must identify where and to whom the appeal must be filed. The superintendent's response must also clearly state either:

(a) That the school district denies the allegations contained in the complaint received; or

(b) The reasonable corrective measures deemed necessary to eliminate any such act, condition, or circumstance within the school district. Any such corrective measures deemed necessary must be instituted as expeditiously as possible but in no event later than thirty calendar days following the school district superintendent's mailing of a written response to the complainant required by this section, unless otherwise agreed to by the complainant.

(4) The complaint procedure required by this section must not prohibit the processing of grievances by an employee bargaining representative and/or a member of a bargaining unit pursuant to grievance procedures established at the school district level by local bargaining agreement.

(5) The school district and complainant may agree to resolve the complaint in lieu of an investigation.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-065, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-065, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-065, filed 5/17/76.]

WAC 392-190-070 Compliance—Appeal procedure—Local school board. (1) A complainant has a right to appeal the school district superintendent's response provided in WAC 392-190-065(2), to the school district board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the date upon which the complainant received the superintendent's response.

(2) In the event a school district superintendent fails to timely respond to a complaint communicated pursuant to WAC 392-190-065, a complainant has a right to an appeal to the board of directors. The appeal must be filed with the secretary of the school board on or before the tenth calendar day following the expiration of the response period provided by WAC 392-190-065(2).

(3) An appeal to the board of directors pursuant to this section shall require the board of directors to schedule a hearing to commence on or before the twentieth calendar day following the filing of the written notice of appeal, unless otherwise agreed to by the complainant and the school district superintendent, or for good cause. The complainant and the school district superintendent must be allowed to present such witnesses and testimony as the board deems relevant and material. Unless otherwise agreed to by the complainant and the school district superintendent, or for good cause, the board of directors must render a written decision on or before the tenth calendar day following the termination of the hearing, and must provide a copy to all parties involved. The written decision must include notice of the complainant's right to appeal to the superintendent of public instruction as set forth in WAC 392-190-075, and must identify where and to whom the appeal must be filed.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-070, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-070, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-070, filed 5/17/76.]

WAC 392-190-075 Compliance—Contested case—Duty of the superintendent of public instruction. (1) In the event a complainant disagrees with the decision of a school district board of directors rendered pursuant to WAC 392-190-070, the complainant may appeal the board's decision to the superintendent of public instruction. For purpose of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal. Decisions in cases appealed pursuant to this section may be made by an administrative law judge selected by the chief administrative law judge if the superintendent of public instruction delegates this authority pursuant to RCW 28A.300.120.

(2) A notice of appeal must be received by the superintendent on or before the twentieth calendar day following the date upon which the complainant received written notice of the school board's decision. The notice is deemed received when the notice is delivered in person or by regular mail, registered mail, or certified mail, with return receipt requested, to the superintendent of public instruction. The notice must be in writing and must set forth (a) a concise statement of the portion or portions of the school board's decision which is appealed from, and (b) the relief requested by the complainant/appellant.

(3) Appeals to the superintendent shall be conducted de novo. The complainant/appellant must have the responsibility for prosecuting the appeal and the school district/respondent shall have the duty of defending the school district's decision or the portion of the decision appealed.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-075, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-075, filed 11/2/89, effective 12/3/89. Statutory Authority: RCW 28A.85.020, 28A.85.030 and 28A.85.050. WSR 80-09-017 (Order 80-26), § 392-190-075, filed 7/9/80; Order 6-76, § 392-190-075, filed 5/17/76.]

WAC 392-190-076 Monitoring—Duty of the superintendent of public instruction. (1) The office of superintendent of public instruction must monitor school districts' compliance with chapters 28A.640 and 28A.642 RCW and the rules and guidelines adopted in furtherance thereof.

(2) Procedures for monitoring school districts may include:

(a) Collection, review, and analysis of data and other information;

(b) Conduct of on-site visits and interviews; and

(c) Review of any compliance issues, including reviews by those agencies referenced in WAC 392-190-077.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-076, filed 4/13/11, effective 5/14/11.]

WAC 392-190-077 Monitoring results—Compliance. (1) Following its monitoring of a school district pursuant to WAC 392-190-076, the office of superintendent of public instruction must notify districts of any findings of identified noncompliance with chapters 28A.640 and 28A.642 RCW and the rules and guidelines adopted in furtherance thereof. This notification of noncompliance must initiate a process of

correction, verification, and validation to ensure that the noncompliance is corrected within a compliance period identified by the office of superintendent of public instruction. The compliance period must be no longer than one year from the identification of noncompliance. If noncompliance is systemic in nature, a systemic corrective action plan is required. The school district will have thirty calendar days after its receipt of the notice of noncompliance to:

(a) Accept the findings contained in the notification of noncompliance; or

(b) Provide the office of superintendent of public instruction with supplemental information that may serve as a basis for amending the notification of noncompliance; or

(c) Provide any revisions to the proposed corrective action plan.

(2) If the school district provides the office of superintendent of public instruction with supplemental information, the office of superintendent of public instruction must respond to the school district with a final monitoring report within thirty calendar days after receipt of the supplemental information.

(3) If the school district does not timely address the identified noncompliance with corrective actions, the superintendent of public instruction may, at his or her discretion, undertake actions to ensure school district compliance. Such actions may include, but are not limited to, referring the school district to appropriate state or federal agencies empowered to order compliance with the law, or the initiation of an office of superintendent of public instruction complaint against the school district.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-077, filed 4/13/11, effective 5/14/11.]

WAC 392-190-078 Monitoring results—Complaints issued by superintendent of public instruction. (1) In the event the office of superintendent of public instruction initiates a complaint against a school district, the superintendent of public instruction must send a copy of the complaint to the school district superintendent. The complaint must include written allegations of fact and proposed corrective actions. The school district must provide a written response to the complaint no later than twenty calendar days after the complaint is sent to the school district, unless otherwise agreed to, or for good cause.

(2) The school district's response to the superintendent of public instruction must clearly state either:

(a) That the school district denies the allegations contained in the complaint and the basis of such denial; or

(b) That the school district admits the allegations and proposes reasonable corrective action(s) deemed necessary to correct the violation.

(3) Upon review of the school district's response and all other relevant information, the superintendent of public instruction must make an independent determination as to whether the school district is in violation of chapters 28A.640, 28A.642 RCW, or the rules of this chapter.

(4) The superintendent of public instruction must issue a written decision to the school district that addresses each allegation in the complaint including findings of fact, conclusions, and the reasonable corrective measures deemed necessary to correct any violation. The superintendent of public instruction may provide technical assistance necessary to resolve a complaint. All actions must be instituted as soon as possible but in no event later than thirty calendar days following the date of the decision, unless otherwise agreed to, or for good cause.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-078, filed 4/13/11, effective 5/14/11.]

WAC 392-190-079 Complaints issued by superintendent of public instruction—Appeal procedure. (1) A school district that desires to appeal the written decision of the superintendent of public instruction issued pursuant to WAC 392-190-078 may file an appeal with the superintendent of public instruction in accordance with the adjudicative proceedings in RCW 34.05.413 through 34.05.494, and the administrative practices and procedures of the superintendent of public instruction in chapter 392-101 WAC. To initiate review under this section, a school district must file a written notice with the superintendent of public instruction within thirty calendar days following the date of receipt of the superintendent of public instruction's written decision.

(2) For purposes of hearing an appeal under this section, the superintendent of public instruction must conduct a formal administrative hearing in conformance with the Administrative Procedure Act, chapter 34.05 RCW. The superintendent of public instruction, in carrying out this duty, may contract with the office of administrative hearings pursuant to RCW 28A.300.120 to hear a particular appeal.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-079, filed 4/13/11, effective 5/14/11.]

WAC 392-190-080 Compliance—Violations—Permissible sanctions. In the event a school district is found to be in violation of the requirements of this chapter, the superintendent of public instruction may, by appropriate order pursuant to chapter 34.05 RCW, impose an appropriate sanction or institute appropriate corrective measures including, but not limited to:

(1) The termination of all or part of state apportionment or categorical moneys to the offending school district;

(2) The termination of specified programs wherein such violation or violations are found to be flagrant in nature;

(3) The institution of a mandatory affirmative action program within the offending school district; and

(4) The placement of the offending school district on probation with appropriate sanctions until such time as compliance is achieved or is assured, whichever is deemed appropriate in the particular case by the superintendent of public instruction.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-080, filed 4/13/11, effective 5/14/11. Statutory Authority: RCW 34.05.220 [(1)](a). WSR 89-23-001 (Order 15), § 392-190-080, filed 11/2/89, effective 12/3/89; Order 6-76, § 392-190-080, filed 5/17/76.]

WAC 392-190-081 Concurrent remedies—Other remedies. (1) Except as provided in subsections (2) and (3) of this section, nothing in this chapter shall be construed as denying an aggrieved person from simultaneously pursuing other available administrative, civil or criminal remedies for an alleged violation of the law.

(2) A complaint made pursuant to WAC 392-190-065 or 392-190-075 will be held in abeyance during the pendency of any proceeding in state or federal court or before a local, state or federal agency in which the same claim or claims are at issue, whether under RCW 28A.640.040, 28A.642.040, or any other law.

(3) Where the complainant elects to pursue simultaneous claims in more than one forum, the factual and legal determinations issued by the first tribunal to rule on the claims may, in some circumstances, be binding on all or portions of the claims pending before other tribunals.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-081, filed 4/13/11, effective 5/14/11.]

WAC 392-190-082 Informing citizens about complaint procedures. The superintendent of public instruction must inform parents and other interested individuals about the complaint procedures in this chapter. Specific actions to be taken by the superintendent of public instruction include:

(1) Disseminating copies of the state's procedures to parents, advocacy agencies, professional organizations, and other appropriate entities; and

(2) Conducting in-service training sessions on the complaint process through educational service districts or in statewide conferences.

[Statutory Authority: RCW 28A.642.020 and 28A.640.020. WSR 11-09-024, § 392-190-082, filed 4/13/11, effective 5/14/11.]

APPENDIX C

Chapter 28A.640 RCW
SEXUAL EQUALITY

Sections

Discrimination—Separation of sexes in dormitories, residence halls, etc.: RCW 49.60.222.

28A.640.010 Purpose—Discrimination prohibited. Inequality in the educational opportunities afforded women and girls at all levels of the public schools in Washington state is a breach of Article XXXI, section 1, Amendment 61, of the Washington state Constitution, requiring equal treatment of all citizens regardless of sex. This violation of rights has had a deleterious effect on the individuals affected and on society. Recognizing the benefit to our state and nation of equal educational opportunities for all students, discrimination on the basis of sex for any student in grades K-12 of the Washington public schools is prohibited. [1975 1st ex.s. c 226 § 1. Formerly RCW 28A.85.010.]

Additional notes found at www.leg.wa.gov

28A.640.020 Regulations, guidelines to eliminate discrimination—Scope—Sexual harassment policies. (1) The superintendent of public instruction shall develop regulations and guidelines to eliminate sex discrimination as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students.

(a) Specifically with respect to public school employment, all schools shall be required to:

(i) Maintain credential requirements for all personnel without regard to sex;

(ii) Make no differentiation in pay scale on the basis of sex;

(iii) Assign school duties without regard to sex except where such assignment would involve duty in areas or situations, such as but not limited to a shower room, where persons might be disrobed;

(iv) Provide the same opportunities for advancement to males and females; and

(v) Make no difference in conditions of employment including, but not limited to, hiring practices, leaves of absence, hours of employment, and assignment of, or pay for, instructional and noninstructional duties, on the basis of sex.

(b) Specifically with respect to counseling and guidance services for students, they shall be made available to all students equally. All certificated personnel shall be required to stress access to all career and vocational opportunities to students without regard to sex.

(c) Specifically with respect to recreational and athletic activities, they shall be offered to all students without regard to sex. Schools may provide separate teams for each sex. Schools which provide the following shall do so with no disparities based on sex: Equipment and supplies; medical care; services and insurance; transportation and per diem allowances; opportunities to receive coaching and instruction; laundry services; assignment of game officials; opportunities for competition, publicity and awards; scheduling of games and practice times including use of courts, gyms, and pools: PROVIDED, That such scheduling of games and practice times shall be determined by local administrative authorities after consideration of the public and student interest in attending and participating in various recreational and athletic activities. Each school which provides showers, toilets, or training room facilities for athletic purposes shall provide comparable facilities for both sexes. Such facilities may be provided either as separate facilities or shall be scheduled and used separately by each sex.

The superintendent of public instruction shall also be required to develop a student survey to distribute every three years to each local school district in the state to determine student interest for male/female participation in specific sports.

(d) Specifically with respect to course offerings, all classes shall be required to be available to all students without regard to sex: PROVIDED, That separation is permitted within any class during sessions on sex education or gym classes.

(e) Specifically with respect to textbooks and instructional materials, which shall also include, but not be limited to, reference books and audio-visual materials, they shall be required to adhere to the guidelines developed by the superintendent of public instruction to implement the intent of this chapter: PROVIDED, That this subsection shall not be construed to prohibit the introduction of material deemed appropriate by the instructor for educational purposes.

(2)(a) By December 31, 1994, the superintendent of public instruction shall develop criteria for use by school districts in developing sexual harassment policies as required under (b) of this subsection. The criteria shall address the subjects of grievance procedures, remedies to victims of sexual harassment, disciplinary actions against violators of the policy, and other subjects at the discretion of the superintendent of public instruction. Disciplinary actions must conform with collective bargaining agreements and state and federal laws. The superintendent of public instruction also shall supply sample policies to school districts upon request.

(b) By June 30, 1995, every school district shall adopt and implement a written policy concerning sexual harassment. The policy shall apply to all school district employees, volunteers, parents, and students, including, but not limited to, conduct between students.

(c) School district policies on sexual harassment shall be reviewed by the superintendent of public instruction considering the criteria established under (a) of this subsection as part of the monitoring process established in RCW 28A.640.030.

(d) The school district's sexual harassment policy shall be conspicuously posted throughout each school building, and provided to each employee. A copy of the policy shall appear in any publication of the school or school district setting forth the rules, regulations, procedures, and standards of conduct for the school or school district.

(e) Each school shall develop a process for discussing the district's sexual harassment policy. The process shall ensure the discussion addresses the definition of sexual harassment and issues covered in the sexual harassment policy.

(f) "Sexual harassment" as used in this section means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

(i) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;

(ii) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(iii) That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment. [1994 c 213 § 1; 1975 1st ex.s. c 226 § 2. Formerly RCW 28A.85.020.]

Additional notes found at www.leg.wa.gov

28A.640.030 Administration. The office of the superintendent of public instruction shall be required to monitor the compliance by local school districts with this chapter, shall establish a compliance timetable and regulations for enforcement of this chapter, and shall establish guidelines for affirmative action programs to be adopted by all school districts. [1975 1st ex.s. c 226 § 3. Formerly RCW 28A.85.030.]

Additional notes found at www.leg.wa.gov

28A.640.040 Civil relief for violations. Any person aggrieved by a violation of this chapter, or aggrieved by the violation of any regulation or guideline adopted hereunder, shall have a right of action in superior court for civil damages and such equitable relief as the court shall determine. [1975 1st ex.s. c 226 § 4. Formerly RCW 28A.85.040.]

Additional notes found at www.leg.wa.gov

28A.640.050 Enforcement—Superintendent's orders, scope. The superintendent of public instruction shall have the power to enforce and obtain compliance with the provisions of this chapter and the regulations and guidelines adopted pursuant thereto by appropriate order made pursuant to chapter 34.05 RCW, which order, by way of illustration, may include, the termination of all or part of state apportionment or categorical moneys to the offending school district, the termination of specified programs in which violations may be flagrant within the offending school district, the institution of a mandatory affirmative action program within the offending school district, and the placement of the offending school district on probation with appropriate sanctions until compliance is achieved. [1975 1st ex.s. c 226 § 5. Formerly RCW 28A.85.050.]

Additional notes found at www.leg.wa.gov

28A.640.900 Chapter supplementary. This chapter shall be supplementary to, and shall not supersede, existing law and procedures and future amendments thereto relating to unlawful discrimination based on sex. [1975 1st ex.s. c 226 § 6. Formerly RCW 28A.85.900.]

Additional notes found at www.leg.wa.gov

Chapter 28A.642 RCW
DISCRIMINATION PROHIBITION

Sections

28A.642.005 Findings. The legislature finds that in 1975 legislation was adopted, codified as chapter 28A.640 RCW, recognizing the deleterious effect of discrimination on the basis of sex, specifically prohibiting such discrimination in Washington public schools, and requiring the office of the superintendent of public instruction to monitor and enforce compliance. The legislature further finds that, while numerous state and federal laws prohibit discrimination on other bases in addition to sex, the common school provisions in Title 28A RCW do not include specific acknowledgment of the right to be free from discrimination because of race, creed, color, national origin, honorably discharged veteran or military status, sexual orientation, 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, nor do any common school provisions specifically direct the office of the superintendent of public instruction to monitor and enforce compliance with these laws. The legislature finds that one of the recommendations made to the legislature by the *achievement gap oversight and accountability committee created in chapter 468, Laws of 2009, was that the office of the superintendent of public instruction should be specifically authorized to take affirmative steps to ensure that school districts comply with all civil rights laws, similar to what has already been authorized in chapter 28A.640 RCW with respect to discrimination on the basis of sex. [2010 c 240 § 1.]

***Reviser's note:** The "achievement gap oversight and accountability committee" was renamed the "educational opportunity gap oversight and accountability committee" by 2011 1st sp.s. c 21 § 33.

28A.642.010 Discrimination prohibited—Definitions. Discrimination in Washington public schools on the basis of 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 is prohibited. The definitions given these terms in chapter 49.60 RCW apply throughout this chapter unless the context clearly requires otherwise. [2010 c 240 § 2.]

28A.642.020 Rules and guidelines. The superintendent of public instruction shall develop rules and guidelines to eliminate discrimination prohibited in RCW 28A.642.010 as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students. [2010 c 240 § 3.]

28A.642.030 Compliance—Monitoring—Compliance enforcement. The office of the superintendent of public instruction shall monitor local school districts' compliance with this chapter, and shall establish a compliance timetable, rules, and guidelines for enforcement of this chapter. [2010 c 240 § 4.]

28A.642.040 Individual right of action. Any person aggrieved by a violation of this chapter, or aggrieved by the violation of any rule or guideline adopted under this chapter, has a right of action in superior court for civil damages and such equitable relief as the court determines. [2010 c 240 § 5.]

28A.642.050 Authority of superintendent of public instruction—Administrative orders. The superintendent of public instruction has the power to enforce and obtain compliance with the provisions of this chapter and the rules and guidelines adopted under this chapter, by appropriate order made pursuant to chapter 34.05 RCW. The order may include, but is not limited to, termination of all or part of state apportionment or categorical moneys to the offending school district, termination of specified programs in which violations may be flagrant within the offending school district, institution of corrective action, and the placement of the offending school district on probation with appropriate sanctions until compliance is achieved. [2010 c 240 § 6.]

28A.642.060 Chapter supplementary. This chapter is supplementary to, and does not supersede, existing law and procedures and future amendments to those laws and procedures relating to unlawful discrimination. [2010 c 240 § 7.]

28A.642.070 Schools established under state-tribal education compacts. Nothing in this chapter prohibits schools established under chapter 28A.715 RCW from:

(1) Implementing a policy of Indian preference in employment; or

(2) Prioritizing the admission of tribal members where capacity of the school's programs or facilities is not as large as demand. [2013 c 242 § 6.]