

NO. 71419-8-I

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

N.W. and R.W., on behalf of B.W.,

Appellants,

v.

Mercer Island School District,

Respondent.

**AMICUS CURIAE BRIEF OF OFFICE OF SUPERINTENDENT
OF PUBLIC INSTRUCTION**

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I. INTRODUCTION

In 2010, the Legislature enacted RCW 28A.642 which broadly prohibits discrimination in Washington's public common schools. The Office of Superintendent of Public Instruction (OSPI) is tasked with ensuring that local school districts comply with state civil rights laws. See, e.g., RCW 28A.640.050; RCW 28A.642.050. This stems from OSPI's discrimination complaint process, one facet of its civil rights enforcement system. See generally RCW 28A.640, .642; WAC 392-190 (2011).

One legal issue raised in this appeal is whether OSPI may order corrective action against a school district if OSPI finds that the district failed to address discriminatory student-on-student harassment about which it "knew or should have known," or whether the district must be "deliberately indifferent" to such harassment. The proper standard for OSPI to apply when it enforces this anti-discrimination law is the "known or should have known" standard. Although the "deliberate indifference" standard was applied by the administrative law judge (ALJ) in the adjudicative proceeding below, 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. Because OSPI acted as a neutral adjudicator in

the matter below, OSPI only addresses the legal standard as it may be applied in future cases, and not the underlying dispute before the court. As set forth below, OSPI has consistently applied the “known or should have known” standard in its administrative enforcement efforts, and has recently amended its rules to expressly adopt that standard.

II. IDENTITY AND INTEREST OF AMICUS

OSPI is the state agency that oversees Washington’s common school system. OSPI performs a variety of functions, including designating state learning standards (RCW 28A.655.070), apportioning state and federal funds to school districts (RCW 28A.150.290), administering rules related to the certification and professional conduct of public school employees (RCW 28A.410.010), and ensuring that local school districts comply with relevant laws, including state civil rights laws. See, e.g., RCW 28A.640.050; RCW 28A.642.050.

OSPI is tasked with developing rules and guidelines to eliminate discrimination in Washington schools, and to enforce the state’s anti-discrimination laws. RCW 28A.642.020-.030, .050. RCW 28A.642.020 directs OSPI to adopt rules and guidelines to “eliminate discrimination

prohibited in RCW 28A.642.010.”¹ The Legislature also directed OSPI to monitor local school districts’ compliance with RCW 28A.642, and establish a compliance timetable, rules, and guidelines for enforcement. RCW 28A.642.030. Shortly after the enactment of RCW 28A.642, OSPI adopted rules under this authority. WAC 392-190 (2011).

OSPI carries out its responsibilities under RCW 28A.642 through its Equity and Civil Rights Office. The Office provides training materials for school district employees,² resources for students and families,³ guidance for school district administrators,⁴ as well as general materials for public education and outreach about civil rights in Washington’s education system.⁵ The Office also conducts compliance monitoring of school districts by collecting and analyzing information from school districts; performing site visits; and appointing ALJs to review discrimination complaint appeals. WAC 392-190-075 to -077 (2011).

¹ The discrimination prohibition of RCW 28A.642.010 reads: “Discrimination in Washington public schools on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability is prohibited.”

² See OSPI, Equity & Civil Rights, Training Materials and Webinars, <https://www.k12.wa.us/Equity/Trainings.aspx> (last visited Dec. 7, 2014).

³ See OSPI, Equity & Civil Rights, For Families, <https://www.k12.wa.us/Equity/Families/default.aspx> (last visited Dec. 7, 2014).

⁴ See OSPI, Equity & Civil Rights, For Districts, <https://www.k12.wa.us/Equity/Districts/default.aspx> (last visited Dec. 7, 2014).

⁵ See OSPI, Equity & Civil Rights, Civil Rights Laws, <https://www.k12.wa.us/Equity/CivilRights/default.aspx> (last visited Dec. 7, 2014).

As required by the Legislature in RCW 28A.642.020, OSPI also issued Guidelines in February 2012 intended to clarify school district responsibilities under the regulatory regime of WAC 392-190 (2011). In the Guidelines, OSPI stated that a district is responsible for adequately addressing discriminatory harassment about which it knows or reasonably should have known. Br. of Resp't, App. B at 32-33.

In 2014, OSPI undertook further rulemaking under RCW 28A.642, after identifying areas that required revision or clarification in order to achieve the legislative mandate of RCW 28A.642. Those issues have been addressed with amendments to WAC 392-190, which become effective on December 19, 2014.⁶ Under 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).

OSPI's interest in this appeal is to inform the Court that the “known or should have known” standard has been established by OPSI for purposes of administrative enforcement, and is necessary to OSPI's efforts to eliminate discrimination as required by RCW 28A.642.020. The “known or should have known” standard allows OSPI to more effectively enforce RCW 28A.642 than the “deliberate indifference” standard that

⁶ The relevant 2014 amendments to WAC 392-190, effective December 19, 2014, are attached as Appendix A. They are cited as 2014 regulations to distinguish from WAC 392-190 (2011), which governed during the events that underlie this dispute.

was applied by the ALJ in this case. OSPI respectfully requests that the Court decide this appeal narrowly, in a manner that does not unnecessarily limit OSPI's efforts to address future complaints of unlawful discrimination under the proper standard for administrative enforcement, which is now expressly stated in the 2014 amendments to WAC 392-190.

III. STATEMENT OF THE CASE

OSPI will address only certain procedural facts related to this case.⁷ OSPI's 2011 rules prescribed a procedure that required school districts to investigate and respond to complaints of unlawful discrimination; allowed complainants to appeal a district's response to the local school board; and, if the complainant disagreed with the school board's decision, authorized complainants to appeal that decision to OSPI. WAC 392-190-065 to -075 (2011). Appeals to OSPI resulted in formal adjudicative proceedings under the Administrative Procedure Act (APA), RCW 34.05. WAC 392-190-075 (2011). See RCW 34.05.410-.476. ALJs from the state's independent Office of Administrative Hearings presided over these cases on behalf of OSPI and issued final decisions. WAC 392-190-075(1) (2011). The complainants —not

⁷ OSPI was not a party to the adjudicative proceeding below that gave rise to this appeal. OSPI acted solely to appoint an ALJ, and it is, at most, a nominal party to these judicial proceedings. See Duwamish Valley Neighborhood Pres. Coal. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 97 Wn. App. 98, 100, 982 P.2d 668 (1999).

OSPI—had the responsibility for prosecuting the appeals. School districts were parties to defend their actions. WAC 392-190-075(3) (2011).

These rules were in effect in fall 2011 when the events at issue in this appeal occurred. Under former WAC 392-190-075 (2011), an ALJ conducted an administrative proceeding at the request of N.W. and R.W., parents who had complained to the Mercer Island School District (School District) that their child was a victim of racial harassment by another student. Parents N.W. and R.W. appeared pro se to present their case. The parents argued that the School District acted with deliberate indifference in its response to their complaint of racial discrimination. See CP 30-31 (Conclusions of Law (CL) 15 and n.15). The ALJ adopted the “deliberate indifference” standard. See CP 29-31 (CL 12-18). Under that standard, the ALJ concluded that the School District violated RCW 28A.642 and WAC 392-190 (2011) in its response to the parents’ complaint of student-on-student racial harassment. CP 32-33 (CL 19-23). The ALJ ordered the School District to train its administrators about the requirements of state anti-discrimination laws, and to continue annual presentations to middle school students about harassment, intimidation, and bullying. CP 34 (ALJ Order 2-3).

The School District filed a petition for judicial review in King County Superior Court. CP 1-35. The parents’ superior court brief argued

for affirmance of the ALJ Order under the “deliberate indifference” standard. CP 712. OSPI filed a brief to inform the superior court that school districts should be held to a “known or should have known” legal standard in administrative enforcement proceedings under RCW 28A.642, while acknowledging that the “deliberate indifference” standard had been applied by the ALJ and was not disputed by the parties. CP 705. Ultimately, the superior court applied the “deliberate indifference” standard, citing the parties’ stipulation to that standard in the ALJ’s proceeding. The superior court reversed the ALJ’s decision, reasoning that the School District’s conduct did not rise to the level of deliberate indifference. CP 839-843. The parents then filed this appeal.

IV. ARGUMENT

The Court should reject the invitation to adopt the “deliberate indifference” as the applicable standard for all of OSPI’s administrative enforcement under RCW 28A.642. In any event, the Court should restrict its analysis to OSPI’s 2011 rules, and need not opine on the new administrative rules explicitly adopting a “known or should have known” standard. The Court can resolve the dispute at hand without unnecessarily restricting OSPI’s ability to hold school districts responsible for adequately addressing discriminatory harassment under the more effective “known or should have known” standard in the future.

A. The Legislature Delegated to OSPI the Duty to Adopt Rules and Guidelines Designed to Eliminate Discrimination

The Legislature broadly tasked OSPI with the duty to “develop rules and guidelines to eliminate discrimination prohibited in RCW 28A.642.010,” and to “monitor local school districts’ compliance” by establishing “a compliance timetable, rules, and guidelines for enforcement of [RCW 28A.642].” RCW 28A.642.020, .030. The Legislature delegated to OSPI the power to enforce compliance with RCW 28A.642 by monitoring school districts, and taking corrective action up to and including termination of state funding. RCW 28A.642.050.

RCW 28A.642 does not specify a process or legal standard for OSPI to apply to determine whether discrimination has occurred and whether a district has sufficiently remedied discrimination. Thus, OSPI must define the standards and procedures for evaluating districts’ responses to alleged discrimination, in order to make the general prohibition of RCW 28A.642.010 meaningful and carry out the intent of the Legislature. See Tuerk v. Dep’t of Licensing, 123 Wn.2d 120, 864 P.2d 1382 (1994) (“Agencies . . . have implied authority to determine specific factors necessary to meet a legislatively mandated general standard.”).

In February 2012, OSPI published Guidelines as directed by RCW 28A.642.020 and .030.⁸ The Guidelines set forth the “known or should have known” standard for evaluating district compliance: a school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known, and take prompt and effective steps reasonably calculated to end any harassment.⁹

However, in this and other cases, school districts and ALJs questioned the clarity of WAC 392-190 (2011) and the legal effect of the 2012 Guidelines. See, e.g., CP 29-31 (CL 12-18). In response, OSPI initiated rule amendments in order to establish an administrative enforcement process that is directed by OSPI, and that operates under a clearly articulated legal standard. After public notice and comment, amended rules were adopted and will go into effect on December 19, 2014. Wash. St. Reg. 14-23-072.

The amended rules expressly state the standard OSPI applies when determining whether school districts have adequately addressed complaints of discriminatory harassment: school districts must take

⁸ The Guidelines, *Eliminating Discrimination in Public Schools*, is Appendix B to the Brief of Respondent.

⁹ Br. of Resp't, App. B at 32-33. “A school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known. . . . A school district must take prompt and appropriate action to investigate or otherwise determine what occurred. . . . If an investigation reveals that discriminatory harassment has occurred, the school 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.”

“prompt and appropriate action to investigate” allegations of discriminatory harassment about which the district “[knows], or . . . should have known.” WAC 392-190-0555 (2014).

In addition, the December 2014 WAC amendments replace the former ALJ-conducted administrative proceeding with a new complaint and investigation process administered directly by OSPI. Under WAC 392-190-075 (2014), complainants dissatisfied with the outcome of their district’s response may file a complaint with OSPI. Upon receiving a complaint, OSPI may initiate an investigation, make determinations with respect to allegations of noncompliance, and order a school to take corrective actions. WAC 392-190-075, -080 (2014).¹⁰ School districts will be entitled to an adjudicative proceeding under the APA. WAC 392-190-079(1) (2014).

B. OSPI Must Apply the “Known or Should Have Known” Standard in Administrative Enforcement to Accomplish the Goal of Eliminating Discrimination

The “known or should have known” standard—expressly adopted both in OSPI’s 2012 Guidelines and the 2014 WAC amendments—more effectively works toward the goal to “eliminate discrimination” than does the “deliberate indifference” standard adopted by the parties and the ALJ

¹⁰ This is similar to the role played by the Department of Education’s Office for Civil Rights (OCR) under Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 100.7 (discussing OCR investigations into violations of Title VI).

in this case. For that reason, the Court should reject the argument that the higher “deliberate indifference” standard is mandated by RCW 28A.642. See Br. of Resp’t at 17.

Under the deliberate indifference standard, a district could respond negligently to a complaint of discrimination, and OSPI would have no ability to impose corrective action on the district. Such a result would be contrary to RCW 28A.642.020’s goal of eliminating discrimination. In fact, the 2014 WAC amendments make it clear that when a school district employee has actual or constructive knowledge of discriminatory harassment, the district is required to “take prompt and appropriate action to investigate” the harassment and 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.” See WAC 392-190-0555 (2014).

The language of the 2014 WAC amendments is consistent with the language of administrative guidance issued to implement federal anti-discrimination laws. The U.S. Department of Education’s guidance in its

2010 Dear Colleague Letter on Harassment and Bullying¹¹ states that a school has an obligation to “take immediate and appropriate action to investigate or otherwise determine what occurred,” when it “knows or reasonably should have known” about harassment. Br. of Resp’t, App. A 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.” *Id.* at 2-3. OSPI’s 2012 Guidelines use nearly identical language. *See* Br. of Resp’t, App. B at 32-33. By adopting this standard, OSPI explicitly rejected deliberate indifference as the standard for purposes of administrative enforcement of RCW 28A.642.¹²

Another argument raised in favor of the deliberate indifference standard is that districts may be subsequently found liable in a claim for money damages based on the doctrine of *res judicata*. *See* Br. of Resp’t

¹¹ This letter is Appendix A to the Brief of Respondent. The letter discusses the responsibilities of recipients of federal education funding to address discriminatory harassment under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d to 2000d-7), Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131-12134). *See* Br. of Resp’t, App. A at 1.

¹² The School District is incorrect in asserting that OSPI looked to the deliberate indifference standard in drafting the 2012 Guidelines. *See* Br. of Resp’t at 18. The Guidelines explicitly state that “[a] school district is responsible for addressing discriminatory harassment about which it knows or reasonably should have known.” Br. of Resp’t, App. B at 32. The 2014 rules also expressly adopt this standard. WAC 392-190-0555(2) (2014).

at 45, 47 (arguing that civil liability under RCW 28A.642.040 would follow from a finding of discrimination). This argument assumes that the same legal standard must apply to two different situations. The civil right of action is *only* available in superior court, and is independent of any OSPI administrative enforcement action.¹³ In fact, at least one federal court has found that under Title IX of the Education Amendments of 1972, a different standard applies when a plaintiff seeks equitable relief, as here, rather than damages. See Frederick v. Simpson Coll., 160 F. Supp. 2d 1033, 1035-36 (S.D. Iowa 2001) (finding that the deliberate indifference standard is specific to claims for monetary damages, and does not apply to claims for equitable relief under Title IX).¹⁴

Thus, RCW 28A.640 does not mandate the “deliberate indifference” standard for purposes of OSPI’s enforcement authority exercised through administrative proceedings.

¹³ RCW 28A.642.040 states persons “aggrieved by a violation of [RCW 28A.642], or aggrieved by a violation of any rule or guideline adopted under [RCW 28A.642], has a right of action in superior court for civil damages and such equitable relief as the court determines.” OSPI takes no position on the proper legal standard for a damages claim.

¹⁴ See also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288-90, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998) (differentiating between notice requirements for administrative orders of remedial action, administrative actions to suspend or terminate funding, and civil suits for damages); Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 639-40, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (applying the deliberate indifference standard to an incident of student-on-student harassment, on the basis that Title IX is Spending Clause legislation, and entitles funding recipients to notice that they could be liable for the conduct at issue).

C. This Court Should Issue a Narrow Holding That Addresses the Applicable Standard for This Case Without Impacting OSPI's 2014 Rule Amendments

The School District also argues that the deliberate indifference standard should apply to this appeal under the doctrine of judicial estoppel. See Br. of Resp't at 48-50. While OSPI does not take a position on the applicable standard for this particular matter, should this Court apply the "deliberate indifference" standard for this case, OSPI respectfully requests that this Court base its decision on the School District's judicial estoppel argument.

Applying judicial estoppel here, rather than engaging in legal analysis regarding the proper standard, gives the appropriate deference to OSPI which has been delegated authority by the Legislature to supervise school districts' compliance with anti-discrimination laws. This deference is consistent with principles of administrative law. RCW 34.05.574 is a section of the APA that applies to appeals such as this one; judicial reviews of administrative agency decisions. RCW 34.05.574 reads in relevant part that when "reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency." Furthermore, courts "accord substantial deference to the agency's

interpretation of law in matters involving the agency's special knowledge and expertise. Overlake Hosp. Ass'n v. Dep't of Health, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010).

The Legislature did not specify a procedure or legal standard in RCW 28A.642. Instead, it delegated to OSPI the discretion to adopt the rules and guidelines best suited to address discrimination in Washington schools. RCW 28A.642.010-.050. OSPI's Equity and Civil Rights Office has special knowledge and expertise relating to both state and federal anti-discrimination laws, and regularly conducts compliance reviews of school districts under those laws. In deciding this appeal, the Court should not limit OSPI's ability to apply the "known or should have known" standard when addressing future discrimination complaints under OSPI's December 2014 amendments to WAC 392-190.

V. CONCLUSION

OSPI respectfully requests that if the Court applies the deliberate indifference standard to this case, that it does so under the doctrine of judicial estoppel. Such a holding would resolve the matter before the Court, while still allowing OSPI to work toward its mandate to eliminate discrimination in Washington under the “known or should have known” enforcement standard, and the procedures established in OSPI’s December 2014 WAC amendments.

RESPECTFULLY SUBMITTED this 15th day of December 2014.

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APPENDIX A

WAC 392-190 (2014)

WAC 392-190-005 Purpose—Elimination of unlawful discrimination in public schools

The purpose of this chapter is to establish rules to implement chapters 28A.640 and 28A.642 RCW. Chapters 28A.640 and 28A.642 RCW prohibit discrimination on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal by a person with a disability in Washington public schools, including public charter schools. Broad federal regulations implementing Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and Titles VI and VII of the Civil Rights Act of 1964 similarly prohibit discrimination based on sex, race, creed, religion, color, national origin, and disability in federally assisted education programs or activities. As a result, several substantive areas have been similarly identified and addressed by both state and federal enactments.

In accordance with chapters 28A.640 and 28A.642 RCW and RCW 28A.710.040, it is unlawful for any public school district or public charter school to discriminate on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal with regard to any program or activity conducted by or on behalf of a school district or public charter school including, but not limited to, recreational and athletic activities, extracurricular activities, preschool, adult education, community education, and vocational-technical program activities.

In accordance with RCW 28A.640.020 and 28A.642.020, the office of superintendent of public instruction will develop guidelines to supplement this chapter and to guide its interpretation and administrative enforcement of chapters 28A.640 and 28A.642 RCW under WAC 392-190-060 through 392-190-081. Under RCW 28A.640.050 and 28A.642.050, the office of superintendent of public instruction has the authority to enforce the guidelines and this chapter.

WAC 392-190-007 Compliance with federal law

For purposes of administrative enforcement of this chapter under WAC 392-190-060 through 392-190-081, and unless otherwise provided in this chapter or in the guidelines adopted under WAC 392-190-005, the office of superintendent of public instruction adopts the definitions, requirements, and procedural safeguards set forth by the United States Department of Education pursuant to Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964.

WAC 392-190-0555 Discriminatory harassment

(1) For purposes of administrative enforcement of this chapter under WAC 392-190-060 through 392-190-081, a school district or public charter school violates a student's rights regarding discriminatory harassment, including sexual harassment as defined under WAC 392-190-056, when the following conditions are met:

(a) The alleged conduct is based on a student's sex, race, creed, religion, color, national origin, sexual orientation, gender expression, gender identity, honorably discharged veteran or

military status, presence of any sensory, mental, or physical disability, or use of a trained dog guide or service animal;

(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 under WAC 392-190-060 through 392-190-081, the office of superintendent of public instruction 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.

(3) Nothing in this chapter is intended to diminish or otherwise modify an individual's right to bring an action under state or federal law alleging that the individual has been harmed by conduct or communication related to the individual's sex, race, creed, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, presence of any sensory, mental, or physical disability, or use of a trained dog guide or service animal that creates a hostile or abusive educational or workplace environment.

WAC 392-190-060 Compliance—School district or public charter school—Designation of responsible employee—Notification

(1) The superintendent of each school district or the public charter school governing board must designate at least one employee who is responsible for monitoring and coordinating the district's or charter school's compliance with this chapter and the guidelines adopted under WAC 392-190-005. The employee designated under this section is also responsible for ensuring that all complaints communicated to the school district or public charter school under WAC 392-190-065 are promptly investigated and resolved.

(2) Each school district and public charter school must, once each year or more often as deemed necessary, publish notice in a manner that is reasonably calculated to inform all students, students' parents and guardians, and employees of the complaint procedure set forth in WAC 392-190-065, 392-190-070 and 392-190-075. School districts and public charter schools must provide this notice in a language that each parent and guardian can understand, which may require language assistance for parents and guardians with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(3) Each school district and public charter school must include a nondiscrimination statement in written announcements, notices, recruitment materials, employment application forms, and other publications made available to all students, parents, or employees. The statement must include:

(a) Notice that the district or public charter school may not discriminate in any programs or activities on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal;

(b) The name or title, office address, and telephone number of the employee or employees designated under this section, as well as the employees designated to ensure compliance with Section 504 of the Rehabilitation Act of 1973 and Title IX of the Education Amendments of 1972; and

(c) Pursuant to the Boy Scouts of America Equal Access Act, notice that the school district or public charter school provides equal access to the Boy Scouts of America and any other youth group listed in Title 36 of the United States Code as a patriotic society.

(4) School districts and public charter schools must not adopt any policy, procedure, or practice that would limit a person's right to file a complaint under this chapter or have the effect of discouraging any person from utilizing the complaint procedure in WAC 392-190-065 through 392-190-075. School districts and public charter schools must not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right secured by this chapter or the guidelines adopted under WAC 392-190-005 or because the individual has made a complaint or participated in an investigation under this chapter.

WAC 392-190-065 Compliance—Complaint procedure—School district or public charter school

Each school district and public charter school must establish a discrimination complaint procedure that, at a minimum, includes the following requirements:

(1) Anyone may file a complaint with a school district or public charter school alleging that the district or charter school has violated this chapter or the guidelines adopted under WAC 392-190-005. The complaint must be written and describe the specific acts, conditions, or circumstances alleged to violate this chapter or the guidelines adopted under WAC 392-190-005.

(2) A school district or local charter school may establish a complaint filing deadline. The filing deadline must be no less than one year after the occurrence that is the subject matter of the complaint. A complaint filing deadline may not be imposed if the complainant was prevented from filing a complaint due to:

(a) Specific misrepresentations by the school district or public charter school that it had resolved the problem forming the basis of the complaint; or

(b) Withholding of information by the school district or public charter school that was required to be provided under this chapter or the guidelines adopted under WAC 392-190-005.

(3) Complaints may be submitted by mail, fax, electronic mail, or hand delivery to any district, school, or charter school administrator or to any employee designated under WAC 392-190-060. Any district, school, or charter school administrator who receives a complaint that meets the criteria in this section must promptly notify the employee designated under WAC 392-190-060.

(4) Upon receipt of the complaint, the employee or employees designated under WAC 392-190-060 must:

(a) Provide the complainant a copy of the school district's or public charter school's discrimination complaint procedure in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964; and

(b) Ensure that the school district or public charter school conducts a prompt and thorough investigation into the allegations in the complaint.

(5) Following the completion of the investigation, the designated employee or employees must provide the district superintendent, charter school administrator, or designee with a full written report of the complaint and the results of the investigation. The district superintendent, charter school administrator, or designee must respond in writing to the complaining party within thirty calendar days after the school district or public charter school received the complaint, unless otherwise agreed to by the complainant or if exceptional circumstances related to the complaint require an extension of the time limit. If an extension is needed, the school district or public charter school must notify the complainant in writing of the reasons for the extension and the anticipated response date; this notice must be provided in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964. At the time the school district or public charter school responds to the complainant, the school district or charter school must send a copy of the response to the office of superintendent of public instruction.

(6) The response of the school district superintendent, charter school administrator, or designee required by this section must include:

- (a) A summary of the results of the investigation;
- (b) Whether the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005;
- (c) Notice of the complainant's right to appeal under WAC 392-190-070, including where and to whom the appeal must be filed; and

(d) If the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005, the corrective measures deemed necessary to correct the noncompliance. Any corrective measures must be instituted as expeditiously as possible but no later than thirty calendar days after the school district's or public charter school's written response to the complainant, unless otherwise agreed to by the complainant.

(7) The school district's or public charter school's response to the complainant must be in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(8) The complainant and the school district or public charter school may agree to resolve the complaint in lieu of an investigation. If the complaint is resolved to the satisfaction of the parties involved, no further action is necessary under this section.

(9) Nothing in this section prohibits a school district or public charter school from adopting a separate procedure to resolve informal (i.e., verbal) complaints or allegations. An informal complaint procedure must not limit a complainant's right to file a formal complaint under this section. When utilizing an informal complaint procedure, school districts and public charter schools must notify complainants about their right to file a formal complaint under this section. The school district or public charter school must provide this notice in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(10) Nothing in this section is intended to modify or supersede any grievance procedure provided for in a school district or public charter school collective bargaining agreement.

WAC 392-190-070 Compliance—Appeal procedure—School district or public charter school

(1) A school district's or public charter school's complaint procedure required under WAC 392-190-065 must provide an option to appeal the decision of the school district superintendent, charter school administrator, or designee to a party or board that was not involved in the initial complaint or investigation.

(2) A school district or public charter school may establish a time limit to file appeals. Appeal time limits must be no less than ten calendar days from the date the complainant received the school district's or public charter school's response under WAC 392-190-065.

(3) The school district or public charter school must provide a written appeal decision to the complainant in a timely manner, not to exceed thirty calendar days from the date the school district or charter school received the appeal, unless otherwise agreed to by the complainant. The appeal decision must include notice of the complainant's right to file a complaint with the superintendent of public instruction under WAC 392-190-075. The school district or charter school must send a copy of the appeal decision to the office of superintendent of public instruction.

(4) The school district's or public charter school's appeal decision must be provided in a language the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

WAC 392-190-075 Compliance Complaint procedure—Office of superintendent of public instruction

(1) If a complainant disagrees with the school district's or public charter school's appeal decision under WAC 392-190-070, or if the school district or public charter school fails to comply with the procedures in WAC 392-190-065 or 392-190-070, the complainant may file a complaint with the office of superintendent of public instruction. A complaint must be received by the office of superintendent of public instruction within twenty calendar days after the complainant received the school district's or public charter school's written appeal decision, unless the office of superintendent of public instruction grants an extension for good cause. Complaints may be submitted by mail, fax, electronic mail, or hand delivery. A complaint must be in writing and include:

(a) A description of the specific acts, conditions, or circumstances alleged to violate this chapter or the guidelines adopted under WAC 392-190-005 and the facts on which the complaint is based;

(b) The name and contact information, including an address, of the complainant;

(c) The name and address of the school district or public charter school subject to the complaint;

(d) A copy of the school district's or public charter school's complaint and appeal decisions under WAC 392-190-065 and 392-190-070;

(e) A proposed resolution of the complaint or relief requested; and

(f) If the allegations regard a specific student, the complaint must also include:

(i) The name and address of the student, or in the case of a homeless child or youth, contact information for the student; and

(ii) The name of the school and school district, or public charter school, the student attends.

(2) Upon receipt of a complaint, the office of superintendent of public instruction may initiate an investigation, which may include reviewing relevant information or conducting an independent on-site review. The office of superintendent of public instruction may, at its discretion, investigate additional issues related to the complaint that were not included in the initial complaint or appeal to the school district or public charter school under WAC 392-190-065 or 392-190-070.

(3) Following an investigation, the office of superintendent of public instruction will make an independent determination as to whether the school district or public charter school has failed to comply with this chapter or the guidelines adopted under WAC 392-190-005. The office of superintendent of public instruction will issue a written decision to the complainant and the school district or public charter school that addresses each allegation in the complaint and any other noncompliance issues that the office of superintendent of public instruction has identified in the investigation. The written decision will include the corrective actions deemed necessary to correct any noncompliance and any documentation the school district or public charter school must provide to ensure that the corrective action is completed. The office of superintendent of public instruction will provide this written decision in a language that the complainant can understand, which may require language assistance for complainants with limited-English proficiency, in accordance with Title VI of the Civil Rights Act of 1964.

(4) All corrective actions must be completed within the timelines established in the written decision unless the office of superintendent of public instruction grants an extension. If timely compliance by a school district or public charter school is not achieved, the office of superintendent of public instruction may take actions to ensure compliance. Such actions may include, but are not limited to, referring the school district or public charter school to appropriate state or federal agencies empowered to order compliance with the law or the initiation of sanctions or corrective measures under WAC 392-190-080.

(5) A complaint may be resolved at any time when, before the conclusion of an investigation, the complainant, the school district, or the public charter school voluntarily agrees to resolve the complaint. The office of superintendent of public instruction may provide technical assistance and dispute resolution methods necessary to resolve a complaint.

WAC 392-190-0751 Mediation

(1) A school district or public charter school may offer mediation, at the district's or charter school's expense, to resolve complaints at any time during the complaint procedure set forth in WAC 392-190-065 through 392-190-075. The purpose of mediation is to offer both the complainant and the school district or public charter school an opportunity to resolve disputes and reach a mutually acceptable agreement concerning the complaint through the use of an impartial mediator.

(2) Mediation must be voluntary and requires the agreement of both parties. It may be terminated by either party at any time during the mediation process.

(3) Mediation cannot be used to deny or delay a complainant's right to utilize the complaint procedure set forth in WAC 392-190-065 through 392-190-075 or to deny any other rights afforded under this chapter or under chapters 28A.640 or 28A.642 RCW.

(4) Mediation must be conducted by qualified and impartial mediators. An individual who serves as a mediator:

(a) May not be an employee of any school district, public charter school, or other public or private agency that is providing education or related services to a student who is the subject of the mediation process; and

(b) Must not have a personal or professional conflict of interest.

(5) A person who otherwise qualifies as a mediator is not an employee of a school district, public charter school, or other public agency solely because he or she is paid by the school district, charter school, or agency to serve as a mediator.

(6) If the parties resolve a dispute through the mediation process, the parties may execute a legally binding agreement that:

(a) Sets forth that resolution;

(b) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent complaint, due process hearing, or civil proceeding; and

(c) Is signed by both the complainant and a representative of the school district or public charter school who has the authority to bind the district or charter school.

(7) The complainant and the school district or public charter school may agree to extend the timelines set forth in WAC 392-190-065 through 392-190-075 to pursue mediation.

(8) The office of superintendent of public instruction does not sign, approve, or endorse any mediation agreements reached by the parties. However, the office of superintendent of public instruction may assist both parties in understanding pertinent legal standards and possible remedies.

WAC 392-190-076 Monitoring—Duty of the superintendent of public instruction

(1) The office of superintendent of public instruction must monitor school districts' and public charter schools' compliance with this chapter, chapters 28A.640 and 28A.642 RCW, and the guidelines adopted under WAC 392-190-005.

(2) Procedures for monitoring school districts and public charter schools may include, but are not limited to:

(a) Investigation of complaints under WAC 392-190-075;

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

(c) Performance of on-site visits and interviews; and

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

WAC 392-190-077 Monitoring Procedures—Results

(1) Following its monitoring of a school district or public charter school under WAC 392-190-076, the office of superintendent of public instruction must notify the district or charter school of any findings of noncompliance with this chapter, chapters 28A.640 and 28A.642 RCW or the guidelines adopted under WAC 392-190-005. This notification of noncompliance must initiate a process of correction, verification, and validation to ensure that the noncompliance is corrected within a compliance period identified by the office of superintendent of public instruction. The compliance period must be no longer than one year from the identification of noncompliance. If noncompliance is systemic in nature, a systemic corrective action plan will be

required. The school district or public charter school will have thirty calendar days after its receipt of the notice of noncompliance to:

- (a) Accept the findings contained in the notification of noncompliance;
- (b) Provide the office of superintendent of public instruction with supplemental information that may serve as a basis for amending the notification of noncompliance; or
- (c) Provide any revisions to the proposed corrective action plan.

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

(3) If the school district or public charter school does not timely address the identified noncompliance with corrective actions, the superintendent of public instruction may, at his or her discretion, undertake actions to ensure the school district's or charter school's compliance. Such actions may include, but are not limited to, referring the school district or public charter school to appropriate state or federal agencies empowered to order compliance with the law, or the initiation of sanctions or corrective measures under WAC 392-190-080.

WAC 392-190-079 Monitoring—Appeal procedure

(1) A complainant, school district, or public charter school that desires to appeal the written decision of the office of superintendent of public instruction issued under WAC 392-190-075 or 392-190-077 may file an appeal with the superintendent of public instruction in accordance with the adjudicative proceedings in RCW 34.05.413 through 34.05.494, and the administrative practices and procedures of the superintendent of public instruction in chapter 392-101 WAC. To initiate review under this section, a complainant, school district, or public charter school must file a written notice with the superintendent of public instruction within thirty calendar days following the date of receipt of the office of superintendent of public instruction's written decision under WAC 392-190-075 or 392-190-077.

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

WAC 392-190-080 Violations—Permissible sanctions

In the event a school district or public charter school is found to be in violation of the requirements of this chapter, the superintendent of public instruction may, by appropriate order pursuant to chapter 34.05 RCW, impose an appropriate sanction or institute appropriate corrective measures including, but not limited to:

- (1) The termination of all or part of state apportionment or categorical moneys to the offending school district or public charter school;
- (2) The termination of specified programs wherein the violation or violations are found to be flagrant in nature;
- (3) The institution of a mandatory affirmative action program within the offending school district or public charter school; and

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

WAC 392-190-081 Concurrent claims and remedies

(1) Except as provided in subsections (2) and (3) of this section, nothing in this chapter is intended to deny an aggrieved person from simultaneously pursuing other available administrative, civil, or criminal remedies for an alleged violation of the law.

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

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

NO. 71419-8-I

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

N.W. and R.W., on behalf of B.W.,

Appellants,

v.

Mercer Island School District,

Respondent.

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the state of Washington that a copy of the Motion to Participate as Amicus Curiae and Amicus Brief of Office of Superintendent of Public Instruction was served on counsel at the following address by email and U.S. Mail Postage Prepaid via Consolidated Mail service:

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DATED this 15th day of December 2014 at Olympia, Washington.



Lisa M. Cole, Legal Assistant