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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WASHINGTON  
KW

NO. 71419-8-I  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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

Appellants,

v.

Mercer Island School District,

Respondent.

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REPLY BRIEF OF APPELLANTS

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## INTRODUCTION

In light of Respondent's brief, Appellants stand on the arguments presented in their initial brief as correct and true. Rather than regurgitate in their Reply brief a mere summary of the extensive arguments expressed in Appellants' Initial Brief, Appellants believe oral argument will be most helpful for a full discussion of the issues. The Appellants have briefly responded to certain issues to which a response would be helpful, however the lack of response to any issues is not an abandonment of those issues.

**I. The Findings of Fact by the ALJ remain undisputed thus ALJ's substantial factual evidence still controls *de novo* analysis of the District's deliberate indifference**

Notably, the District acknowledges that the Order on Administrative Appeal by the Hon. Superior Court Judge Rogers (i.e., the subject of this appeal) accepted the ALJ's Findings of Facts in full. Br. Respondent 11. Yet the District still wishes to minimize the effect of these undisputed factual findings by disparaging, and verily disputing, the ALJ's substantial undisputed factual record that is the only true measure of the District's response.

This Court should not "take the bait"; a *de novo* review where the facts are undisputed necessarily requires weighing the ALJ's factual findings to determine if they support the conclusion of deliberate indifference. The Superior Court did

not properly weigh the ALJ's factual findings in reversing the finding of deliberate indifference. Thus, the Superior Court committed legal error.

**II. The reversal of ALJ's deliberate indifference finding required *de novo* consideration of administrative enforcement liability standard adopted by the Washington state education agency, and Parents are not estopped from asserting WA legal guidelines.**

The District urges that the official interpretive guidance of U.S. DOE 2010 "Dear Colleague" Letter setting forth a lower Administrative Enforcement Liability Standard for purely administrative enforcement actions should be ignored. This is because it wishes this Court to ratify the District's ignorance of the (February, 2012) OSPI Guidelines publication that reproduced the 2010 DCL verbatim, whereby the OSPI clearly adopted a lower standard for administrative enforcement that follows much of the 2010 DCL guidance. Br. Appellants at 38.

Both the District and the Superior Court ignored the OSPI Guidelines that dictate that school districts are "responsible for addressing discriminatory harassment about which it knows or reasonably should have known" under the Washington anti-discrimination statutes RCW 28A.640.010 and WAC 392-190-005. Br. Appellants 38.

The District's convenient disavowal of any understanding of the administrative complaint process is disingenuous. It is inarguable that this is a

purely administrative enforcement matter. The Parents filed a purely administrative complaint that was heard by a Washington State Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) that made a conclusion of law that the District's response to the underlying complaint of school-based peer harassment rose to the level of deliberate indifference (based on undisputed factual findings). There are no money damages at issue.

It is clear the ALJ's legal conclusion that District's unreasonable response satisfied the more stringent deliberate indifference standard would, *ipso facto*, necessarily satisfy the much lower administrative enforcement liability standard of "knows or reasonably should have known." Thus, reversal of the ALJ's deliberate indifference finding, necessarily requires *de novo* consideration of if the District's conduct still violated the lesser liability standard. The administrative standard was overlooked and the Parents cannot be "estopped" from correctly pointing out this legal error and legal guidelines applicable to the instant matter.

Upon rejection of the ALJ's deliberate indifference finding, *de novo* review required consideration of the 2010 Dear Colleague letter adopted by the state agency, OSPI, to analyze the District's liability. After reversing the ALJ's decision, the Superior Court failed to give the U.S. Department of Education's 2010 DCL any consideration or due deference. This is clear legal error.

DATED: December 1, 2014

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**CERTIFICATE OF SERVICE**


The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below, the foregoing **Reply Brief of Appellants** was caused to be served via First-Class U.S. Mail and Email on the individuals and/or offices at the addresses listed below:

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The undersigned caused the original document to be filed with the appellate court clerk, by mailing the same via First-Class U.S. Mail and via Facsimile to the following:

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Dated: December 1, 2014 at Seattle, Washington.

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