

No. 36804-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW HIRSCHFELDER,
Petitioner.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 17 AM 9:04
STATE OF WASHINGTON
DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

RESPONDENT'S BRIEF

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: M. Q. U. H.
MEGAN M. VALENTINE
Deputy Prosecuting Attorney

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951
WSBA #35570

PM 3-14-08

TABLE

Table of Contents

IDENTITY OF NON-MOVING PARTY 1

DECISIONS OF COURTS BELOW 1

ISSUE PRESENTED FOR REVIEW 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE 1

ARGUMENT WHY REVIEW SHOULD BE DENIED 3

 1. RCW 9.44.093(b) criminalizes sexual intercourse
 between an employee of the school district and a registered
 student of the school district even if that student is 18, if the
 employee is 60 months older than the student 3

 2. RCW 9.44.093(b) is not unconstitutionally vague 11

CONCLUSION 23

TABLE OF AUTHORITIES

Table of Cases

State v. Armendariz, 160 Wash.2d 106, 156 P.3d 201 (2007) 13, 14

State v. Bradshaw, 152 Wash.2d 528, 98 P.3d 1190 (2004) 13

State v. Eckblad, 152 Wn.2d 515, 522 n.3 (2004) 21-22

<u>State v. Brown</u> , 140 Wash.2d 456, 998 P.2d 321 (2000)	4
<u>Equipto Division v. Yarmouth</u> , 134 Wash.2d, 356, 950 P.2d 451 (1998)	4, 13
<u>State v. Riles</u> , 135 Wash.2d 326, 957 P.2d 655 (1998)	11
<u>City of Seattle v. Montana</u> , 129 Wash.2d 583, 919 P.2d 1218 (1996)	13, 15
<u>State v. Myles</u> , 127 Wash.2d 807, 903 P.2d 979 (1995)	12
<u>State v. Aver</u> , 109 Wash.2d 303, 746 P.2d 479 (1987)	12-13
<u>Spokane v. State</u> , 198 Wash. 682, 89 P.2d 826 (1939)	4, 8, 14
<u>State v. Vaughan</u> , 163 Wash. 681, 1 P.2d 888 (1931)	4, 8
<u>State v. Clinkenbeard</u> , 130 Wash.App. 552, 123 P.3d 872 (2005) ...	6, 11
<u>State v. Stevenson</u> , 128 Wash.App. 179, 114 P.3d 699 (2005) ..	12-13, 15
<u>State v. Pollard</u> , 80 Wash.App. 60, 906 P.2d 976 (1995), review denied 129 Wash.2d 1011, 917 P.2d 130	11
<u>State v. Dyson</u> , 74 Wash.App. 237, 872 P.2d 1115 (1994), review denied 125 Wash.2d 1005, 886 P.2d 1133	11, 12
<u>State v. Russell</u> , 69 Wash.App. 237, 848 P.2d 743 (1993), review denied 122 Wash.2d 1003, 859 P.2d 603.	12

STATUTES

U.S.C.A. Cost. Amend. 14	11
RCWA Cost. Art. 1 §§3	11

RCW 9A.44.010	16
RCW 9A.44.093	4- 6, 8-9, 11, 16-18
RCW 26.28.010	8
RCW 26.28.080	8
RCW 26.28.085	8, 9
RCW 28A.150.220(3)	10
RCW 28A.225.160	10
RCW 66.44.270	8, 9
RCW 74.13	10

OTHER

Chicago Manual of Style (1993)	7
Defendant’s Motion for Dismissal	19, 20
Legislative History of Bill: SB 6151, http://dlr.leg.wa.gov/billsummary/default.aspx?year=2001&bill-6151 (accessed August 7, 2007).	18
June 4, 2001, 40:01, archives, House of Representatives Floor 2001, www.tvw.org (Accessed August 8, 2007)	19
hppt://en.wikipedia.org/wiki/Wikipedia:About	22
http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia . .	22

A. IDENTITY OF NON-MOVING PARTY

Respondent, the State of Washington, by and through Megan M. Valentine, Grays Harbor County Deputy Prosecuting Attorney, asks this court to affirm the rulings of the court below.

B. DECISIONS OF COURTS BELOW

Petitioner asks this court to deny the decision of the Grays Harbor County Superior Court in cause no. 07-1-294-7 denying the Defendant's Motion to Dismiss under *Knapstad*, and finding the underlying statute, RCW 9A.44.093 constitutional.

C. ISSUE PRESENTED FOR REVIEW

Was the Superior Court correct in denying the Defendant' Motion to Dismiss under *State v. Knapstad*?

Was the Superior Court correct in denying the Defendant's Motion to Declare RCW 9A.44.093 unconstitutional?

D. RESPONDENT'S COUNTER STATEMENT OF THE CASE

Matthew Hirschfelder was charged by Information filed in Grays

Harbor Superior Court on May 18, 2007 with one count of Sexual Misconduct with a Minor in the First Degree under RCW 9.44.093(1)(b), this matter was previously filed as a preliminary hearing in Grays Harbor District Court on April 19, 2007.

The State alleges that at the time of the incident Hirschfelder was employed by the Hoquiam School District as a Choir Teacher. A.N.T. was a student at Hoquiam High School, where Hirschfelder taught, and a member of the choir. Hirschfelder was more than 60 months older than A.N.T. On the night of the book signing, held at Hoquiam High School, Hirschfelder had sexual intercourse with A.N.T. A.N.T. was 18 at the time. The book signing was held a short time before A.N.T.'s graduation from Hoquiam High School.

Hirschfelder filed a Motion to Dismiss under *Knapstad* on July 13, 2007. Hirschfelder filed his supporting brief to the Motion to Dismiss for unconstitutionality of the statute on August 1, 2007. The State filed its response to the Motion to Dismiss on August 14, 2007. Oral argument was heard by the court on August 24, 2007. On September 4, 2007, the court issued an oral ruling denying the Motion to Dismiss under *Knapstad* and for unconstitutionality of the statute. At that hearing the court entered a written order certifying the issue for review and granted a continuance of

the trial set for September 25, 2007. On September 28, 2007 Hirschfelder filed a Notice and supporting Brief and Motion for Discretionary Review with this Court. This court accepted review in a written order filed November 19, 2007.

E. ARGUMENT WHY LOWER COURT SHOULD BE AFFIRMED

This Court should affirm the decision of the trial court below because the court correctly interpreted the statute as criminalizing sexual intercourse between an adult employee of the school district and a registered student of the school district, even if that student is 18, and affirm the finding of the court below that the statute is not unconstitutionally vague.

- 1. RCW 9.44.093(b) criminalizes sexual intercourse between an employee of the school district and a registered student of the school district even if that student is 18, if the employee is 60 months older than the student.**

“The primary objective of statutory interpretation is to give force to

the language of a statute and carry out the intent of the Legislature”.¹ The court must give meaning to every part of the statute, however, the court should not strain in its interpretation to inject requirements not set forth by the legislature.²

Defense first argues that use of the term “minor” in the title of the statute necessarily limits the age of the victim to someone under the age of eighteen. The title does not control the meaning of the statute.³ The body of the statute is where the offense is defined.⁴

There is no requirement in RCW 9A.44.093 that the victim be a minor. That the victim be a minor is not, as the defense argues “implicit in the statute”.⁵ RCW 0A.44.093 reads in relevant part:

¹ *State v. Brown*, 140 Wash.2d 456, 469; 998 P.2d 321 (2000).

² *Supra*. (holding that knowledge that the victim is a law enforcement officer in the performance of official duties at the time of an assault is not an implied element of the crime of assault in the third degree even though the legislature has made it an element in other statutes relating to crimes against law enforcement officers).

³ *Equipto Div. Aurora Equipment Co. v. Yarmouth*, 134 Wash.2d 356, 950 P.3d 451 (1998).

⁴ *City of Spokane v. State*, 198 Wash. 682, 89 P.2d 826 (1939) (holding that only where there is an ambiguity in the text does the court look at the title to get meaning); *State v. Vaughan*, 163 Wash. 681, 1 P.2d 888 (1931).

⁵ Motion to Dismiss - Knapstad p. 3, ln 17.

A person is guilty of sexual misconduct with a minor in the first degree when: . . . (b)the person is a school employee who has . . . sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.

The law requires that (1) the defendant be a school employee; (2) the defendant have sexual intercourse; (3) with a registered student; (4) of the school; (5) the student must be at least sixteen years old; (6) the defendant and registered student must not be married and (7) the defendant must be at least sixty months older than the student.

Section (b) of RCW 9A.44.093 was challenged in The Court of Appeals, Division Three in 2005 in a case involving sexual intercourse between a school bus driver and an 18 year old registered student of the school district in which the driver was employed. That court was asked to determine whether the statute was (1) facially unconstitutional; (2) in violation of the defendant's substantive due process rights or (3) violated equal protection. The court clearly stated that the behavior criminalized by the statute was an intimate relationship between two consenting adults. The court began its analysis by outlining the statute as follows:

RCW 9A.44.093(1)(b) makes it a class C felony for any school employee to have sexual intercourse with a

registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student. By its terms, this statute can be applied to criminally prosecute a public school employee who has sexual intercourse with a student who is legally an adult (over the age of 18) and does not require the school employee to be in a position of authority or supervision over the students.⁶

This statute has been interpreted by Division Three to apply to a victim who is over the age of 18. RCW 9A.44.093(b) does not limit the age of the registered student to someone under the age of eighteen and has been found to apply to students over the age of eighteen.⁷

The plain language of subsection (1)(b) does not require that the victim be under 18. The statute contains the language, “or knowingly causes another person under the age of eighteen to have,”. This is set off by commas at the beginning and end of the clause. This clause makes it a crime for a school employee to cause a third person to have sexual intercourse with a registered student. Do the words “under the age of eighteen” modify the subject (the school employee) or direct object (the registered student of the school) of the main clause of the sentence creating an age limit on either?

⁶ *State v. Clinkenbeard*, 130 Wash.App. 552, 560, 123 P.3d 872 (2005).

⁷ *Clinkenbeard*, 130 Wash.App. 552.

Because the remainder of the statute requires the registered student be at least sixteen and the employee of the school district be at least sixty months older than the student, the youngest possible age of the employee of the school district is twenty-one. Therefore it would be completely illogical to read the words “under the age of eighteen” as modifying the subject of the sentence.

If a dependent clause is a nonrestrictive clause (may be removed without altering the meaning of the main clause) it is set off by commas. A restrictive clause is not set off by commas.⁸ Because this clause, “or knowingly causes another person under the age of eighteen to have,” is set off at the beginning and end with a comma, it is a nonrestrictive clause and, therefore, does not modify the meaning of the main clause.⁹ Thus, “under the age of eighteen” does not alter the age of the school employee or the registered student because to do so would alter the meaning of the main clause. The Statute is not ambiguous, the victim may be eighteen years old.

If, however, there is an ambiguity in the meaning of the statute, the

⁸ *Chicago Manual of Style*, 5.34, 5.35, 5.41, pages 166-168.

⁹ *Supra*.

court should then look to the title of the statute.¹⁰ The defense argues that the term “minor”, included in the title, and without explicit definition in the statute, must mean one having not yet reached the age of majority as defined in RCW 26.28.010. It is true, as the defense contends, the legislature did not define “minor” in RCW 9A.44.093 or even in RCW 9A.44. However, that does not mean a minor is always one who has not yet reached the age of majority. In fact, RCW 26.28.010 itself does not define a “minor”, it defines “Age of Majority”. RCW 26.28.010 does not even contain the word “minor” in the body or title.

A minor is not always a person under eighteen. Additional provisions of RCW 26.28 include statutes with the word “minor” in the title.¹¹ Despite the fact each of these contains the word minor in the title, the body of the statute specifically defines that the person must be under the age of eighteen.¹² RCW 66.44.290 is title “Minor purchasing or

¹⁰ *City of Spokane v. State*, 198 Wash. 682, 89 P.2d 826 (1939) (holding that only where there is an ambiguity in the text does the court look at the title to get meaning); *State v. Vaughan*, 163 Wash. 681, 1 P.2d 888 (1931).

¹¹ RCW 26.28.080, Selling or giving tobacco to a minor.
RCW 26.28.085, Applying a tattoo to a minor.

¹² “Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor.” RCW 26.28.080

attempting to purchase liquor - Penalty” and criminalizes the purchase of alcohol by persons under the age of twenty-one. RCW 66.44.270 is titled “Furnishing Liquor to Minors – Possession, use – Penalties – Exhibition of effects – Exceptions”. This statute criminalizes the possession of alcohol by a person under the age of twenty-one.¹³ Despite the inclusion of the word “minor” in the title, the language in the body of the statute describing the crime controls.

Defense second argues that the statute contains an implicit limitation that the victim must be under 18 because the victim under subsection (a) and subsection (c) are persons under 18. Subsection (a) contains an explicit limitation that the victim be “another person who is at least sixteen years old but less than eighteen years old”. Subsection (c) requires only that the victim be “his or her foster child who is at least sixteen”.¹⁴ The fact that there are no foster children over the age of

“Every person who applies a tattoo to any minor under the age of eighteen is guilty of a gross misdemeanor.” RCW 26.28.085.

¹³ RCW 66.44.270(2) (1987).

¹⁴ RCW 9A.44.093.

eighteen by virtue of RCW 74.13¹⁵ creates a limitation on the possible age of the victim of that crime.

Subsection (b) requires that the victim be “a registered student of the school who is at least sixteen years old”. According to the Basic Education Act “[e]ach school district’s kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age.”¹⁶ RCW 28A.225.160 states, “it is the general policy of the state that the common schools shall be open to the admission of all persons who are five years of age and less than twenty-one years residing in that school district.”¹⁷ Thus, because a registered student may be up to twenty-one years old, a victim under subsection (b) may be up to twenty-one years old (but not less than sixteen).

The court should not add elements not included by the legislature. The Basic Education Act does not differentiate in its duty to provide education to students between five and twenty-one years old and neither

¹⁵ Which limits the age of a child under that chapter to a person under the age of eighteen.

¹⁶ RCW 28A.150.220(3).

¹⁷ RCW 28A.225.160.

should the safeguards enacted to protect those students.¹⁸ The victim in the present case was eighteen at the time she and the defendant are alleged to have had sexual intercourse. There is no dispute the defendant was a school employee, the victim was a registered student at the time of the alleged incident, the book signing, they were not married to each other and the defendant was at least sixty months older than the student. The State respectfully requests this Court affirm the ruling of the trial court below finding the statute to apply to these facts and allowing the State to proceed to trial.

2. RCW 9.44.093(b) is not unconstitutionally vague.

The due process vagueness doctrine under the Federal and State Constitutions serves two purposes: (1) to ensure the statute provides the public with adequate notice of what conduct is prohibited, and (2) to protect the public from arbitrary or discriminatory law enforcement.¹⁹

Defense challenges the first of these two purposes, Hirschfelder's

¹⁸ *Clinkenbeard*, 130 Wash.App at 565 (discussing [t]he state's interest in providing a safe school environment and preventing the exploitation of students).

¹⁹ U.S.C.A. Const. Amend. 14; RCWA Const. Art. 1, §§ 3; *State v. Riles*, 135 Wash.2d 326, 957 P.2d 655 (1998); *State v. Pollard*, 80 Wash.App. 60, 906 P.2d 976 (1995), review denied 129 Wash.2d 1011, 917 P.2d 130; *State v. Dyson*, 74 Wash.App. 237, 872 P.2d 1115 (1994), review denied 125 Wash.2d 1005, 886 P.2d 1133.

statement of additional grounds for review challenges the second.

(A) The statute provides the public adequate notice of what conduct is prohibited.

In evaluating whether the statute provides adequate notice of what conduct is prohibited, the court should examine the context of the entire enactment and give the language a sensible, meaningful and practical interpretation. A statute is presumed constitutional “unless its unconstitutionality appears beyond a reasonable doubt.”²⁰ Some imprecisions or uncertainty are constitutionally permissible and absolute specificity is not required.²¹ The statute is to be viewed as a whole and in the context of the entire enactment, to determine if it has the required degree of specificity.²² The court should inspect the actual conduct of the party not examine hypothetical situations when considering a vagueness

²⁰ *State v. Aver*, 109 Wash.2d 303, 746 P.2d 479 (1987).

²¹ *State v. Stevenson*, 128 Wash.App. 179, 114 P.3d 699 (2005); *State v. Dyson*, 74 Wash.App. 237, 872 P.2d 1115 (1994), review denied 125 Wash.2d 1005, 886 P.2d 1133l; *State v. Russell* 69 Wash.App. 237, 848 P.2d 743 (1993), review denied 122 Wash.2d 1003, 859 P.2d 603.

²² *State v. Myles*, 127 Wash.2d 807, 903 P.2d 979 (1995).

challenge.²³

If the legislature uses a phrase or term in one portion of a statute, but excludes it from another, the courts should not imply an intent to include the missing term in that part where the term or phrase is excluded.²⁴ Only if a statute is ambiguous, meaning it is susceptible to more than one interpretation, may courts resort to extrinsic aids to determine legislative intent, such as legislative history.²⁵ The court should not strain to inject doubt into the meaning of the statute but should give all portions of the statute meaning.²⁶

The statute is presumed Constitutional unless vague beyond a reasonable doubt.²⁷ The title of the statute does not control the meaning of the statute.²⁸ The body of the statute is where the offense is defined. The title may be used to determine legislative intent only where the text

²³ *State v. Stevenson*, 128 Wash.App. 179, 114 P.3d 699 (2005), *City of Seattle v. Montana*, 129 Wash.2d 583, 919 P.2d 1218 (1996).

²⁴ *State v. Bradshaw*, 152 Wash.2d 528, 98 P.3d 1190 (2004).

²⁵ *State v. Armendariz*, 160 Wash.2d 106, 156 P.3d 201 (2007).

²⁶ *Aver*, 109 Wash.2d at 308; *see also State v. Roggenkamp*, 153 Wash.2d 614, 625, 106 P.3d 196 (2005).

²⁷ *Aver*, 109 Wash.2d at 308.

²⁸ *Equipto Division v. Yarmouth*, 134 Wash.2d, 356, 950 P.2d 451 (1998)

contains an ambiguity.²⁹ The text of the statute is not ambiguous and does not requires the registered student be a minor.

The term “minor” in the title does not show the legislature intended the statute not apply to students who were eighteen years old. The plain meaning of the statute’s text is clear and unambiguous and even if it is ambiguous, there is no showing the legislature intended to protect sexual intercourse between teachers and students if the student was 18 or older.

RCW 9A.44.093(b) is definite and specific. The fact that the legislature placed an age limit on the victim in section (a) should not be implied as a legislative oversight in section (b). The statute should be given its plain meaning as enacted.³⁰ That the term “at least sixteen years old” would include someone who is eighteen is a reasonable interpretation.

Hirschfelder also points out numerous possible activities involving sexual actions by a registered student that are not covered by the statute. Hirschfelder argues that the statute would not criminalize this behavior is illogical and therefore the statute must be vague. The Court should not analyze possible behavior in a vagueness analysis but should limit its

²⁹ *Spokane v. State*, 198 Wash. 682.

³⁰ *Armendariz*, 160 Wash.2d at 110.

analysis to the facts in the present case.³¹ Regardless of Hirschfelder's ability to realize additional sexual activities that may legally be engaged in between an employee of the school district and the registered student, this case involves sexual intercourse, a topic clearly addressed by the statute.

If and only if the statute is ambiguous, a review of legislative intent is appropriate. Hirschfelder directs the court to the legislative history in enacting this statute, arguing that the statute was not intended to apply to students over eighteen and therefore is unconstitutionally vague if it does. However all they clearly show is a lack of discussion on this issue. When the first House Bill 1091 was presented, which was vetoed, it included in its original House Bill Report that the statute "eliminates the requirement that the student be under the age of 18, thus covering registered students over the age of 18 who are completing independent education plans".³² For all the legislative history in HB 1091 and the following bill 6151 which was ultimately enacted into Laws of 2001 2nd Sp. Sess. Ch. 12 §357 and became the current version of RCW 9A.44.093, there is no further

³¹ *State v. Stevenson*, 128 Wash.App. 179, 114 P.3d 699 (2005), *City of Seattle v. Montana*, 129 Wash.2d 583, 919 P.2d 1218 (1996).

³² Attachment D to Defendant's Motion to Dismiss, Appendix A 3-A 11 to Defendant's Motion for Discretionary Review.

mention of this particular issue, either for or against.

Sexual Misconduct with a Minor in the First Degree was enacted in 1988³³ and read as follows:

NEW SECTION. Sec. 8. SEXUAL MISCONDUCT WITH A MINOR IN THE FIRST DEGREE. (1) A person is guilty of sexual misconduct with a minor in the first degree when the person has sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in sexual intercourse with the victim. (2) Sexual misconduct with a minor in the first degree is a class C felony.

RCW 9A.44.010 was amended to include the following definitions:

(8) "Significant relationship" means a situation in which the perpetrator is: (a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors; or (b) A person who in the course of his or her employment supervises minors. (9) "Abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor.³⁴

RCW 9A.44 does not include a definition of "minor".

Sexual Misconduct with a Minor in the First Degree was amended

³³ Washington Laws, 1988 Ch. 145 §8.

³⁴ Washington Laws, 1988 Ch. 145 §1.

in 1994. The legislature stated its purpose in Section 1 as follows: “The purpose of this act is to make certain technical corrections and correct oversights discovered only after unanticipated circumstances have arisen. These changes are necessary to give full expression to the original intent of the legislature.”³⁵ The only amendment made to Sexual Misconduct with a Minor in the First Degree was to add the phrase “, or knowingly causes another person under the age of eighteen to have,” to the statute.³⁶

Sexual Misconduct with a Minor in the First Degree was lastly and most recently amended in 2001. The statute was amended to make the previous statute sub-section (a) and to add a sub-section (b) as follows:

; or (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student³⁷.

The following definition was also added to the statute RCW 9A.44.093:

(3) for the purposes of this section, “school employee” means an employee of a common school defined in RCW 28A.150.020, or a

³⁵ Washington Laws, 1994 Ch. 271 §1.

³⁶ Washington Laws, 1994 Ch. 271 §306.

³⁷ Washington Laws, 2001 2nd Sp. Sess. Ch. 12, §357.

grade kindergarten through twelve employee
of a private school under chapter 28A.195
RCW, who is not enrolled as a student of the
common school or private school.

This most recent amendment began as House Bill 1091. That bill was vetoed and the more than sixty months older requirement was added and the amendment was reintroduced as House Bill 2262 in May 2001. When the House Bill went to the Senate the bill it was incorporated into a bill already pending in the Senate and the amendment to RCW 9A.44.093 which ultimately became the law first went before the Senate as Third Engrossed Substitute Senate Bill 6151 on June 20, 2001. The bill received final passage in the House on June 21, 2001 and final passage in the Senate on June 21, 2001. The bill was delivered to the Governor on June 22, 2001 and signed into law on June 26, 2001.³⁸ There was no discussion of whether the law would apply to students 18 or over.

The House Bill Report on HB 1091 clearly states under
“**Substitute Bill Compared to Original Bill**” that “[t]he substitute bill eliminates the requirement that the student be under the age of 18, thus covering registered students over the age of 18 who are completing

³⁸ Legislative History of Bill: SB 6151,
<http://dlr.leg.wa.gov/bills/summary/default.aspx?year=2001&bill=6151> (accessed August 7, 2007)

independent education plans.”³⁹ This bill ultimately was vetoed by the governor due to concerns the statute would criminalize sexual intercourse between two students, one of whom also worked for the school.⁴⁰ The bill that became law, 3ESSB 6151, contained the exact same wording as the original bill with one addition, it required that the school employee be at least sixty months older than the registered student.

There is no clear statement that either the Legislature or the Governor intended that the law not apply to school employees having sexual intercourse with registered students over eighteen. When HB 2262 was introduced after the Governor vetoed HB 1091 the sponsoring representative, Representative Lambert, indicated to the house she had worked with the Governor’s office as well as the Senate in creating the new bill. She indicated that the Governor’s office had wanted the bill to require that the school employee be nineteen or older but that they had decided to include a sixty month age difference requirement instead.⁴¹ If anything can be drawn from this statement, it is that the age of victims and

³⁹ Defendant’s Motion to Dismiss, Attachment D.

⁴⁰ Defendant’s Motion to Dismiss, Attachment A.

⁴¹ June 4, 2001, 40:01, archives, House of Representatives Floor 2001, www.tvw.org (accessed August 8, 2007)

defendants impacted by the statute was considered during its revision.

The court should be cautious, however, when inquiring about legislative motive or purpose. Comments made during enactment of a law do not necessarily indicate what motivates fellow legislators to enact the law they only indicate what motivated the speaking legislator unless otherwise indicated. Although the State contends there is no ambiguity in the statute, if the court does find ambiguity, the Governor's statement in vetoing HB 1091 does not contradict an interpretation that the statute prohibits sexual intercourse between school employees and students who are eighteen. It is true that the statute prohibits sexual intercourse between school employees and students who are sixteen or seventeen as stated in the defense materials.⁴² This statement, however, does not by necessity mean it is legal to have sexual intercourse between school employees and students who are eighteen. As indicated in every bill report presented by the defense, the legislature never indicated the statute was not to apply to students eighteen or older.⁴³

Hirschfelder next directed the court to a power point presentation

⁴² Attachment A to Defense Motion to Dismiss.

⁴³ Attachment C, Attachment D (specifically stating the bill will apply to students eighteen and older), Attachment E to Defense Motion to Dismiss.

from the Office of the Superintendent of Public Instruction which says the statute does not apply if the student is eighteen. This is not an administrative interpretation. This is a document apparently prepared by the Washington School Personnel Association in collaboration with the Office of Superintendent of Public Instruction. It is unknown whether the presentation was reviewed by the Superintendent of Public Instruction and the context in which it was prepared, but it does not endorse any sexual relationship between any school employee and a student.

Defense also asks the court to find vagueness because Wikipedia indicates the student must be 16 or 17 for sexual intercourse between a school employee and student to be a crime. His reliance on this source flies in the face of the Washington Supreme Court's opinion in *State v. Eckblad*.

We note in passing the State's argument that "federal standard 208" is easily found through an Internet search and therefore, more available to persons of ordinary intelligence than the motorcycle regulations at issue in Maxwell. However, the Internet teems with information both accurate and inaccurate which can and does mislead users. E.g., Joe McDonald, China Paper Runs U.S. Satire as News, AP ONLINE, June 8, 2002, available at 2002 WL 22577471 (reporting that a Chinese news service had mistakenly reported that the United States Congress, in the tradition of several sports teams, was threatening to move from Washington D.C. unless a new Capitol building was built, relying on the satirical online paper www.theonion.com).

We decline to adjust the vagueness analysis to take the Internet into account. We also decline to reach whether a good faith exception to the exclusionary rule is potentially available, as this issue was not raised below and is rendered moot by our disposition of the substantive issue. See RAP 2.5(a).⁴⁴

Wikipedia is an online project and “its articles can be edited by anyone with access to the Internet, simply by clicking the *edit this page* link.”⁴⁵

Wikipedia itself states “not everything in Wikipedia is accurate, comprehensive or unbiased.”⁴⁶ This is not a reliable or accepted source for the court to use in determining whether a term is ambiguous or a statute vague.

B. The Statute does not discriminate in its application.

The statement for additional grounds challenges that the statute does not apply equally to all teachers of registered students because teachers not employed by the school district may engage in sexual intercourse with their students. The defendant’s status as an employee of a the school district is not a suspect classification and the statute is, therefore, subject to rational review. There is a rational basis for the

⁴⁴ State v. Eckblad, 152 Wn.2d 515, 522 n.3 (2004).

⁴⁵ <http://en.wikipedia.org/wiki/Wikipedia:About>.

⁴⁶ http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia.

legislature to limit the statute to employees of the school district. Whether or not a student engages in other academic programs offered outside the school district for school credit is voluntary and the legislature has a legitimate interest in protecting students from undue influence by those employees of the school district which have the greatest access and control to the students.

F. CONCLUSION

For the reasons set forth above, the State respectfully requests the court affirm the decisions of the court below and remand this matter for further proceedings.

DATED this 14th day of March, 2008.

Respectfully Submitted,

By: Megan M. Valentine
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

08 MAR 17 AM 9:04

STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW J. HIRSCHFELDER,
Appellant.

No.: 36804-8-II

DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman, hereby declare as follows:

On the 14th day of March, 2008, I mailed a copy of the Respondent's Brief to counsel for Appellant, Robert Hill, Morgan Hill, P.C., Attorneys at Law, 2102 Carriage Drive S.W., Building C, Olympia, WA 98502, and to the Appellant, Matthew J. Hirschfelder, 1416 Cunningham Lane S., Salem, OR 97302, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 14th day of March, 2008, in Montesano, Washington.

Barbara Chapman

DECLARATION OF MAILING

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563