NO. 71419-8-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

MERCER ISLAND SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENTS IN RESPONSE TO AMICI CURIAE OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

Amicus Curiae the American Civil Liberties Union of Washington (ACLU) attempts to broaden the scope of this matter unnecessarily by asking the Court to determine the legal standard to apply in future proceedings for claims of school district liability for peer-on-peer discriminatory harassment under Chapter 28A.642 RCW. In light of recent revisions by the Office of Superintendent of Public Instruction (OSPI) to that statute's implementing regulations, Chapter 392-190 WAC, the ACLU argues for application of a lenient administrative standard for district liability—one that did not exist in state statute, regulations, or guidance in fall 2011, the time of the events at issue here.[1]

However, as OSPI recognizes, this case focuses on a much narrower question: whether the superior court properly interpreted and applied the law applicable in a formal administrative hearing before an ALJ under chapters 28A.642 RCW and 392-190 WAC *as it existed in 2011.* The court properly reversed the ALJ's decision that Respondent Mercer Island School District (the "District") discriminated against student B.W. through its response to his complaint of peer-on-peer racial harassment, applying the "deliberate indifference" standard governing federal discrimination claims,

[1] Amici Curiae refer to this standard, found in revised WAC 392-190-0555(2) and discussed below, as the "knew or should have known" standard.

as stipulated by the parties. Based on the unique posture of this case, the Court should issue a narrow ruling affirming the court's determination that the deliberate indifference standard governs this matter, and that the District's response was not clearly unreasonable under the circumstances.

II. ARGUMENT

A. This case is not the proper vehicle for addressing the standard to apply in future administrative or judicial proceedings.

The briefing of OSPI and the ACLU provides limited value to the Court, because both organizations focus not on the narrow issue relevant here, but rather expound what they view as the proper standard for district liability in future matters under state regulations and administrative guidance that did not exist at the time of this case. *See* Br. OSPI 14 ("OSPI does not take a position on the applicable standard for this particular matter," but argues for application of judicial estoppel); Br. ACLU 14-15 (acknowledging OSPI rules did not elaborate standard until after the events here). Due to the unique posture of this case, it would be inappropriate and unfair to apply a more lenient standard for liability articulated months or years after the time of the District's response to B.W.'s claim of harassment.

1. This case has a unique posture, because the events at issue occurred prior to OSPI's guidance or revised regulations indicating a standard for administrative adjudications under Chapter 28A.642 RCW.

This case centers on the District's response to B.W.'s November 1, 2011, complaint alleging racial/ethnic harassment by a seventh-grade

classmate on two occasions: October 5 and 25, 2011. CP 8-10. The District investigated and took a variety of steps intended to stop any harassment in October 2011, CP 11-13, completing its last measure, a harassment, intimidation, and bullying presentation for seventh-grade students, in February 2012, CP 16. N.W. and R.W. (the "Parents") appealed the District's determination that there was no violation of its policies or procedures to OSPI on February 2, 2012, pursuant to WAC 392-190-075 (2011). CP 6. B.W. did not experience further alleged racial comments. CP 16.

No state legal source available to the District in late 2011 and early 2012 contained any standard governing Parents' claim, much less the administrative standard now advocated by Parents and the ACLU. First, Chapter 28A.642 RCW was then, and remains now, completely silent regarding (1) whether a school district may be liable for peer-on-peer harassment at all, and (2) if so, what standard would apply in either administrative enforcement by OSPI or a civil suit for money damages. Enacted in 2010, the statute creates two methods for enforcement of a student's right to be free from discrimination based on race and other protected classes. RCW 28A.642.030 authorizes OSPI administrative actions to "monitor local school districts' compliance with this chapter, and [to] establish a compliance timetable, rules, and guidelines for enforcement of this chapter." OSPI exercised this authority in 2011, revising its

nondiscrimination regulations to provide an adjudicative process for appealing District decisions to OSPI, which contracted with the Office of Administrative Hearings (OAH) to appoint ALJs to hear such cases pursuant to the Administrative Procedure Act (APA). WAC 392-190-075 (2011). In addition, RCW 28A.642.040 creates a private right of action for money damages and equitable relief in superior court for "[a]ny person aggrieved by a violation of this chapter."

Second, OSPI's 2011 regulations also did not offer a standard for either administrative enforcement or civil actions. *See* Chapter 392-190 WAC (2011). OSPI and the ACLU admit as much. CP 703; Br. ACLU 14 ("[U]ntil recently the applicable regulations were silent regarding the standard for school liability in cases involving discriminatory peer-to-peer harassment."). Instead, the regulations merely provided that compliance with relevant federal law (here, Title VI) should constitute compliance with Chapter 28A.642 RCW. WAC 392-190-005 (2011); CP 703.[2]

Third, OSPI did not exercise its authority to issue guidelines under RCW 28A.642.030 until after the events at issue here. *See* Susanne Beauchain et al., Office of Superintendent of Public Instruction, *Prohibiting Discrimination in Washington Public Schools* (Feb. 2012) [hereinafter "the

[2] It is undisputed that the federal standard governing claims against school districts under Title VI for peer-on-peer racial harassment is deliberate indifference. *See, e.g., Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 664-65 (2d Cir. 2012).

Guidelines"].[3] The Guidelines set forth a standard similar to that used by the U.S. Department of Education's Office for Civil Rights (OCR) for administrative investigation and enforcement of peer-on-peer racial harassment claims under Title VI; this administrative standard, which is not applicable in civil actions for money damages under Title VI, arguably is more lenient than the deliberate indifference test. Br. Resp't 43-47. It is this standard that Parents and the ACLU incorrectly urge the Court to adopt.

However, even after adopting the Guidelines, OSPI did not argue for this lower standard as a party to this case on appeal in superior court.[4] OSPI now erroneously claims that it "filed a brief to inform the superior court that school districts should be held to a 'known or should have known' legal standard." Br. OSPI 7. However, OSPI's brief on appeal stated that it "takes no position here regarding whether Judge Mentzer correctly concluded, as a matter of law, that the . . . District discriminated against the student in violation of chapters 28A.642 RCW and 392-190 WAC . . . ." CP 704. OSPI urged the court to "assume, without deciding, that [the deliberate indifference] standard is the proper one to use in disposing of this petition for judicial review." CP 705. OSPI makes a similar argument now: "OSPI

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[3] The ACLU erroneously states that the Guidelines issued in February 2011. Br. ACLU 14.

[4] OSPI is no longer a party on appeal. On February 26, 2014, Assistant Attorney General Justin Kjolseth sent a letter to the parties and the Court stating that he did "not foresee participating in briefing or oral argument." *See* Appendix A.

respectfully requests that this Court base its decision on the School District's judicial estoppel argument." Br. OSPI 14.

2. Given this case's unique posture, it would be inappropriate and unfair to entertain a more lenient administrative standard.

Application of the lower administrative standard would be inappropriate, because the District did not have notice that it might apply until after it completed its investigation and took effective steps to remedy any alleged harassment. The ALJ recognized as much, stating "[t]he 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." CP 28.

Moreover, OSPI's recent revisions to Chapter 392-190 WAC—dramatically changing how discrimination complaints are handled and inserting the lower "knew or should have known" standard—demonstrate that it would be inappropriate to apply that standard here. In its revisions effective December 19, 2014, OSPI made two key changes.

First, it abolished the adjudicative procedure before an ALJ under former WAC 392-190-075 (2011) that Parents used in this case. In its place, current WAC 392-190-075 provides that if a complainant disagrees with a school district's decision or the district fails to comply with the regulation's procedures, he or she may file a complaint directly with OSPI, which will

itself investigate and "make an independent determination" as to whether the district complied with the regulations. WAC 392-190-075(3). OSPI may order corrective actions, and it may provide technical assistance to school districts in complying with the law. WAC 392-190-075(3)-(5).[5]

This new process mirrors OCR's investigation and enforcement authority under Title VI. *See* Br. Resp't 43-47. As such, it corresponds with the concept of "administrative enforcement," *see* Br. OSPI 5, better than the prior adjudicative administrative hearing process in which OSPI took no direct role, *see* CP 703. A more lenient liability standard arguably fits better under this new scheme, in which OSPI can respond more quickly than the time required for a formal administrative hearing, apply its administrative expertise to identify prohibited discriminatory harassment, and help school districts resolve problems by offering specific advice or ordering corrective actions. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998) (discussing administrative enforcement of Title IX); *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 607, 84 Cal. Rptr. 3d 285 (Cal. App. 2008) (discussing administrative enforcement of California Education Code Section 220). Under the prior

[5] Either a complainant or a district may appeal OSPI's decision to OSPI pursuant to the APA. WAC 392-190-079. OSPI must conduct a "formal administrative hearing" under the APA, and may contract with OAH to hear these appeals. *Id.*

scheme applicable here, the ALJ sat as an arbiter without any specialized expertise in identifying or addressing discrimination; the ALJ could at most identify perceived flaws in the District's investigation and/or response post-hoc, as ALJ Mentzer did here. *See* CP 32-33.

Second, the fact that OSPI revised its regulations to implement the "knew or should have known" standard indicates that this lower standard did *not* apply under the 2011 regulations applicable in this matter. OSPI states that "[u]nder the amended rules, the 'known or should have known' standard for finding discriminatory harassment is now explicitly set forth in WAC 392-190-0555 (2014)." Br. OSPI 4; *see also id.* at 9 (new regulations contain "clearly articulated legal standard"). If the prior regulations had dictated this lower standard, OSPI's 2014 revisions would be unnecessary.

In addition, it cannot be overemphasized that the lower standard is inappropriate because the prior statutory and regulatory scheme created a significant risk that an adverse finding of discrimination in a formal administrative hearing would lead to res judicata on the issue of district liability in an action for money damages in superior court under RCW 28A.642.040. Br. Resp't 47. The new OSPI regulations clarify that the "knew or should have known" standard applies "[f]or purposes of administrative enforcement" of Chapter 392-190 WAC. WAC 392-190-0555(1). This language suggests that the lower standard is not intended to

apply in the context of a civil lawsuit under RCW 28A.642.040. *See* Br. OSPI 13 ("The civil right of action is *only* available in superior court, and is independent of any OSPI administrative enforcement action."). The 2011 regulations made no such distinction, leading to the possibility that Parents could argue for res judicata in a civil suit based on the ALJ's findings. Therefore, it is more appropriate to apply the deliberate indifference standard applicable to Title VI claims for money damages in this case.

B. The Court should apply the deliberate indifference standard in the limited context of this case, as urged by OSPI, because the Parents are estopped from arguing for a more lenient standard.

Given the unique posture of this case, the Court should narrowly hold that Parents are judicially estopped from arguing for a standard of school district liability other than deliberate indifference, as supported by OSPI. This Court recently reaffirmed the basic principles of judicial estoppel, clarifying that "[b]efore the doctrine of judicial estoppel may be applied, a party's initial position—which is subsequently contradicted in a different proceeding—must be accepted by the court to which it is presented." *Taylor v. Bell*, No. 70414-1-I, slip op. at 1 (Wash. Ct. App. Dec. 29, 2014).

Here, both the ALJ and the superior court clearly accepted Parents' position that the deliberate indifference standard governed this matter. In light of Chapter 392-190 WAC's reference to compliance with federal law, Parents discussed the deliberate indifference standard in their briefing

before the ALJ. CP 31. Moreover, the parties stipulated to the deliberate indifference standard in superior court. CP 839. Both tribunals based their decisions on the deliberate indifference standard, *see* CP 31-32; CP 840-42, although the superior court properly determined that the ALJ incorrectly applied it, CP 841-42. Acceptance of the lower standard would create the perception that either the superior court or this Court was misled. *See Taylor*, *supra*, slip op. at 11.

In addition, the District detrimentally relied on Parents' position as accepted by the ALJ and the superior court. It might have taken a different approach, both at hearing and on appeal, if the legal standard was at issue. *See id.* For example, it may have contested the ALJ's findings of fact in superior court. Because the ALJ and the superior court accepted Parents' clear position that the deliberate indifference standard applied and the District relied on that representation to its detriment, it would be unfairly prejudicial to apply a lower standard in this case.

OSPI likewise argues for application of judicial estoppel, stating that "this appeal can and should be decided on narrow grounds that do not interfere with OSPI's delegated authority to establish and use the 'known or should have known' enforcement standard in future cases." Br. OSPI 1. OSPI aptly points out that the Court need not reach the issue of the standard to apply in future OSPI enforcement actions under WAC 392-190-075,

which OSPI clarified in the recent regulatory revisions, or in civil suits under RCW 28A.642.040, which statute is not before the Court for review. *See* Br. OSPI 7. Articulation of the standard for civil suits is best left to the Legislature, or to a proceeding arising under the private right of action. Resolving this matter based on judicial estoppel furthers the interests of judicial economy while not unduly restricting OSPI's administrative oversight of school districts. *See* Br. OSPI 14.

C. The deliberate indifference standard is appropriate for deciding school district liability for peer-on-peer harassment in cases that could lead to money damages.

The ACLU erroneously argues that the origins of the deliberate indifference standard as governing claims for money damages against school districts based on peer-on-peer sex discrimination under Title IX make the standard inappropriate here. Rather, deliberate indifference is the correct standard because: (1) state regulations explicitly provided that compliance with relevant federal law (i.e., the deliberate indifference standard) would constitute compliance with the above statute and regulations, *see* WAC 392-190-005 (2011); (2) the ACLU mistakenly relies on distinguishable cases interpreting other states' laws, *cf. Doe ex rel. Subia v. Kansas City, Mo. Sch. Dist.*, 372 S.W.3d 43 (Mo. Ct. App. 2012); *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 915 A.2d 535 (2007); and (3) at least one other state has interpreted deliberate indifference to govern claims under its

similar statute prohibiting discrimination in public schools, *see Donovan*, 167 Cal. App. 4th at 579 (applying deliberate indifference standard to claim under Section 220 of the California Education Code for damages from peer sexual-orientation harassment).

1. The ACLU ignores WAC 392-190-005, which states that compliance with federal law is sufficient.

The ACLU fails to address the prominent regulatory pronouncement by OSPI that "compliance with relevant *federal* civil rights law should constitute compliance with those similar substantive areas treated in this chapter." WAC 392-190-005 (2011) (emphasis added). The ACLU does not dispute that Title VI is the relevant federal civil rights law prohibiting race discrimination by Washington public schools. Nor does it dispute that federal and state courts have established a voluminous amount of case law under Title VI and analogous federal civil rights laws applying deliberate indifference in the context of peer-on-peer harassment claims. It does not even dispute the superior court's holding that under this precedent, Parents cannot establish discrimination by the District here based on the two instances of racial name-calling, especially when the District promptly investigated and took multiple effective measures to respond to the alleged harassment. *See* Br. Resp't 25-42.

2. The state court decisions cited by the ACLU are distinguishable.

Rather than acknowledge the District's reasonable reliance on the federal deliberate indifference standard, the ACLU bases its argument for application of the "knew or should have known" standard primarily on judicial decisions from other states applying those states' broad anti-discrimination laws. *See* Br. ACLU 9. However, the cited state decisions are distinguishable, because they address interpretation of laws that (1) do not contain the broad statement regarding compliance with federal law discussed above, and (2) are the equivalent of the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW.

The *L.W.* court interpreted the New Jersey Law Against Discrimination (LAD), N.J. Stat. Ann. § 10:5-1 to -49.[6] The court stated that cases applying the LAD to claims of hostile work environment for sexual harassment impute liability to employers where they knew or should have known of the harassment but failed to take effective measures to stop it, thus joining with the harasser. 915 A.2d at 548. The court reasoned that schools should be held to the same standard for the conduct of their *students* as employers are for the conduct of their *employees*. *Id.* at 549.

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[6] The statute provides that "[a]ll persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination . . . ." N.J. Stat. Ann. 10:5-4.

Likewise, the court in *Doe ex rel. Subia* interpreted a similar broad anti-discrimination statute, the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010 *et seq.*[7] As in *L.W.*, the court reasoned that it should apply the standard for liability based on employee sexual harassment—where the employer knew or should have known of harassment and failed to take prompt and effective remedial action—to cases involving student-on-student harassment. 372 S.W.3d at 52.

Washington's WLAD is akin to the LAD and MHRA. It provides the "right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any . . . accommodation." RCW 49.60.030. As in New Jersey and Missouri, Washington Courts have interpreted employers to be liable for peer harassment by employees where the employer knew or should have known of the harassment and failed to take "reasonably prompt and adequate" corrective action. *DeWater v. State*, 130 Wn.2d 128, 135, 921 P.2d 1059 (1996).

However, this case does not involve claims brought under the WLAD: it arises under a separate statute passed after the WLAD that OSPI, the agency tasked with enforcing the statute, interpreted to be satisfied by

[7] Like the LAD, this statute provides that "[a]ll persons . . . are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation . . . without discrimination or segregation . . . ." Mo. Rev. Stat. § 213.065(1).

compliance with federal law. *See* WAC 392-190-005 (2011). The other states' laws discussed above contain no such pronouncement.

The Court should not import the standard for peer-on-peer harassment in the workplace under the WLAD for purposes of Chapter 28A.642 RCW. First, the Legislature was aware of the remedies available under the WLAD when it adopted Chapter 28A.642 RCW. Bill Analysis, HB 3026, 61st Legislature 2 (2010) (pointing out WLAD already applies to schools as public accommodations and gives rise to a private right of action) (attached as Appendix B). Yet the Legislature did not dictate the WLAD standard for employers, or any other standard. Instead, it provided that the statute is "supplementary to, and does not supersede, existing law and procedures." RCW 28A.642.060. It also tasked OSPI with developing rules to eliminate such discrimination, RCW 28A.642.030. OSPI chose to exercise that authority by stating that compliance with federal law was sufficient.

Second, the Legislature did not express any intent to subject school districts to liability for what arguably amounts to a negligence standard based on the conduct of students. Although school districts have disciplinary authority over students, they generally exert far less control over pupils than do employers over their workers. *See Davis v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 649, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) ("we acknowledge that school administrators shoulder substantial burdens as a result of legal

constraints on their disciplinary authority"). As the ALJ stated, using the WLAD standard which does not require any showing of intentional discrimination "would be unfair to school districts in cases of student-on-student harassment." CP 31.[8]

3. At least one other state uses the deliberate indifference standard for purposes of its analogous statute.

Chapter 28A.642 RCW is analogous to the California statute at issue in *Donovan*, which held that the deliberate indifference standard governs claims under that state's law. 167 Cal. App. at 579. Like Chapter 28A.642 RCW, Section 220 broadly prohibits discrimination in public schools and is silent regarding whether a party may bring a claim based on peer-on-peer discrimination (and if so, what standard applies). *Id.* at 596. The court determined that the California Legislature relied on Title IX and developing federal law to shape California's anti-discrimination law. *Id.* at 597. The

[8] Although the ACLU is correct that Chapter 28A.642 RCW is not federal spending clause legislation, and that this statute creates an express right of action, unlike Title VI or Title IX, the rationales underlying the creation of the deliberate indifference standard remain applicable in the context of Chapter 28A.642 RCW. Legislative history of the statute and its regulations demonstrates that it traces its roots to federal spending power legislation, including Title IX. The statute parallels Chapter 28A.640 RCW, Bill Analysis, *supra*, at 5, which is modeled on Title IX, *see* WAC 392-190-005 (1990) ("The intent of this chapter to encompass similar substantive areas addressed by the Title IX regulations and in some aspects extend beyond the Title IX regulations. Accordingly, compliance with this chapter should constitute compliance with those similar substantive areas treated in the Title IX regulations . . . ."). By creating a scheme for administrative enforcement by OSPI that includes the possibility of witholding funding, the Legislature made this statute more analogous to spending clause legislation such as Title VI and Title IX than state statutes such as the WLAD.

court noted that both Title IX and Section 220 "condition their prohibition on discrimination on the receipt of public funding; both broadly proscribe discrimination in education; and both have procedures for administrative enforcement." *Id.* at 603. The court declined to adopt a liability standard based in negligence. *Id.* at 604.

Chapter 28A.642 RCW shares the features listed above. By its very nature, the statute applies to schools that receive public funds. *See* RCW 28A.642.010.[9] It broadly prohibits discrimination. *Id.*[10] And it creates an administrative enforcement scheme. RCW 28A.642.030-.050. As in *Donovan*, the Court should not impose the "knew or should have known" standard resembling negligence, subjecting districts to claims of discrimination based not on official policies or actions of the District, but the results of the District's response to peer-on-peer harassment. *See* 167 Cal. App. at 605.

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[9] At least one underlying purpose for enacting Chapter 28A.642 RCW was compliance with federal civil rights laws, explaining why OSPI chose to provide in WAC 392-190-005 that compliance with such laws means compliance with the new statute. "State law specifically confers authority upon the OSPI to represent the state in the receipt and administration of federal funds." Bill Analysis, *supra*, at 5. Pursuant to that authority, the "federal government requires that the OSPI provide written assurances of both state and local compliance with several civil rights and access laws, including Title VI, Title IX . . . ." *Id.*

[10] The ACLU incorrectly argues that Chapter 28A.642 RCW is modeled on the WLAD. Br. ACLU 4. Although the statute uses the same protected classes, *see* RCW 28A.642.010, it does not prohibit discrimination by places of public accommodation.

D. Amici Curiae fail to explain how their standard differs from deliberate indifference or how it would lead to a different result.

Conspicuously, Amici Curaie do not provide any explanation of how application of the "knew or should have known" standard differs from deliberate indifference or would lead to a different result in this case. Rather, the undisputed facts as found by the ALJ demonstrate that even applying the administrative standard, the District took reasonably prompt and adequate steps to address B.W.'s complaint and thus should not be subject to imputed liability for racial name-calling by his peer.

1. It is unclear whether and to what extent Amici Curiae's preferred standard differs from deliberate indifference.

Amici Curiae do not discuss how, if at all, the "knew or should have known" standard requires a different response to alleged peer harassment than the deliberate indifference standard. *See* Br. ACLU 7-8. It is not clear that the standard set forth in new WAC 392-190-0555, requiring districts to take "prompt and appropriate action to investigate" allegations of discriminatory harassment about which the district knows or should know, is inconsistent with the deliberate indifference standard. Both require the District to take some level of action in response to harassment. *Compare S.S. v. Alexander*, 143 Wn. App. 75, 97-100, 177 P.3d 724 (2008), *with* WAC 392-190-0555. If it is different, OSPI and the ACLU do not explain how.

2. Amici Curaie never attempt to apply their preferred standard to the undisputed facts of this case, which show that the District did not discriminate against B.W.

Even assuming that the standard advocated by Amici Curiae is somehow different from the deliberate indifference standard, neither OSPI nor the ACLU explain how use of that standard could lead to a different result here. The undisputed facts demonstrate that the District did not discriminate under the standard in new WAC 392-190-0555.

First, the regulation still requires that alleged conduct be "sufficiently severe, persistent, or pervasive that it limits or denies a student's ability to participate in or benefit from" school. WAC 392-190-0555(1)(b). As argued below, two instances of name-calling by a classmate during one month is not severe and pervasive harassment. Br. Resp't 42.

Second, the District took prompt and effective steps to investigate and respond to B.W.'s claims, preventing a finding of discrimination. To determine that a district is liable for peer-on-peer harassment, there must be a finding that "upon notice," the district failed to take "prompt and appropriate action to investigate" the harassment or "prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects." WAC 392-190-0555(1)(c). The facts as found by the ALJ demonstrate that the District quickly investigated; that its various

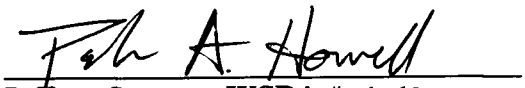
interventions timely occurred (mostly within a month of B.W.'s complaint); and that they worked, because there were no further instances of harassment. Br. Resp't 25-42; CP 664-98.

III. CONCLUSION

The Court should affirm the superior court's determination that the District did not discriminate against B.W. on the narrow grounds that application of the "knew or should have known" standard—which did not exist in regulation or administrative guidance at the time of this case—would be inappropriate, and that Parents are judicially estopped from arguing for application of a standard other than deliberate indifference.

RESPECTFULLY SUBMITTED this 9th day of January, 2015.

PORTER FOSTER RORICK LLP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent the **Brief of Respondents in Response to Amici Curiae Office of Superintendent of Public Instruction and American Civil Liberties Union of Washington** to the following:

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By: Cynthia Nelson, Legal Assistant

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APPENDIX A

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February 26, 2014

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RE: ***Mercer Island School District, Respondent v. Nicholas and Robin Wilt, Appellants***
Court of Appeals - Division One, Case No. 71419-8-I

Dear Counsel:

As you know, I am the attorney assigned to represent the Office of Superintendent of Public Instruction. In this matter OSPI acts as a quasi-judicial body, and as such is generally not a litigant in the judicial review process. We anticipate the parties who appeared before the trial court will continue to advocate their respective positions in this appeal.

Although I am counsel of record for OSPI, I do not foresee participating in briefing or oral argument. If my participation becomes necessary to preserve either the integrity of OSPIs decision making process, or OSPIs ability to enforce and administer policy within its delegated authority, I will involve myself and my client at that time. *See Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993).

Sincerely,

Justin Kjolseth
Assistant Attorney General

JK:lmc
cc: Court Administrator/Clerk, Court of Appeals – Division I

APPENDIX B

Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Education Committee

HB 3026

Brief Description: Regarding school district compliance with state and federal civil rights laws.

Sponsors: Representatives Santos, Quall, Chase, Upthegrove, Kenney, Hunt, Nelson, Liias, McCoy, Hudgins, Simpson and Darneille.

Brief Summary of Bill

- Adds a new chapter to the school code paralleling the current Sexual Equality chapter and prohibiting discrimination on the basis of race, creed, color, national origin, sexual orientation, veteran or military status, disability, or the use of a trained guide or service animal by a person with a disability.
- Tasks the Office of the Superintendent of Public Instruction (OSPI) with developing rules and guidelines to eliminate such discrimination.
- Authorizes the OSPI to enforce and obtain compliance with various discrimination laws.

Hearing Date: 1/29/10

Staff: Cece Clynch (786-7195).

Background:

Achievement Gap Oversight and Accountability Committee.
The 2008 Legislature commissioned five studies to analyze the differences in academic achievement and educational outcomes among various subgroups of students. These differences are referred to as the achievement gap. The commissioned studies drew from research, best practices, and personal, professional, and cultural experiences and came up with various recommendations to close the achievement gap.

In 2009, the Legislature created the Achievement Gap Oversight and Accountability Committee (Committee) to synthesize findings and recommendations from the 2008 studies into an implementation plan, and recommend policies and strategies in specified areas to the Office of

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Superintendent of Public Instruction (OSPI), Professional Educator Standards Board (PESB), and the State Board of Education to close the achievement gap. The Committee is comprised of six legislators, a representative of federally recognized tribes in Washington to be designated by the tribes, and four members appointed by the Governor in consultation with the state ethnic commissions and representing African Americans, Hispanic Americans, Asian Americans, and Pacific Islander Americans. The Governor and the tribes were encouraged to designate members with school experience. Staff support for the Committee is provided by the Center for the Improvement of Student Learning. The Committee is tasked with reporting annually to the Legislature on the strategies to address the achievement gap and improvement of education performance measures for groups of students.

The Committee met eight times during 2009. Draft recommendations to the Legislature from the Committee recommended "that OSPI be given legal authority to take affirmative steps to ensure that school districts comply with state and federal civil rights laws. RCW 28A.640 (the sex equity law) should be updated to include other federal and state protected classes."

State Civil Rights Laws.

Washington Law Against Discrimination (WLAD)

The WLAD recognizes the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or 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. The right includes "The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." Schools are recognized in both statute and regulation as places of public accommodation and, thus, are barred by this law from discriminating on the basis of any of the above listed protected classes.

The WLAD created the Human Rights Commission (HRC) with powers in respect to elimination and prevention of discrimination. Any person claiming to be aggrieved by an alleged unfair practice may file a complaint with the HRC. Currently, upon receipt of an individual complaint that appears to fall within the WLAD, OSPI advises the complainant to contact the HRC. Additionally, whenever the HRC has reason to believe that any person has been engaged or is engaging in an unfair practice, the HRC may itself issue a complaint.

The HRC must investigate complaints and issue written findings of fact as well as a finding as to whether there is or is not reasonable cause for believing that an unfair practice has been or is being committed. Upon a finding of reasonable cause, the HRC staff must endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached, the HRC issues an order setting forth the terms of the agreement. If no agreement is reached, the HRC requests the appointment of an administrative law judge (ALJ) to hear the complaint. An ALJ is empowered to award damages, to require that wrongful conduct cease and desist, and to order affirmative action so as to effectuate the purposes of the law. There is a right of judicial review from the ALJ's final order.

In addition, rather than go through the HRC complaint process, a complainant may instead file a civil suit against the alleged wrongdoer. Available relief includes an injunction against further violations, the recovery of actual damages, and reasonable attorneys' fees.

Sexual Equality
Discrimination on the basis of sex for any student in grades K-12 of the Washington public schools is expressly prohibited by this sexual equity law. There is overlap with the WLAD, in that discrimination on the basis of sex is expressly prohibited under each and both apply to schools.

Under the sexual equity law, the OSPI is charged with developing regulations and guidelines to eliminate sex discrimination as it applies to employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students. The OSPI is also charged with developing criteria for use by school districts in developing sexual harassment policies and districts are required to adopt and implement such a policy.

The OSPI is specifically required to monitor compliance by districts, establish a compliance timetable and regulations for enforcement, and establish guidelines. Pursuant to rules adopted by the OSPI, each district must appoint an employee who is responsible for monitoring and coordinating compliance, including taking and investigating complaints and providing a written report to the district superintendent. The district superintendent must respond in writing to the complainant within 30 days of receipt of the complaint, setting forth whether the district denies the allegations or spelling out the nature of the corrective actions deemed necessary. If the complainant remains aggrieved, he or she may appeal to the school board. Upon receipt of a complaint, the board must schedule a hearing and render a written decision.

There is a right of appeal to OSPI from a school board's decision. Such appeals must be conducted "de novo", which means that the parties present evidence afresh rather than just putting the record from the board before OSPI. The OSPI is also explicitly empowered to enforce and obtain compliance by appropriate order, which may include the termination of all or part of moneys to the offending district, the termination of specified programs in which violations are flagrant, the institution of a mandatory affirmative action program, and the placement of the offending district on probation with appropriate sanctions until compliance is achieved.

Similar to the WLAD, an aggrieved person has the right to bring a civil action in superior court. Both civil damages and appropriate injunctive relief are available. There is no explicit right to recover attorneys' fees as there is under the WLAD.

This 1975 law is specifically supplementary to, and does not supersede, existing law and procedures and future amendments thereto relating to unlawful discrimination based on sex.

Harassment, intimidation, and bullying prevention policies
Each school district is required to adopt a policy that prohibits the harassment, intimidation, or bullying of any student. The OSPI was charged with providing a model harassment, intimidation, and bullying prevention policy as well as disseminating training materials. The Washington State School Directors Association (WSSDA) was charged with developing a model cyber bullying policy.

The OSPI model policy and procedure includes informal and formal complaint processes that can be adopted and implemented at the school district level. The OSPI Safety Center website, which hosts the model policy and procedure, notes that each school board adopts its own discipline policies and that, with certain limited exceptions such as in the case of sex discrimination, the OSPI has not been authorized to enforce local rules adopted by each individual school board.

Federal Civil Rights Laws.

Section 504 of the Rehabilitation Act of 1973 and Individuals with Disabilities Act (IDEA)

Section 504 and IDEA require school districts to provide students with disabilities a free appropriate public education. IDEA requires an individualized education program (IEP) to be developed that outlines what the special education and related services are that will be provided. Section 504 does not require an IEP but school districts must be able to demonstrate what special education or regular education and related aids and services are being provided to a child with a disability.

There are a range of options for addressing individual complaints and conflicts under these laws, including complaints alleging an act of discrimination on the basis of disability:

- Collaborative problem solving.
- Mediation. Funded by the OSPI, mediation is available statewide at no charge to parents or districts.
- Citizen complaint to the OSPI about alleged district violation. The OSPI investigates to determine whether a violation has occurred. If there is not enough information, the OSPI staff will visit the district. The OSPI issues a final decision within 60 days, unless there has been an extension of time. Either the complainant or the district may ask the U.S. Department of Education to review the final decision.
- Citizen complaint to U.S. Department of Education, Office for Civil Rights (OCR). A complainant may choose, but is not required, to first utilize the institution's grievance process.
- Due process hearing may be requested by a parent of a student with disabilities, the adult student, or a school district. Any such request is directed to the OSPI. Hearings are conducted by administrative law judges appointed by the OSPI. Any party aggrieved by the final decision may appeal to the courts. Parents and/or an adult student may recover attorneys' fees if they prevail.

Title VI of the 1964 Civil Rights Act

This federal law prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal funds. Agencies and institutions that receive funds covered by Title VI include the 50 state education agencies and their sub-recipients, as well as many other entities.

The OCR's principal enforcement activity is through investigation and resolution of complaints filed by individuals alleging discrimination. The OCR also conducts a compliance review program of selected recipients in order to identify and remedy discrimination that may not be addressed through complaint investigations. Compliance reviews differ from complaint investigations in that the OCR has discretion in selecting the institutions it will review. Additionally, through a program of technical assistance, the OCR provides guidance and support to recipient institutions to assist them in voluntarily complying with the law.

Title IX of the 1972 Education Amendment
Title IX of the Education Amendments was enacted in 1972. Since then, all institutions receiving federal assistance for educational programs or activities have been obligated to protect against discrimination on the basis of sex. The law is probably best known for enforcing equity in sports, however, its text addresses all educational resources, programs and activities.

Title IX regulations require recipients to designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of discrimination on the basis of sex in educational programs and activities. These are similar to the requirements imposed under Washington's sex equity law.

Withholding of Funds As Means of Enforcement.
State law specifically confers authority upon the OSPI to represent the state in the receipt and administration of federal funds. Pursuant thereto, the OSPI has adopted regulations that provide for a citizen complaint process relative to violations of certain federal education laws, including Title IX, by recipients of federal funds. Also included in these OSPI regulations is a provision indicating that, if compliance is not achieved, the OSPI may initiate fund withholding, fund recovery, or any other sanctions deemed appropriate.

The federal government requires that the OSPI provide written assurances of both state and local compliance with several civil rights and access laws, including Title VI, Title IX, Section 504, the Age Discrimination Act of 1975 and, if applicable, the Boy Scouts of America Equal Access Act of 2001, as well as all regulations, guidelines, and standards adopted under these statutes. Included in this assurance form is a provision indicating that noncompliance may result in the termination of funds, the denial of future funds, a court order requiring compliance, or other judicial relief.

Summary of Bill:

The Legislature recognizes that the school code currently includes a chapter recognizing the deleterious effect of discrimination on the basis of sex, specifically prohibiting such discrimination in the state's public schools, and requiring the OSPI to monitor and enforce compliance. The Legislature further finds that the common school code does not include specific similar acknowledgment of the right to be free from discrimination on other bases, nor do the common school laws specifically direct the OSPI to monitor and enforce compliance with various other federal and state civil rights laws. Finally, the Legislature acknowledges the request from the Committee to specifically authorize the OSPI to take affirmative steps to ensure that school districts comply with all state and federal civil rights laws, similar to its authority with respect to discrimination on the basis of sex.

A new chapter is added to the school code, prohibiting discrimination on all of the same bases as prohibited under the WLAD. The new chapter is modeled after the Sexual Equality chapter already in the school code. The OSPI is tasked with developing rules and guidelines to eliminate discrimination as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students.

The OSPI is to monitor and enforce compliance with the chapter and other state and federal laws prohibiting discrimination, specifically including the WLAD and all of the federal laws for which the federal government requires written assurances. Similar to orders under the Sexual Equality chapter, the OSPI order may include, but is not limited to, termination of all or part of federal financial assistance or state apportionment or categorical monies to the offending school district, termination of specified programs in which violations may be flagrant, institution of corrective action, and the placement of the offending school district on probation with appropriate sanctions until compliance is achieved.

Similar to the parallel provision found in the Sexual Equality chapter, any person aggrieved by a violation has a right of action in superior court for civil damages and such equitable relief as the court determines. The chapter is supplementary to and does not supersede existing law and procedures relating to unlawful discrimination.

Appropriation: None.

Fiscal Note: Requested on January 21, 2010.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.