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

[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:

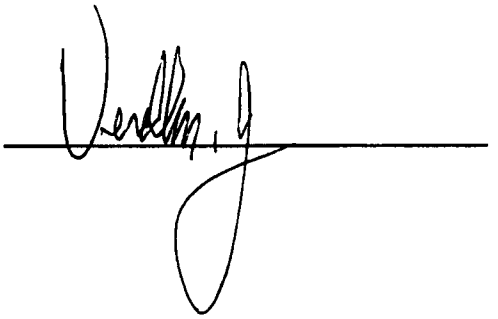
Leach, J.

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.

APPENDIX B

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

IN THE MATTER OF	EQUAL EDUCATIONAL OPPORTUNITY CAUSE NO. 2012-EE-0002
MERCER ISLAND SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing was held before Administrative Law Judge (ALJ) Michelle C. Mentzer on June 4, 5, July 31, and August 1, 2012, in Mercer Island, Washington. The Appellants[1] represented themselves. The Mercer Island School District (District or School District) was represented by Jeffrey Ganson, attorney at law.

STATEMENT OF THE CASE

On February 2, 2012, the Appellants filed an appeal with the Office of the Superintendent of Public Instruction (OSPI) pursuant to Washington Administrative Code (WAC) 392-190-075. Prehearing orders were issued on March 13, April 11, April 24, May 1, May 4, May 15, and May 23, 2012. An order was also issued on July 19, 2012, an interim day between hearing dates.

Under the Administrative Procedure Act, Revised Code of Washington (RCW) 34.05.461(8)(a), the written decision in this matter is due within ninety (90) days after the close of the record. The record closed on August 15, 2012 with the filing of post-hearing briefs. The written decision is therefore due November 13, 2012.

EVIDENCE RELIED UPON

The following witnesses testified under oath:

Jan Brousseau, District teacher;
Harry Brown, counselor, City of Mercer Island, Department of Youth and Family Services;
Mary Jo Budzius, District co-principal;
Aaron Miller, District co-principal;
Pat Turner, District director of special education;
Brody LaRock, District teacher and program coordinator;
Mark Roschy, District director of human resources and career/technical education;
Gary Plano EdD, District superintendent;
Rachel Miller, attorney;
Alexis Guerriero, District teacher; and
Appellant (Mother).

[1] The names of the Appellants and all students referred to in this decision are omitted to protect their privacy. The Appellants are sometimes referred to herein as the Mother or the Father. Their son who is the subject of this case is referred to as the Student.

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EXHIBIT A - 1

The following exhibits were admitted:

Court Exhibit:	C-1;
Joint Exhibits:	J-1 through J-58;
Appellant Exhibits:	A-1 through A-14, A-16 through A-31, A-33 through A-40, A-42, A-44 through A-47, A-49 through A-68; and
District Exhibits:	D-3, D-6, and D-19 through D-23.

ISSUES

The Issues and remedies for hearing are:

1. Whether the District discriminated against the Student in violation of chapter 28A.642 Revised Code of Washington (RCW), or its implementing regulations, chapter 392-190 Washington Administrative Code (WAC), in its handling of allegations that the Student was harassed by other students in October 2011;

2. And if so, whether the Appellants are entitled to the following requested remedies, or other equitable relief as appropriate:

   a. An order that the District take reasonable measures to ensure the Student is not subjected to further harassment by other students;

   b. An order that the District take corrective measures against the alleged aggressors;

   c. An order that training be required for: (1) District staff who allegedly did not follow proper procedure following the October 2011 incidents; and (2) students who were bystanders to the October 2011 incidents, who should receive racial sensitivity training;

   d. An order that the District amend its Non-Discrimination Policy and Procedure to provide specific parameters for the investigation of harassment, intimidation and bullying (HIB) complaints.

See First Prehearing Order of March 13, 2012.

FINDINGS OF FACT

Background

1. The Student completed the seventh grade at the District's Islander Middle School in the 2011-12 school year. This was his first year in the District. The family had relocated to the District from out of state. The Student is the eldest of the family's children. The Student's mother is African-American. His father is Caucasian.

2. The Student had an individualized education program (IEP) in his prior school district based on diagnoses of Asperger's Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). The

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EXHIBIT A - 2

Appellants declined special education after approximately one week in the Mercer Island School District because it uses a pull-out method of service delivery, instead of the push-in method used in their prior school district.[2]

Racial/Ethnic Harassment Allegations and Investigations

3. On November 1, 2011, the Student filed a written complaint that two incidents of racial/ethnic harassment had occurred in his social studies class in October. The first incident was on October 5, 2011, when the Student and three other boys were working on a group project for a unit called "Rock Around Washington". The three other boys are referred to here as Students A, B and C. Jan Brousseau was the teacher. The Student reported:

> On October 5th, [Student A] and I were working on our Rock Around Washington project (for which we were paired in a group). [Student A] was derisive and saying cruel things to me, most of which I ignored, or were being whispered in hushed tones to [Student B]. I offered an idea about the project, and [Student A] told me to "Shut up, you stupid Black."
>
> Although Ms. Brousseau had been intervening to help the group work constructively during the class period, she did not hear the comment. At the conclusion of class, I reported to Ms. Brousseau that I thought that [Student A] was being mean. I was upset and crying and she gave me tissues and said that she would handle it.

J-22, p. 3.

4. Later that day, October 5th, the Student and Student A threw crabapples at one another while waiting for the school bus. The Student threw the first crabapple. Brody LaRock, a teacher and program coordinator, observed the incident and spoke with them briefly. The Student told Mr. LaRock that he threw the crabapple because Student A had not listened to his ideas in class that day. Mr. LaRock directed the boys to report to his office the next day.

5. The next day, Student A filled out an incident report in Mr. LaRock's office about the crabapple throwing and was disciplined with a one-day in-school suspension. The Student was out of town with his family for the next three school days. Mr. LaRock therefore referred the matter to co-principal Mary Jo Budzius for follow-up. Mr. LaRock did not know that Student A allegedly used a racial epithet against the Student prior to the crabapple incident.

6. Student C later told an attorney investigator that during the Rock Around Washington project, Student A was being "a little bit racist" towards the Student, making fun of the Student's color, of the fact that the Student is black. Student C further reported as follows: Student A called the Student a "Brownie". Student A made this remark to Students B and C, but the Student heard it. Student C did not report any of this to the teacher. He did not hear any other racial remarks in the group,

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[2] The push-in method involves placing a special education teacher in the general education classroom. The pull-out method involves students leaving the general education classroom to receive their special education separately.

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EXHIBIT A - 3

though he was out sick for one or more days of the project. J-40, pp. 9; J-41, pp. 3, 25 - 27; Testimony of Budzius. Student C is very bright, and was closer to neither the Student nor Student A, according to Ms. Brousseau. J-41, p. 37.

7. Student B later told the attorney investigator that during the Rock Around Washington project, Student A may have called the Student an "Indian," but he could not be certain. The interview of Student B took place approximately seven weeks after the fact. Student B denied hearing the word "stupid" or "black" used between the boys. J-40, p. 9.

8. The teacher, Ms. Brousseau, noted a great deal of conflict in the Student's Rock Around Washington group. It was the most dysfunctional group she ever had, and the boys had trouble getting the group work done. Ms. Brousseau placed most of the blame for the conflict on the Student. He was quick to complain to her about others in the group, especially about Student A, but he himself acted loudly and aggressively with the others. She does not recall the Student crying or anything particular happening on October 5th. Ms. Brousseau intervened numerous times to try to get the boys to cooperate. She eventually split the group into two pairs in order to separate the Student and Student A. J-40, p. 8; J-41, pp. 35 - 37; Testimony of Brousseau.

9. On October 10, 2011, the Student told his Parents about the "stupid Black" remark by Student A. The Parents already had a meeting scheduled for October 11th with Ms. Brousseau and Ms. Budzius. The Mother sent an email saying she had an additional issue she wanted to discuss with them.

10. At the meeting on October 11th, the Appellants reported the "stupid Black" remark. This was the first that Ms. Brousseau or Ms. Budzius had heard of it. The next day, Ms. Budzius spoke with Student A, who admitted calling the Student "stupid" but denied calling him "stupid Black."

11. Ms. Budzius decided not question Students B or C to ask whether they heard any racial remarks. Ms. Budzius made this decision for several reasons. One reason was that the Student has Asperger's Syndrome and has difficulty reading social cues. She thought this could have contributed to the difficulties he was having with Student A. J-40, p. 5. Another reason was that Student A admitted calling the Student "stupid," so Ms. Budzius reasoned he would not lie about calling him "stupid Black." J-41, p. 6. Ms. Budzius believed the Student heard the word "Black," but she does not know whether he heard it with his ears, or only in his own mind. Testimony of Budzius. Neither Ms. Budzius, nor any District witness, explained how difficulty reading social cues would explain the use of a racial slur against a student, or whether Asperger's Syndrome affects the ability to hear and accurately report words said.

12. Ms. Budzius had Student A sign an anti-harassment contract and talked to him about not using race as the basis for angry comments. J-40, p. 19. She also distributed a behavior contract to Student A's teachers that dealt with inappropriate interactions with peers. J-40, p. 22.

13. By the time the attorney investigator interviewed Students B and C and learned of other racial slurs attributed to Student A, it was seven weeks after October 5th. No action was taken to discipline Student A at that time. The District concluded that the various racial slurs attributed to Student A were different, so no slur was substantiated. Also, seven weeks is well beyond the "teachable moment" when the District could have effectively educated Student A about his conduct, according

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EXHIBIT A - 4

to Superintendent Plano. Testimony of Plano.

14. Student A was new to the school that year, just as the Student was. The crabapple-throwing incident was the third time in a week that the school had contacted Student A's mother about a behavior problem. The allegation of harassing the Student, which came to light the following week, was the fourth time his mother was contacted. J-40, p. 20. On October 12, 2011, Student A was the subject of a Building Guidance Team (BGT) meeting. J-41, p. 5. The BGT meeting was unrelated to the racial harassment allegation against him, which came to light only one day before the BGT meeting.[3]

15. Ms. Budzius testified she would have given no more discipline than the anti-harassment contract to Student A had it been found he did, in fact, engage in race-based harassment. This testimony is not credible. Given that Student A received a full-day in-school suspension for throwing one crabapple, he likely would have received at least that much or more for racist remarks. Ms. Buzius' assertion that Student A had no reason to lie about saying "stupid Black" since he admitted saying "stupid" is also not found credible. A student in the 7th grade is old enough to know that uttering a racial insult can get one into big trouble, while calling someone "stupid" is a more common school-yard occurrence and is unlikely to do so.

16. The second racial incident set forth in the Student's November 1st complaint occurred on October 25th. On that date, Ms. Brousseau's class was working in the library on a unit called the Melting Pot, concerning ethnic diversity and tolerance. The Student's complaint reported the following:

> On October 25th, I had finished my center and moved on to another center where [Student A, Student B] and two girls were working. [Student A] again began saying cruel and derisive things to me. I ignored it until he said that I crossed the border from Mexico. [Student B] added that I was "exported" from Mexico. I responded by asking [Student B] "Why don't you make me a croissant for 25 cents, you French jackass?" The table became quiet, [sic] then.
>
> At lunch next hour, Mr. LaRock observed that I was upset and met with me to determine what was wrong. I also met with [co-principal] Mr. Miller to relate what had happened.

J-22, p. 3. The Student's derogatory comment about being French was aimed at Student B, who is of French heritage and has a French first name.

17. Mr. LaRock approached the Student in the lunch room the period after this occurred because it appeared the Student was crying. Mr. LaRock spoke with the Student in his office and had him fill out an incident report. J-40, p. 26. Mr. LaRock then asked building administrators to address the matter.

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[3] BGTs are composed of a school's principal, counselor, school psychologist, and pertinent teachers. It is not a disciplinary body. It meets to plan support for students who need either academic assistance or other forms of support. Testimony of Plano.

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EXHIBIT A - 5

18. Co-principal Aaron Miller investigated that day. He interviewed all five student witnesses during fifth period: the Student and Students A, B, D and E, who were in the group when the incident occurred. J-16. None of the other four students mentioned hearing anything about Mexico, but all four heard the Student's anti-French remark. Mr. Miller told the attorney investigator that the Student joining a group he was not part of may have played a role in causing the problem. Testimony of R. Miller.

19. Student A did not tell the following to Mr. Miller, but later told it to the attorney investigator: On October 25th, the group was talking about "people from Mexico", Mexican culture, burritos, and the food people ate in Mexico as differentiated from the food in Mexican restaurants in America. J-40, p. 11; J-41, p. 13.

20. After interviewing the five students on October 25th, Mr. Miller emailed the Appellants later that day about the incident and his investigation. J-16. Mr. Miller delayed issuing his Informal Investigation Notes until October 31st in order to first speak with the parents of Students A and B. Testimony of A. Miller.

21. The Mother replied to Mr. Miller on October 26th that this was the second time Student A had targeted the Student based on ethnicity or race. She asked to file a "formal" complaint if one had not already been filed. She said the Appellants had discussed with the Student not responding in kind with aspersions against anyone else's heritage, even in the heat of the moment. She suggested to Mr. Miller that a school-wide awareness program may be needed. J-17.

22. In response to the Mother's request to file a formal complaint, Mr. Miller sent her a "Harassment / Bullying Report Form." J-2. He did not send a complaint form under the District's Nondiscrimination Procedure, 3210P, or mention the District's Nondiscrimination Policy, 3210.

23. The form Mr. Miller sent the Mother asked the complainant to select either an "informal" complaint, to be handled on the building level, or a "formal" complaint, to involve a District-level investigation. J-2. However, Mr. Miller was already conducting an informal, building-level investigation, and his October 31st report would be titled "Informal Investigation Notes." J-19. This is despite the Mother writing on October 26th that she wished to file a "formal" complaint. J-17.

24. The "Harassment / Bullying Report Form" that Mr. Miller sent the Mother was actually no longer in use by the District. The District had replaced it with an HIB complaint form that did not split investigations into formal and informal. *See* J-7.

25. Although Mr. Miller found no remarks about Mexico in his quick interviews (which averaged approximately 10 minutes each, since five interviews were conducted in one period), as mentioned above, Student A later told the attorney investigator that the group was discussing "people from Mexico," Mexican culture, and burritos. J-41, p. 13. This disclosure gave context to the Student's French croissant remark: If the group was discussing "people from Mexico", and Students A and B said the Student had come from Mexico, then the Student's anti-French retort and reference to a croissant (counterpoint to burrito), makes much more sense than the Student's remark did standing alone.

26. The District's procedure no. 3207P on "Prohibition of Harassment, Intimidation and Bullying"

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EXHIBIT A - 6

contains a section on minor incidents that can be resolved by staff without an investigation:

> **Staff Intervention**
> All staff members shall intervene when witnessing or receiving reports of harassment, intimidation or bullying. Minor incidents that staff are able to resolve immediately, or incidents that do not meet the definition of harassment, intimidation or bullying, may require no further action under this procedure.

J-4, p. 3 (bold in original).

27. When investigations are conducted, four minimum steps must be followed, according to the HIB procedure:

> The investigation shall include, at a minimum:
>
> - An interview with the complainant;
> - An interview with the alleged aggressor;
> - A review of any previous complaints involving either the complainant or the alleged aggressor; and
> - Interviews with other students or staff members who may have knowledge of the alleged incident.

J-4, p. 4.

28. Ms. Budzius' investigation of the October 5th incident did not include the fourth bullet point: interviews with other students who may have knowledge of the alleged incident. Mr. Miller's investigation of the October 25th incident did not meet the third bullet point, because it did not review the previous complaint of October 5th involving the same individuals. Mr. Miller talked with Ms. Budzius about the October 5th incident, but nothing in his report reflects this, and it does not consider the two incidents together.

29. Although Mr. Miller found no support for the Student's complaint, he outlined steps the school would take to prevent future discrimination: (1) a paraeducator was placed in Ms. Brousseau's fourth period class[4] to support all students with academic, social and emotional dynamics; (2) Ms. Brousseau and a counselor, Harry Brown[5], would develop specific units on diversity and multiculturalism for Ms. Brousseau's class; (3) In November 2011, the school would be starting its yearly anti-bullying and anti-harassment program for all students; (4) The school administration had contacted all parents and worked with families to clarify expectations about appropriate interactions

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[4] Ms. Brousseau's class was a joint Language Arts and Social Studies (LASS) block, which met for two periods a day: first and fourth periods. A paraeducator was placed only in fourth period because that was the less-structured of the two, when students engaged in more group work. Fourth period was more inquiry-based and involved more need to read social cues than first period, according to Mr. Miller. J-41, p. 30A.

[5] Harry Brown is employed by the City of Mercer Island's Youth and Family Services, but is assigned full-time to the Student's middle school.

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between students; and (5) Harry Brown would work with the students in question to develop a supporting learning environment and make sure they have the skills and support to develop positive relationships at school. J-19. With the email conveying his report to the Appellants, Mr. Miller again attached the outdated Harassment / Bullying Report Form he had sent the Mother on October 26th.

30. Mr. Miller's October 31st investigation report did not mention that on October 25th, the Student turned in an essay for the Rock Around Washington project that described a violent accident to Student A, with devastating consequences. The essay was turned in several weeks late. It is referred to herein as the "Moment" essay, because the assignment was to write about "My Most _____ Moment" in an imaginary tour of Washington State by a rock band. J-40, p. 50. The Student's Moment essay is set forth here in its entirety:

> MY MOST AMAZING MOMENT OF THE TOUR
>
> We got out of the tour bus at the pizza place to celebrate after a great [b]and concert in Kennewick: [Student A], me, [Student B] and [Student C]. [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. The Fed Ex truck driver yelled, "I'm sorry!" and drove away as fast as he could go. [Student B] started screaming as loud as he could[.] I laughed, [Student C] ran and [Student A] said some vile sentiment. The pizza place waiter came out and yelled, "What in gods [sic] name is going on out here! Quiet down!"
>
> [Student C] called from his post at the phone, "[Student A] got hit by a crazy Fed Ex guy! I'm calling the ambulance!" When the ambulance came [Student B] was as if frozen[.] [Student A] was screaming that he wouldn't live, [Student C] was trying to calm them and tried to shout encouragement to [Student A.] "You'll be all right I promise, I've called the ambulance they'd [sic] be here at any moment," said [Student C]. I simply sat back and watched. We followed the ambulance to the hospital and waited for the results.
>
> The doctor came in and smiled sheepishly, "It looks like your friend," I sneezed at the "friend" comment, "would be mentally challenged for the rest of his short life." I pretended to cough trying to suppress a laugh at this. Today was the best day of my life.

J-40, p. 48.

31. Ms. Brousseau immediately turned the Student's Moment essay over to co-principal Budzius for her to address. Co-principal Budzius promptly shared the Moment essay with co-principal Miller. None of them informed the Appellants about the disturbing essay or provided them with a copy of it. No one talked with the Student about the essay, offered him counseling, or sought to discipline him concerning it. Ms. Brousseau did not alert the Appellants to it, but simply returned the Moment essay to the Student with the following comment written on it:

> THE CONTENT OF THIS PAPER IS NOT IN KEEPING W/ THE NATURE OF THIS PROJECT WHERE BAND MEMBERS ARE TO RESPECT, SUPPORT &

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ENCOURAGE OTHER BAND MEMBERS[.]

J-40, p. 47. (Ms. Brousseau often writes in all capital letters when correcting papers.)

32. On or about November 7, 2012, Ms. Brousseau corrected another Rock Around Washington essay by the Student. A-18. It is referred to herein as the "Kennewick" essay. It was one of two expository paragraphs the class was assigned to write about cities in Washington. The Student turned in the Kennewick essay prior to the Moment essay, but Ms. Budzius corrected them in the reverse order. The Kennewick essay stated, in pertinent part:

> After our concert we decided to celebrate by going to Papa John's Pizza. But when we got out of the car at Papa John's Pizza [Student A] aka skittles got hit by a Fed Ex truck. After driving [Student A] to the hospital and eating pizza, we went to go eat some slurpees. Kennewick sells the more [sic] slurpees than any store in the world. It was fun in Kennewick and [Student A] was out of the hospital in 24 hours because the Fed Ex truck was only going 20 mph in a parking lot. All of us (but [Student A]) thought that this trip was a huge success and that we would visit again some time.

J-40, p. 37. Ms. Brousseau gave the Kennewick essay only 8 of 20 possible points, because it did not contain many of the required elements from the rubric (e.g., the city's population, relative location, importance to Washington State or to the band). J-40, p. 36.

33. When this earlier essay about an accident to Student A came to light, the school still did not provide a copy of either essay to the Appellants. Nor did anyone speak with the Student about either essay.

34. On November 7, 2011, Ms. Brousseau sent an email to the Appellants saying that all students with grades lower than 15 out of 20 on their city essays were encouraged to re-write them for a higher grade. She stated that the Student had gotten an 8 out of 20 on one of them, but had declined to re-write it. Ms. Brousseau suggested the Appellants encourage the Student to re-write it for a higher grade, since it was missing some required pieces of information about the city. She did not provide the Appellants with a copy of the essay. Nor did she disclose that the essay included an accident to the student who had allegedly targeted the Student twice for discriminatory harassment. A-18.

35. On November 15, 2011, the Appellants met with Ms. Brousseau and the co-principals about the two racial/ethnic harassment incidents and the Student's progress in Ms. Brousseau's class.

36. On the night of November 15, 2011, unrelated to the meeting earlier that day,[6] the Student

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[6] The Order Denying District's Motion for Summary Judgment issued April 24, 2012, was incorrect on this point. Finding of Fact no. 33 in that Order stated that the Appellants received a copy of the Kennewick essay at the November 15, 2011 meeting with school staff. At the hearing, the evidence showed that the Appellants did not receive a copy of the Kennewick essay at the November 15th meeting. Rather, the Student brought it home with him that day and the Appellants read it on the evening of November 15th.

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brought home the Kenewick essay and the Appellants read it. (They were still unaware of the more disturbing Moment essay.) After reading the Kenewick essay, the Mother sent an email on November 16th to Ms. Brousseau, with copies to the co-principals and the District superintendent. She wrote that the Kennewick essay was disturbing on many levels and read like a cry for help. She said the Student's failure to follow the rubric and his resultant low grade contradicted Ms. Brousseau's insistence at the meeting of November 15th that the dysfunction of the Rock Around Washington group had no effect on the Student's grade. The Mother questioned how Mr. Miller's investigation report could have failed to mention the Kennewick essay, since the essay was used as a vehicle to express the Student's dislike for the person he alleged had twice harassed him. A-28.[7]

37. In response to this November 16th email from the Mother, Ms. Brousseau emailed co-principal Budzius the same day, and forwarded the email to co-principal Miller as well. She told them the Appellants were still unaware of the Moment essay, which the Appellants would probably think is "double the evidence of his [the Student's] harassment". Ms. Brousseau, however, saw it as "double the meanness":

> Just so you know all the facts. What [the Mother] and [the Father] are reacting to is the RAW [Rock Around Washington] expository paragraph in which [Student A] gets hurt. This is NOT the RAW "moment" narrative that I gave to you which was way worse and had [Student A] mentally retarded at the end. What the [Appellants] 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 [Appellants] have NOT seen the 'moment' [sic] 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?

A-35. Ms. Brousseau told the investigator that the Moment essay was "incredibly mean-spirited". J-41, p. 37.

38. Prior to receiving this November 16th email from Ms. Brousseau, Ms. Budzius thought Ms. Brousseau had given a copy of the Moment essay to the Appellants. J-44. After learning on November 16th that Ms. Brousseau had not done so, Ms. Budzius still did not notify the Appellants about it. The Appellants did not learn about the Moment essay until receiving a copy of the attorney investigator's report on November 30, 2011. The essay was attached to that report.

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[7] Actually, Mr. Miller was unaware of the Kennewick essay when he issued his investigation report on October 31, 2011. He was aware, however, of the more disturbing Moment essay at that time, but did not mention it in the investigation report.

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39. When asked why she did not notify the Appellants about the Moment essay, Ms. Budzius testified she was worried that if she disclosed the essay, the conversation would become about her (Ms. Budzius), as past conversations had, rather than about the Student. Testimony of Budzius.

40. Also on November 16th, Mr. Miller sent two emails to Ms. Brousseau in which he acknowledged, contrary to her assertions, that the Student's negative relationship with Student A in her class may have affected the Student's achievement and grades in that class. A-34; A-36.

41. The Student re-wrote his Kennewick essay and submitted it on November 16. This version followed the required rubric. He earned a score of 19 out of 20. A-40; J-40, pp 45 - 46.

42. On or about November 18th, Student A was transferred out of Ms. Brousseau's LASS class for reasons that are not disclosed in the record. District witnesses stated that the reasons were unrelated to the accusations of racial/ethnic harassment against him. The Student experienced no further racial or ethnic harassment for the remainder of the year.

43. On November 21st, Mr. Brown and Ms. Brousseau co-taught a class on harassment, intimidation and bullying during Ms. Brousseau's fourth period. The Powerpoint materials presented to the class did not address race or multiculturalism, except for one example of a student teased for being from another country. J-39. Those subjects did come up during the class discussion. Testimony of Brown. The Student was very engaged during the presentation. Student A was not present for the presentation. He had already transferred to another class.[8]

44. The HIB presentation for the whole 7th grade, which Mr. Miller's October 31, 2011 report stated would take place in November 2011, did not occur until late-February 2012. It focused on a student harassed based on his sexual orientation. A-12.

45. The Appellants transferred the Student out of Ms. Brousseau's class in early December 2011, immediately upon reading the attorney investigator's report. Attached to the report was a written statement by Ms. Brousseau making quite negative comments about the Student. J-40, pp. 39 - 40. The Appellants had earlier considered transferring the Student to another class when Student A was still there, but the alternative schedules all had down-sides for the Student's other subjects. The Appellants also asked Mr. Miller and the School Board whether Student A could be transferred out of the class instead of the Student having to transfer out. J-36, pp. 3 - 4. Mr. Miller told them he would get back to them about the matter, but did not do so.

46. The Student earned higher grades in all his other classes than he did in Ms. Brousseau's class. She reported on November 2, 2011 that he was testing in the C and D range. J-40, p. 39. By the end of the first trimester, he received a B- in her Language Arts class and a C in her Social Studies class. These were the lowest grades he received all year. He earned A's and B's in his other classes, never earning as low as a B- again. Excluding Ms. Brousseau's classes, his grade

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[8] The attorney investigator's notes indicate Mr. Brown told her that both the Student and Student A were engaged during the November 21, 2011 presentation. J-41, p. 28. However, Mr. Brown testified he does not recall whether Student A was present, and Mr. Miller testified that Student A transferred out of the class on or about November 18th.

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point average was 3.41 for first trimester, 3.72 for second trimester, and 3.67 for third trimester (the third trimester average is based on a partial report). A-44.[9]

47. In his new LASS class with teacher Alexis Guerrlero, the Student earned A's throughout the year. Ms. Guerrlero was unaware of the harassment complaint throughout her time teaching the Student. She testified he turned in his work on time, was a good student, an eager learner, and had generally good behavior. He only made a few mistakes in behavior that were addressed very quickly, and once they were addressed they were not repeated. Testimony of Guerrlero. This is significantly different from how the Student functioned in Ms. Brousseau's class. Ms. Brousseau wrote on November 2, 2012:

> In class he easily loses focus, he struggles with organization, he often does not get work in on time, and his testing is usually in the C to D range.
>
> . . .
>
> As a student of mine, [the Student] has shown the following characteristics. He is very quick to criticize others, he usually announces his sentiments loudly, and he very often tells other students what to do quite bluntly. . . . Probably on the second work day [of the Rock Around Washington project], there was trouble brewing at their table. [The Student] was standing and shouting at the others to be quiet. The other three were seated. They were all trying to talk and no one was happy, but [the Student] was definitely trying to dominate the conversation and take over.
>
> . . .
>
> Of the four boys, the one whose demeanor was the most aggressive, that I saw in class, was [the Student].

J-40, pp. 39 - 40.

48. District staff believed that the Student's difficulty interacting with Student A and others was due to the Student's social deficits. District staff were frustrated that, because of the Appellants' withdrawal of consent, they were unable to provide the Student with special education in social skills. Their response to the Student's racial/ethnic harassment complaints was to focus on him as the source of the conflicts. The following steps taken by District staff show this focus.

49. First, on October 27, 2011, two days after the Student's second racial/ethnic harassment allegation, co-principal Budzius wrote the following to all of the Student's teachers:

> I wanted to do a check-in with you regarding [the Student] and his behavior in your classes. I have been hearing/experiencing through a variety of sources some situations that are arising regarding behavior.

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[9] The information on the Student's third trimester grades is a printout from Skyward (the District's grade and attendance software program that families can access) which lists all six classes, but contains grades for only four of them: Language Arts (but not Social Studies), Math, Science and Spanish. It was printed in late May 2012, before the trimester ended. A-44, p. 3. The information on third trimester is incomplete because exhibits for the hearing were due in late May 2012, prior to the end of the school year.

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> Let me know your level of concern and whether we need to meet as a teacher/support team to discuss some behavior modification support.

A-8. Only two of the Student's teachers responded to this email. They said the Student did have some behavioral issues, but did not raise major concerns. A-9; A-10.

50. Nothing in the record indicates Ms. Budzius made a similar inquiry to Student A's teachers regarding his behavior. This was despite the fact that, in his first two months in the District, Student A had three behavioral incidents requiring parental contact, in addition to two complaints of race/ethnic harassment, and a BGT meeting.

51. Second, on October 27th, Ms. Budzius asked counselor Harry Brown to provide assistance to the Student with social skills. Ms. Budzius did not ask Mr. Brown to provide counseling to the Student regarding racial harassment. Nor did she ask him to provide counseling regarding the Moment essay she had received October 25th. Mr. Brown telephoned the Mother on October 27th with an invitation for the Student to join Boys' Council. Boys' Council is for students who need assistance developing social skills. Mr. Brown acknowledges that he did not share with the Appellants the reasons for the invitation. Shortly thereafter, the Appellants asked Mr. Brown not to have further contact with the Student because he had not been forthcoming about the reasons for his invitation. Testimony of Budzius and Brown.

52. Third, on October 27th, the District placed a paraeducator in Ms. Brousseau's fourth period class. Ms. Brousseau testified the paraeducator was placed there specifically to help the Student stay on task in his class work and maintain appropriate behavior, so that she could focus on the rest of the class. Under repeated questioning she was quite insistent that this was the paraeducator's assignment. Mr. Miller concurred that this was one of the reasons the paraeducator was placed in Ms. Brousseau's class. The other reason was to help prevent further incidents between the Student and Student A. Testimony of A. Miller. When Student A left Ms. Brousseau's class, the paraeducator was transferred elsewhere. This shows that preventing further incidents with Student A was the primary reason for the paraeducator's presence.

53. Fourth, sometime between October 25 and 28, 2011, District Superintendent Dr. Gary Plano was on a regular monthly site visit to Islander Middle School. He spent most of the visit examining the Student's needs and problems. This included observing the Student in his science class to assess his interaction with others. Dr. Plano did not do any observations related to Student A or his problems. Dr. Plano wrote in his weekly report to the School Board:

> Mary Jo [Budzius], Aaron [Miller] and I discussed a student incident that caused a parent to file a harassment claim last week. . . . Most of my time at IMS was spent discussing the student's academic and behavioral issues as well as those alleged behaviors expressed by other students. Following the conversations, Aaron [Miller] and I visited that student's science classroom, where Aaron and I took note of the student and his interactions with others.

A-48, p. 3.

54. Fifth, on October 29 or 30, 2011, Dr. Plano asked Pat Turner, District director of special

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education, to prepare a letter for him concerning the Student's initial special education status in the District and the Appellant's subsequent withdrawal of consent for special education. Testimony of Turner. On October 31st, Ms. Turner produced a chronology of events related to the Student's special education status, attaching relevant documents. A-14.

55. Sixth, on October 31, 2011, co-principal Miller wrote to Dr. Plano that the list of the Student's "limitations and challenges" in his confidential special education profile contained many of the topics he and Dr. Plano had discussed about the Student. Mr. Miller suggested these "limitations and challenges" might be a basis for their next communication with the Appellants. A-13, p. 1.

56. Seventh, for more than two weeks in late-October and early-November, the Appellants repeatedly requested a meeting with Ms. Brousseau to discuss the negative dynamics for the Student in her LASS class. A-5, A-7, J-20, A-19, A-21. After the first two emails making this request, they began cc'ing the co-principals. *Id.* Finally on November 8, 2011, Mr. Miller wrote to the Appellants suggesting a BGT meeting and a Section 504 evaluation. A-22. In response, the Appellants reiterated their request for a meeting with Ms. Brousseau and the co-principals to discuss the Student's experience in her class. A-23. This meeting occurred the following week.

57. Eighth, on November 16, 2011, Mr. Miller was interviewed by the attorney investigator. In addition to discussing the Student's harassment allegations, Mr. Miller told the investigator about the Student's special education history and his "behavioral challenges." Mr. Miller did not discuss Student A's behavioral challenges with the investigator. J-41, pp. 30 - 32.

58. Ninth, Mr. Miller selected one teacher (in addition to Ms. Brousseau) for the attorney investigator to interview: Natasha Robsen. Ms. Robsen had a negative experience with the Student when he was in her Mentor class for a few weeks. The Mentor class is a guided study hall for students who are not in special education but who need extra support. J-41, p. 32. The Student often told Ms. Robsen the class was "pointless" and he behaved in a disruptive manner. J-40, p. 9. Mr. Miller did not direct the attorney investigator to any of the Student's other teachers, with whom he had more successful experiences. Mr. Miller did not direct the attorney investigator to any of Student A's teachers, with some of whom he had negative experiences.

59. Finally, at the hearing in this case, the District continued its focus on the Student's problems. The District offered in evidence 18 exhibits concerning the Student's special education history. D-1 through D-18.[10]

60. The Student is found to have been a credible reporter of events. First, he was forthcoming from the start, prior to anyone confronting him about his actions, concerning very negative conduct on his part: He admitted that he was the first to throw a crabapple, that he engaged in name-calling with Student A, and that he delivered a profanity-laced ethnic insult to Student B. Second, his report that Student A engaged in racist slurs was corroborated by a neutral witness, Student C. Student

[10] Only two of these 18 exhibits were admitted: the Student's out-of-state IEP and the District's Transfer Review that was based on that IEP. D-3; D-6. These exhibits were admitted because they were considered by Dr. Plano and the co-principals. The remaining 16 exhibits were excluded based on relevance.

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B, as well, believes Student A may have engaged in a racial slur. Third, the Student's report about having been told he was exported from Mexico is credible in light of other evidence: (a) Student A had previously engaged in racial harassment toward the Student; (b) the remark about coming from Mexico came after a discussion about people from Mexico and burritos; and (c) the Student's remark about the French and croissant makes sense as a retort to that remark, and makes little sense without it.

61. None of the District's investigations discussed the fact that several undisputed utterances were not heard by some student witnesses (or were not reported to have been heard). First, Student A admitted he called the Student "stupid", but Student B stated he did not hear that word. J-40, p. 9. Second, Student A stated the group was discussing people from Mexico and Mexican food, but no other witness (except the Student) reported hearing anything about Mexico. Third, Student C said that Student A acted in a racist manner toward the Student, made fun of his color, and called him a "Brownie". Student C was a neutral, credible witness to the October 5th incident. Yet no other student reported hearing these remarks.

62. None of the District investigations considered factors that may cause students not to hear a remark, or if they heard it, not to disclose it. Classrooms can be busy, noisy places during group work time. Students have their own priorities and agendas at any given moment, and their attention may be focused elsewhere. Some remarks may be made more loudly than others. Ms. Brousseau noted that the Student talked loudly. Student A may have uttered his racial/ethnic remarks in a lower voice, knowing he could get in trouble for saying them. Students who hear a remark may not want to report it for a variety of reasons: not liking the Student, not wanting to get someone else in trouble, not wanting to be themselves labeled as a snitch, or simply not wanting to get involved. No finding is made that any of these things occurred. Rather, it is found that none of the District investigations considered these factors; they simply reported that the Student's allegations were unsupported.

63. It is found more likely than not that the Student was the target of racial/ethnic slurs in both of the incidents he reported. While the ALJ was only able to review the documentary record and hear testimony from the adults in this case, not the students, the ALJ heard extensive testimony and argument from both sides about the words and demeanor of the students, and how they should be interpreted. It is found more likely than not that the Student's reports are credible.

64. Turning to the "Next Steps" taken by the District in response to the Student's allegations, the District did not complete those steps. Co-principal Miller's investigation report of October 31, 2011 listed the steps the District would take, and they were later endorsed by Superintendent Plano and the School Board. The "Next Steps" were implemented as follows:

(1) Placement of paraeducator in social studies class: Done.
(2) Units on diversity and multiculturalism by Mr. Brown and Ms. Brousseau: Only one unit was presented, not multiple units. Student A, who was most in need of the presentation, did not participate -- he had transferred to another class. The presentation did not address race discrimination.
(3) School will present annual anti-bullying and anti-harassment program in November 2011: Did not occur until late-February 2012. Did not address race discrimination.
(4) Contact with parents of students involved to clarify appropriate interactions between students: Done.

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(5) Harry Brown will work with the students in question to develop a supporting learning environment: There is no evidence Mr. Brown worked with Student A. Mr. Brown contacted the Appellants and invited the Student to join Boys' Council.

Student's Complaint and District's Disposition of the Complaint

65. In response to the Student's November 1, 2011 complaint, Superintendent Plano issued a decision on November 4, 2011 under the HIB Policy no. 3207. He concluded that co-principal Miller's investigation of the October 25th incident was "sufficiently thorough in its scope and intensity" and included appropriate preventive measures, despite finding no corroboration of the Student's allegations. J-29. Because the Appellants also wanted an investigation under the District's Nondiscrimination Policy no. 3210, and because the complaint covered two incidents, Dr. Plano stated he wanted an outside attorney to conduct the investigation. *Id.*

66. Dr. Plano represented to the Appellants that the attorney investigator from the law firm of Dionne & Rorick was working on behalf of all of them as an outside, unbiased outsider: "I believe this [use of an outside attorney investigator] *will provide us all* with the best opportunity for an *unbiased observer* to gather and review all the related facts." J-34 (italics added). Dr. Plano did not inform the Appellants that Dionne & Rorick was on regular retainer as the District's legal defense firm. Nor did he inform the Appellants that Dionne & Rorick would represent the District against them if they appealed his decision.

67. On November 4, 2011, the Appellants contacted OSPI's Equity and Civil Rights Office and learned of their rights under the discrimination law and regulations that were not mentioned in the District's Nondiscrimination Policy or Procedure. J-27.

68. The Appellants appealed Dr. Plano's HIB Policy no. 3207 decision to the District Board of Directors (School Board). On November 16, 2011, the School Board denied their appeal. The Board noted that the investigation by outside counsel under Nondiscrimination Policy no. 3210 was still ongoing. J-38.

69. On November 29, 2011, the attorney investigator issued her report finding no support for the Student's allegations. J-40. On November 30, 2011, Dr. Plano adopted the report and denied the Appellants' complaint under the Nondiscrimination Policy no. 3210. J-42.

70. The report's conclusions did not address the fact that three students said Student A used racial slurs ("stupid Black," "Brownie" and "Indian"). The only reference to this evidence in the report's conclusions are the two italicized words below:

> The evidence gathered in the course of the investigation could not substantiate that [Student A] made a *specific* racially derogatory comment to [the Student] on October 5, 2011. While it does appear that both students made multiple inappropriate comments to each other, there is no *consistent* evidence to confirm that any of these comments were made on the basis of race or was so severe, persistent or pervasive to create an intimidating or threatening educational environment.

J-40, pp. 11 - 12 (italics added). The report also concluded that despite the lack of substantiation,

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the school took appropriate action to ensure a positive school climate. *Id.*

71. The attorney investigator, Rachel Miller, is a partner in Dionne & Rorick. Her interviews were significantly more thorough than those conducted by Ms. Budzius or Mr. Miller, and discovered important facts they had failed to discover. However, Ms. Miller omitted significant facts from her report, and failed to consider important matters in her conclusions.

72. First, Ms. Miller's conclusions made no mention of the Student's two disturbing essays. The essays are among numerous documents attached at the end of the report. However, the only mention of them is in the notes of Ms. Brousseau's interview: Ms. Brousseau stated what she did with one of the essays (gave it to Ms. Budzius) and what she wrote on the top of it. The essays received no analysis or mention in the report's conclusions. A review of Ms. Miller's report, her interview notes, and her testimony, shows she did not do any of the following, despite the essays being written during the period of the alleged racist remarks and despite the fact that the essays targeted the person who alleged made those remarks:

> Ask the Student why he wrote about injuries to Student A;
> Ask the co-principals why they did not offer the Student counseling and/or discipline after receiving the essays, or even talk to the Student about them;
> Ask the co-principals why they did not notify the Student's parents about the essays;
> Consider whether the essays are evidence that tends to make the Student's allegations any more or less credible;
> Consider whether the essays are evidence of a substantial interference with the Student's educational environment;
> Consider whether the District's decision not to disclose the essays to the Appellants is evidence of the District properly or improperly handling the Student's complaint.

73. Second, Ms. Miller did not address the Student's grades. She did not consider whether his low grades in Mr. Brousseau's LASS class, and his higher grades in all other classes, may be evidence that what occurred in Ms. Brousseau's class had an adverse effect on his educational environment.

74. Ms. Miller testified she did not consider the Student's grades because it was not alleged that there was any effect on his grades. This is incorrect. The Appellants' November 10, 2011 appeal to the School Board stated that Student A's actions had substantially interfered with their son's education, as evidenced by several facts including: "our son had mostly B's and an A in the remainder of his graded classes. He is currently only managing a D in the class in which these incidents have occurred." J-36, p. 1. Their appeal went on to state:

> [The Student] was an excellent student at his previous school, making A's in Social Studies throughout the year and maintaining majority A's and a few B's in his overall GPA. It has been both stressful and saddening to have [the Student] struggle in a hostile learning environment . . .

J-36, p. 4.

75. The District's HIB procedure states that a student's grades should be considered in

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determining whether there has been a substantial interference with his education:

> Conduct that is "substantially interfering with a student's education" will be determined by considering a targeted student's *grades,* attendance, demeanor, interaction with peers, participation in activities, and other indicators.

J-4, p. 1 (italics added). Likewise, OSPI's publication *Prohibiting Discrimination in Washington Public Schools: Guidelines for school districts to implement Chapters 28A.640 and 28A.642 RCW and Chapter 392-190 WAC* (February 2012) (OSPI Guidelines) states that students may experience "declining grades" as the result of a discriminatory hostile environment. J-58, p. 32.

76. Third, Ms. Miller did not address the logical connection between the October 25th discussion of Mexico and Mexican food, and the Student's report of the ethnic insults exchanged thereafter. The background provided by Student A renders the Student's allegations much more credible than they were absent that background. It provided a context for the other students to have said *the Student* came from Mexico. And the Student's insult about being French and making a croissant makes much more sense if the group was talking about people from Mexico and burritos. The Student's remark made no sense without what preceded it; it made a lot of sense given this context. None of this was examined in Ms. Miller's report.

77. Fourth, Ms. Miller failed to measure the District's actions against the standards of the applicable law, chapters 28A.642 RCW and 392-190 WAC. She also failed to state that the District's Nondiscrimination Policy 3210 and Procedure 3210P, which supposedly governed her investigation, were not in compliance with that law. She attached copies of the policy and procedure to her report without informing the reader that they were not in compliance with the law. She did not analyze whether the District's failure to comply with the applicable statute and regulations affected its handling of the Student's complaint, or affected the Appellant's access to their rights.

78. Ms. Miller explained the absence of several of these matters from her report by characterizing the scope of her inquiry in very narrow terms: simply to find the facts of who said what, when. Her inquiry was not, however, so restricted. She went on to draw conclusions about whether the evidence of racial slurs was substantial and consistent, whether there was a severe or persistent effect on the Student's educational environment, and whether the District's actions in response to the complaint were adequate to ensure a positive school environment. J-40, pp. 11-12. No transcript has been made of the hearing, but the following questions and answers paraphrase portions of Ms. Miller's testimony. They shed light on her perspective on the investigation:

Q: Did evidence that Student A used the term "Brownie" demonstrate racial animus and tend to corroborate the Student's allegation of "stupid Black"?
A: No. The two statements were not factually consistent.

Q: Was it your role to determine whether Student A's harassment was motivated by race?
A: I did not find that harassment occurred. And investigations are particular to who was there, what was said. I would not have been comfortable jumping to a conclusion about motivation.

Q: Did you consider the Student's grades?
A: No, it was not alleged that there was an effect on his grades.

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Q: Did you consider the Student's two essays in evaluating whether there was a hostile environment?
A: They did not shed light on the two incidents I was to investigate. The essays did not address them factually.

Q: What about the fact that one of the essays was handed in the same date as one of the incidents?
A: I don't think it goes to the incident we were discussing.

Q: Why did you interview Natasha Robsen?
A: Aaron Miller asked me to do so. Although Ms. Robsen's information was not really significant, it provided a context of what the Student's experience had been in another class. I included it in my report to be thorough.

Q: Would interviewing some of Student A's teachers have provided a similar "context"?
A: The issue was not to dig up dirt.

Q: Were you aware when you conducted the investigation that the District's Nondiscrimination policy and procedure were obsolete?
A: (After a long pause) My job was to investigate facts and the District's response.

Q: Did you evaluate whether the District's response was in compliance with WAC 392-190?
A: No, that was not what I was tasked with.

Testimony of R. Miller.

79. Ms. Miller acknowledged that the District was her client when she conducted the investigation, and she could not take off that "hat".[11] She also noted there were no formal measures taken at the law firm to separate her work from the eyes of another lawyer at the firm who represented the District against the Appellants. Testimony of R. Miller.

80. The District was not open with the Appellants about this. Dr. Plano did not tell them that Ms.

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[11] The ALJ previously ruled, on Appellants' motion to disqualify Dionne & Rorick as counsel, that Ms. Miller was hired to conduct the investigation on behalf of the District, just as a compliance coordinator would have done if the District had appointed one:

> It is ultimately up to an employee, just as it is up to an attorney, to determine how best to serve their employer. They may believe they can best serve the employer by conducting as objective an investigation as possible. On the other hand, they may be more biased, either consciously or unconsciously, and conduct the investigation in a manner more likely to lead to a favorable result for their employer. The objectivity of the investigator is more determined by which of these approaches they take than by their status as employee versus attorney. Like the Appellants' other arguments, this one goes to the merits and quality of the District's investigation rather than to disqualifying Ms. Miller's law firm from representing the District.

Order Denying Appellants' Motion to Disqualify Counsel, May 15, 2012.

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Miller's firm would represent the District against the Appellants in the event of an appeal. He told the Appellants that Ms. Miller was an "outside" attorney who was an "unbiased observer," and implied that she was acting on behalf of all of them. J-29; J-34. The District did not select an outside attorney with whom it had no other relationship. Thus, when the Appellants sought discovery of communications between Ms. Miller and the District about the Student's complaint, and about what instructions were given to Ms. Miller concerning the investigation, the District denied discovery on grounds of attorney-client privilege and the attorney work product doctrine. J-53, pp. 1 - 3.[12]

81. On December 16, 2011, the Appellants appealed Dr. Plano's decision (which adopted the attorney investigator's report) to the School Board. The Board heard the appeal despite it being filed late. On February 15, 2012, The Board denied the appeal, finding no violation of District policies or procedures and no "significant" evidence that the Student was subject to harassment or discrimination. J-50.

Effects of District's Failure to Amend Its Policy and Procedure to Comply with Chapters 28A.642 RCW and 392-190 WAC

82. The District did not amend its Nondiscrimination Policy and Procedure to extend coverage to race and ethnicity discrimination, and did not appoint a nondiscrimination compliance coordinator, as required by law, until a month before the OAH hearing in this case. The Appellants therefore did not know the Nondiscrimination Policy and Procedure were available to them at the time they filed the Student's complaint.

83. Because the District did not appoint a compliance coordinator, it appears no one informed the co-principals about the changes in state law. Ms. Budzius treated the October 5th allegation of race discrimination as if the only applicable District policy was HIB. Mr. Miller did the same when the October 25th allegation of ethnicity discrimination arose.

84. At the time Ms. Budzius and Mr. Miller conducted their informal investigations, the Appellants did not know they had another option. By the time they received the obsolete HIB reporting form that offered both an informal and a formal option, both Ms. Budzius and Mr. Miller had already unilaterally chosen to conduct their investigations under the informal option. Also, no one informed the Appellants -- and they could not learn it from the District's website -- that HIB complaints cannot be appealed above the local School Board, but discrimination complaints can be appealed to a neutral, outside body (OSPI) or can be filed in court.

85. Based on the formal and tenacious manner in which the Appellants 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 Dionne & Rorick, the Appellants may have requested that either the compliance coordinator or an unaffiliated law firm

[12] The ALJ subsequently granted the Appellants' motion to compel discovery on these matters, ruling the District had waived the attorney-client privilege and the attorney work product doctrine with regard to Ms. Miller's investigation. *See* Second Prehearing Order of April 11, 2012.

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conduct the investigation; and may have declined to allow their son to be interviewed by Dionne & Rorick. 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 the Student 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 the Student heard a racial slur in his mind, but not necessarily with his ears.

86. In May 2012, the District brought its Nondiscrimination Policy and Nondiscrimination Procedure into compliance with chapters 28A.642 RCW and 392-190 WAC. J-56; J-57. A District nondiscrimination compliance coordinator has been appointed and his contact information, as well as information about the new law, has been widely publicized in the community. Testimony of Plano.

CONCLUSIONS OF LAW

Jurisdiction

1. The Washington legislature enacted chapters 28A.640 and 28A.642 RCW to eliminate discrimination in the public schools. The legislature charged OSPI with developing regulations, monitoring compliance, and enforcing compliance with these anti-discrimination statutes. OSPI promulgated chapter 392-190 WAC to implement those statutes.

2. OSPI has designated the Office of Administrative Hearings (OAH) to hear and issue a final decision in this case, pursuant to RCW 34.05.425(1)(c), WAC 392-101-010(3) and WAC 392-190-075(1). Appeals of discrimination complaints brought under chapters 28A.640 and 28A.642 RCW are conducted *de novo*. WAC 392-190-075(a). The complainant/appellant has the responsibility for prosecuting his or her case, and the school district/respondent has the duty of defending the decision appealed. *Id.* This language places the burden of proof on the complainant/appellant. *See also Cohen v. Brown University*, 991 F.2d 888, 901 (1st Cir. 1993) and *Garcia v. Clovis Unified. School Dist.*, 627 F.Supp.2d 1187, 1196 (E.D. Cal. 2009) (under Title IX, the federal equivalent to RCW 28A.640, the burden of proof is on the complainant/plaintiff).

3. Neither OSPI, nor this tribunal as its delegate, has jurisdiction to hear claims under RCW 28A.300.285, which concerns harassment, intimidation and bullying in general, not necessarily due to discrimination based on a protected classification. That statute does not provide for an appeal to OSPI, nor does it provide the right to sue in court. To the extent the parties have presented evidence concerning claims under RCW 28A.300.285, those claims are not addressed herein.[13]

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[13] The link between the two statutes is that OSPI is required monitor the policies and procedures adopted pursuant to the HIB statute (RCW 28A.300.285) to ensure they include a prohibition on HIB that is

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State Law on Discrimination in the Public Schools

4. RCW 28A.642.010 prohibits discrimination against students or employees 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. An older set of statutes, chapter 28A.640 RCW, prohibits discrimination based on gender in public schools. Chapter 392-190 WAC contains the regulations promulgated by OSPI to carry out the mandates of both of these statutes.

5. School districts are required to designate at least one employee as the district's compliance coordinator for chapter 392-190 WAC. The compliance coordinator must monitor the district's compliance with the chapter and investigate discrimination complaints:

> 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.

WAC 392-190-060(1).

6. Districts must publicize the name and contact information for the compliance coordinator at least annually, along with information concerning the complaint and appeal procedure:

> 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.

WAC 392-190-060(2).

7. The complaint and appeal procedure has three levels. At the first level, the district's compliance coordinator must investigate and give a full written report to the district superintendent, who then responds to the complainant in writing. WAC 392-190-065(1) and (2).

8. The second level is an appeal to the school board, which must hold a hearing concerning the complaint. WAC 392-190-070.

9. If the complainant is not satisfied with the school board's decision, he or she may appeal to OSPI, which is the third level. WAC 392-190-075. OSPI may designate OAH to hear the third-level appeal, as has occurred in the present case. *Id.* Complainants also have the right to file suit in

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based on sex, race, disability and the other protected classifications. WAC 392-190-059.

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court against the school district, whether or not they availed themselves of the three-level administrative complaint procedure before suing. RCW 28A.640.040; 28A.642.040; WAC 392-190-081.

Legal Standards for Assessing District Conduct

10. The OSPI Guidelines[14] define "discriminatory harassment "as harassment that is:

> 1. Based on sex, race, creed, religion, color, national origin, sexual orientation, gender expression or identity, veteran or military status, disability, or the use of a trained dog guide or service animal;
>
> 2. Sufficiently serious to create a hostile environment; and
>
> 3. Encourage, tolerate, ignored, or not adequately addressed by school employees.
>
> Harassing conduct may include verbal acts and name-calling, graphic and written statements, or other conduct that may be physically threatening, harmful or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.

Id. at p. 32. The OSPI Guidelines go on to state that a hostile environment is created:

> 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. For example, a hostile environment may cause a student to experience emotional distress, physical illness, or declining grades and attendance.

Id.

11. The OSPI Guidelines allow compliance coordinators to delegate investigations to legal counsel:

> If the compliance coordinator is concerned about their ability to conduct an unbiased or impartial investigation, or the perception that they will not conduct a fair investigation, the compliance coordinator should delegate this responsibility to another district administrator, outside agency, or legal counsel.

Id. at p. 64. Finally, the OSPI Guidelines discuss appropriate steps to end harassment:

> Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed – for

[14] Both parties cite and rely on the OSPI Guidelines. The Guidelines were published a few months after the District's investigations were completed, so the District will not be held to anything stated in the Guidelines that is not also required by statute or regulation.

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example, not requiring the target to change his or her class schedule.

> In addition, depending on the extent of the harassment, the school district may also need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school district may also be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment.

Id. at p. 33.

12. The Washington Court of Appeals has also provided guidance on the legal standard to be used in cases of student-on-student discriminatory harassment. In *S.S. v. Alexander*, 143 Wn. App. 75, 177 P.3d 742 (2008), a student reported to school officials that she had been raped by another student several months earlier. She ultimately sued both the other student and the University of Washington (UW), alleging the UW had mishandled the matter after she reported it. The case arose under Title IX of the Education Amendments of 1972, 20 United States Code (USC) §1681 *et seq.*, which prohibits discrimination based on gender in schools.

13. *S.S. v. Alexander* held that a school may be liable for discrimination where the plaintiff has experienced harassment so severe, pervasive and objectively offensive from another student as to deprive her of access to educational opportunities or benefits, and the school knew of the harassment but responded in a "deliberately indifferent" manner. *S.S. v. Alexander*, 143 Wn.2d at 98 - 100.

> "[F]unding 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 known circumstances." *Davis, [v. Monroe County Bd. Of Educ.]*, 526 U.S. [629,] at 648 [119 S. Ct. 1661 (1999)]. Stated differently, the recipient must "respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 649.
>
> . . .
>
> A total denial of access is not required to state a claim. Rather, the sexual harassment must be of sufficient severity that it "so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651.

S.S. v. Alexander, 143 Wn. App. at 97-98. The court went on to state:

> Courts have found funding recipients' responses to notices of sexual harassment to be wanting in a variety of circumstances. An institution's failure to properly investigate a claim of discrimination is frequently seen as an indication of deliberate indifference. [citations omitted]
>
> . . .
>
> The funding recipient's failure to meaningfully and appropriately discipline the student-harasser is frequently seen as an indication of deliberate indifference. [citations omitted]

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Id. at 104-105.

14. The court explained the measure of cognizable injury in such cases in the following discussion:

> [T]he university contends that inasmuch as S.S. remained enrolled in school and continued with her work in the athletic department she has not proved that she was "effectively barred" from educational opportunities as required by *Davis*.

S.S. v. Alexander, 143 Wn. App. at 114. The court rejected this contention, citing cases in which "[t]he measure of cognizable injury is whether the effects of the sexual harassment 'compromise or interfere with educational opportunities normally available to students.' [citation omitted]." *Id.*

15. The foregoing discussion addresses the Title IX standard for how schools may become liable for discrimination in cases of student-on-student harassment. The ALJ invited the parties to address, in their closing briefs, whether the Title IX standard, or some other legal standard, should apply to cases under chapters 28A.640 and 28A.642 RCW, since this has not been decided by the courts. *See* Order Denying District's Objection to Order on Summary Judgment issued May 1, 2012, [15] The District's closing brief did not address this matter. The Appellants' closing brief relied

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[15] The Order Denying District's Objection to Order on Summary Judgment stated:

> The foregoing discussion addresses how universities and school districts may be liable for discrimination in cases of student-on-student harassment. There are some crucial differences, however, between Title IX on the one hand, and chapters 28A.640 and 28A.642 RCW on the other. First, the "deliberate indifference" standard adopted in Title IX cases is tied to the plaintiffs' requests for money damages in those cases. No money damages are at issue in the present case. Second, the "deliberate indifference" standard was adopted because Title IX was an exercise of Congress' powers under the Spending Clause of the U.S. Constitution. *S.S. v. Alexander,* 143 Wn. App. at 94. Our state statutes have a very different genesis. *See* RCW 28A.640.010; RCW 28A.642.005. Finally, the courts have found a private right of action implied in Title IX, but it is explicitly provided for in our state statutes. *See* RCW 28A.640.040; 28A.642.040. The Court in *Davis, supra,* addressed all three of these matters as follows:
>
> > This Court has indeed recognized an implied private right of action under Title IX, [citation omitted], and we have held that money damages are available in such suits, [citation omitted]. Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Cause, however, [citations omitted], private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. When Congress acts pursuant to its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." [citation omitted]. . . . "there can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." [citations omitted].
>
> *Davis v. Monroe County Bd. of Educ., supra,* 526 U.S. at 639-640 (bracketed material is bracketed in the original, except for the statement "citations omitted").
>
> This tribunal has not yet received briefing, nor had the opportunity to itself research, whether the

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primarily on the *S.S. v. Alexander* Title IX standard, and discussed some other legal standards, but did not argue why one should be adopted in lieu of others.

16. It is concluded that the Title IX standard enunciated in the Washington Court of Appeals in *S.S. v. Alexander* should apply to cases under chapters 28A.640 and 28A.642 RCW. First, Title IX is the statute most closely analogous to chapter 28A.640 RCW among the statutes discussed in the Order Denying District's Objection to Order on Summary Judgment.

17. Second, the standard enunciated in *S.S. v. Alexander* is very similar to the one suggested in the OSPI Guidelines. Deference is given to the interpretations of the administrative agency charged with enforcing a statute. *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 756, 953 P.2d 88 (1998). Under the OSPI Guidelines, liability is not imposed on school districts unless they encourage, tolerate, ignore or do not adequately address discrimination. Under the Title IX standard, liability is not imposed on school districts unless they act with "deliberate indifference" to reports of student-on-student discrimination, meaning their response is clearly unreasonable in light of known circumstances. *S.S. v. Alexander*, 143 Wn. App. at 97-98. These standards employ different phraseology, but have similar meaning.

18. Third, the Title IX standard protects schools from liability for monetary damages for student-on-student harassment unless the schools respond in a deliberately indifferent manner. There is no possibility of monetary damages for claims under chapters 28A.640 or 28A.642 RCW. The level of protection afforded by the Title IX standard is therefore more than fair to school districts when they are not faced with the possibility of monetary damages. The standard under the Washington Law Against Discrimination, chapter 49.60 RCW -- which does not require any showing of intentional discrimination in disability cases (*see* footnote above) -- would be unfair to school districts in cases of student-on-student harassment.

"deliberate indifference" standard should be applied to cases that do not seek money damages, do not arise under the U.S. Constitution's Spending Clause, and are based on an explicit private right of action rather than an implicit one. (The state statutes in question include both a private right of action to an administrative appeal and to a suit in superior court. *See* RCW 28A.640.040; RCW 28A.642.040; WAC 392-190-075.) The parties are invited to address these matters in their closing arguments after hearing.

Alternative standards of liability might be imported from the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. The WLAD applies to public schools, though it is much more frequently used in other settings. In cases of worker-on-worker harassment under the WLAD, the courts find a hostile work environment imputable to the employer if the employer "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *DeWater v. State*, 130 Wn.2d 128, 135, 921 P.2d 1059 (1996), citing *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985). In disability discrimination cases under the WLAD, there is no requirement of a showing of intentional discrimination: "The WLAD differs from Title II of the ADA and §504 of the Rehabilitation Act in that it does not require a showing of intentional discrimination in suits for money damages." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001). "A cause of action under the WLAD differs from one under Section 504 only in that the WLAD requires no showing of intentional discrimination." *S.L.-M. v. Dieringer School Dist.*, 614 F. Supp.2d 1152, 1163 (W.D. WA 2008). No prior Equal Education Opportunity decision issued by the Office of Administrative Hearings has addressed these questions.

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19. Applying the legal standards articulated above to the present case, we begin with the definition of discriminatory harassment. The harassment here was on the basis of race and national origin, so it meets the first element stated in the OSPI Guidelines. The second element is whether the actions were sufficiently serious to create a hostile environment. A hostile environment is created, according to the Guidelines, when conduct is sufficiently severe, pervasive or persistent 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. Examples of such interference include suffering emotional distress and declining grades. OSPI Guidelines, at p. 32.

20. It is concluded that the incidents of racial/ethnic discrimination against the Student were sufficiently serious to create a hostile environment. They were open taunts done in front of peers, to a student at an age when peer perceptions are very important to children. The Student suffered emotional distress, as evidenced by his crying in front of peers in the lunch room and writing extremely disturbing essays targeting violence to Student A. He did not just write stories about Student A for his own satisfaction or to share with friends. He turned them in to a teacher as school work. After the first essay received no reaction, he wrote a second, more inflammatory one. This supports the Appellant's view that the essays were like a cry for help. The Student's low grades and very late assignments in Ms. Brousseau's class are another indication of emotional distress, especially when contrasted with his high performance in all other classes during the year.

21. Turning to the third element in the OSPI Guidelines we examine whether the District encouraged, tolerated, ignored, or did not adequately address the discriminatory harassment. As expressed in *S.S. v. Alexander*, this element is whether the District's response to the reports of discriminatory harassment was clearly unreasonable in light of known circumstances, and thus deliberately indifferent.

22. As discussed more fully in the Findings of Fact, the District's actions were clearly unreasonable in light of known circumstances at several stages of the events at issue:

(a) Failing to update District Nondiscrimination Policy and Procedure as required by law, resulting in Appellants being deprived of the choice to have the initial investigations be District-level rather than informal investigations;
(b) Failing to appoint a nondiscrimination compliance coordinator as required by law, resulting in the co-principals being uninformed about requirements of the new nondiscrimination law and regulations;
(c) Inadequate investigation of the October 5, 2011 incident by co-principal Budzius;
(d) Inadequate investigation of the October 25, 2011 incident by co-principal Miller;
(e) Inadequate discipline of Student A for the incidents of October 5th and 25th;
(f) Failing to complete the Next Steps listed in co-principal Miller's informal investigation report;
(g) Failing to disclose the Student's Moment essay to the Appellants;
(h) Failing to consider the Moment or Kennewick essays as relevant in either the informal or the formal investigations;
(i) Focusing on the Student and his disability as the reason for his conflicts with Student A, while overlooking evidence that corroborated the Student's allegations;
(j) Representing to the Appellants that Dionne & Rorick's investigator was an outside, unbiased observer assisting both parties, resulting in the Appellants allowing their son to participate in an investigation that was biased in the District's favor; and

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(k) Adopting the investigator's report, which omitted relevant facts and came to unjustified conclusions.

23. For these reasons, the Appellants have established that the District acted with deliberate indifference to the Student's reports of discriminatory harassment, and thereby discriminated against him in violation of chapters 28A.642 RCW and 392-190 WAC.

24. The Appellants request adjudication of an additional issue: Whether the District discriminated on the basis of *disability* in its handling of the Student's complaint. The Issues and Remedies statement in the First Prehearing Order of March 13, 2012 did not specify what type of "discrimination" it included. However, that Issues and Remedies statement was based on the Appellants' appeal letter of February 2, 2012 (the complaint). The complaint made no mention of discrimination on the basis of disability. This is understandable, because the Appellants did not become aware of many of the facts they allege constitute disability discrimination until the discovery process, after they had filed the complaint. However, nothing barred the Appellants from requesting leave to amend their complaint once those facts became known to them.

25. Because the complaint was not amended to add discrimination on the basis of disability, that issue will not be adjudicated herein. While it is found that the District focused on the Student's disability as the reason for his conflicts with Student A, while overlooking evidence that Student A engaged in racial and ethnic slurs toward the Student, this finding is made in the context of the legal standard applied to this case: Whether the District's handling of the Student's allegations was clearly unreasonable in light of known circumstances. There is no adjudication of whether the District engaged in discrimination based on disability.

Remedies

26. The remedies requested by the Appellants are considered as follows. First, the Appellants request an order that the District take reasonable measures to ensure the Student is not subjected to further harassment by other students. The District's placement of a paraeducator in the Student's fourth period class -- where both of the discriminatory harassment incidents occurred -- was such a measure. It is too late to take the otherwise-reasonable measure of disciplining Student A (and to a lesser extent Student B); the "teachable moment" is long gone, in Dr. Plano's words. Other measures to ensure against future discrimination are discussed and ordered below.

27. Second, the Appellants request an order that the District take corrective measures against the alleged aggressors. For the reasons discussed in the paragraph above, it is too late to implement such a remedy.

28. Third, the Appellants request that racial sensitivity training be required for District staff who did not follow proper procedures and for the students who were bystanders to the October 2011 incidents involving their son. The following training is found to be appropriate:

(a) The District will be ordered 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. The training may be provided by OSPI's Equity and Civil Rights office,

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or by other qualified trainers. To the extent the District staff mentioned in this paragraph have received such training in 2012, it may be deducted from the hours ordered herein.

(b) The District will be ordered to continue its annual presentations to middle school students about harassment, intimidation and bullying, and to ensure that the following are addressed during those presentations: (i) harassment on the basis of race and ethnic origin; (ii) the duty of all students to report instances of discrimination, harassment, intimidation or bullying that they become aware of; and (iii) how to report such instances. Subparagraph (i) herein does not bar the District from having the primary focus of a presentation be on some other form of discrimination (e.g., sexual orientation), as long as the presentation also includes material on harassment based on race and ethnic origin.

29. Finally, the Appellants request that the District be ordered to amend its Nondiscrimination Policy and Procedure. The District has already done so, and the amendments brought the policy and procedure into compliance with chapters 28A.642 RCW and 392-190 WAC. No further relief of this nature is warranted.

30. The fact that the Appellants prevailed in this case should not be taken as an endorsement of the manner in which they pursued the case, which was litigious to a fault. The case file became so large that it had to be split into four files. It must be acknowledged that the District contributed to the Appellants' enthusiasm for the case by continuing to focus on the Student as the source of his own problems and acknowledging no faults in its own investigations. Whatever the cause, the parties are urged to be more understanding of one another as they work toward their mutual goal of providing a safe, positive learning environment for the Appellants' children and for all other children in the District.

ORDER

1. The District discriminated against the Student in violation of chapters 28A.642 RCW and 392-190 WAC in its handling of allegations that the Student was harassed by other students in October 2011.

2. The District shall 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.

3. The District shall continue its annual presentations to middle school students about harassment, intimidation and bullying, and shall ensure that the following are addressed during those presentations: (a) harassment on the basis of race and ethnic origin; and (b) the duty of all students to report instances of discrimination, harassment, intimidation or bullying that they become aware of; and (c) how such reporting is to be done.

Signed at Seattle, Washington on October 15, 2012.

Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

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APPEAL RIGHTS

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

Pursuant to RCW 28A.642.040 and RCW 34.05.510 through 34.05.598 this matter may be further appealed to a court of law by filing a petition for review in superior court of either Thurston County or the county of the petitioner's residence within thirty (30) calendar days of the date of mailing this decision.

CERTIFICATE OF SERVICE

I certify that I emailed and mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

Appellants
9115 SE 50th Street
Mercer Island, WA 98040

Dr. Gary Plano, Superintendent
Mercer Island School District
4160 86th Avenue SE
Mercer Island, WA 98040-4121

Jeffrey Ganson, Attorney at Law
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cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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EXHIBIT A - 30

OFFICE RECEPTIONIST, CLERK

To: justice@defendmyright.com
Subject: RE: Case NO. 920095 - APPENDICES: INDIVIDUAL RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Rec'd on 8-19-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: equaljusticelaw@gmail.com [mailto:equaljusticelaw@gmail.com] **On Behalf Of** Ernest Saadiq Morris/DEFENDMYRIGHT.com
Sent: Wednesday, August 19, 2015 4:14 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Re: Case NO. 920095 - APPENDICES: INDIVIDUAL RESPONDENTS' ANSWER TO PETITION FOR REVIEW

I apologize for the error and the confusion.

Attached are the true and correct copies of the Appendices for Individual Respondents' Answer re Case No. 920095.

Ernest Saadiq Morris, Esq.

Attorney for Respondents N.W. and R.W., on behalf of B.W., a minor child

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Co-Chair, Educational Civil Rights Accountability Project of ABA Children's Rights Litigation Committee

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On Fri, Aug 14, 2015 at 8:33 AM, OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> wrote:

Good Morning, I am writing to you, again (first email was sent on 08/11/2015), to inform you that there are no documents attached to your email besides a cover letter for your appendices.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: equaljusticelaw@gmail.com [mailto:equaljusticelaw@gmail.com] **On Behalf Of** Ernest Saadiq Morris/DEFENDMYRIGHT.com
Sent: Tuesday, August 11, 2015 4:16 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Case NO. 920095 - APPENDICES: INDIVIDUAL RESPONDENTS' ANSWER TO PETITION FOR REVIEW

TO: Clerk, WA Supreme Court

Please find attached APPENDICES (A & B) to be filed as attachments to INDIVIDUAL RESPONDENTS' ANSWER TO PETITION FOR REVIEW, filed yesterday.

Thank you for your attention to this matter.

Ernest Saadiq Morris, Esq.

Attorney for Respondents N.W. and R.W., on behalf of B.W., a minor child

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