COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38372-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STUART MCCOLL
Father of Theodore "Ted" McColl,

Appellant

v.

SEQUIM SCHOOL DISTRICT
A Washington Municipal Corporation,

Respondent.

BRIEF OF RESPONDENT

Rockie Hansen, WSBA No. 21804
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TABLE OF CONTENTS

I. INTRODUCTION. 1

II. ASSIGNMENT OF ERRORS. 2

III. ISSUES. 3

IV. STATEMENT OF THE CASE 3

V. STANDARD OF REVIEW. 4

VI. ARGUMENT. 6

A. School Boards Are Granted Broad Discretion To Adopt Appropriate Policies And Procedures Ensuring Quality In The Content And Extent Of Its Educational Programs. 6

1. Sequim School District Policy No. 2421 was properly applied.... 8

B. The Grade Level Determination Made By The Sequim School District Does Not Impair Any Rights Guaranteed By The Washington State Constitution Or Impair The Student's Access To A Public Education. 10

1. The Washington State Constitution does not guarantee a student the right to a public education until the age of 18..... 11

2. Mr. McColl has not shown that Ted McColl will be denied access to the public schools in the future. 11

3. Estimated Graduation Date is simply an estimate and does not negatively impact Ted McColl. 13

4. The Sequim School District has not denied Ted McColl access to education in the public schools at any time. 15

5. Ted McColl has no right to retain the eighth grade designation for a grade he has already completed. 15

6. Mr. McColl is motivated by a desire to have his son participate in eighth grade athletics as a ninth grader, which is not a constitutionally protected interest..... 16

C. Sequim School District's Highly Capable Program Does Not Create A Substantive Right For Ted McColl To Be Declared An Eighth Grader In Name Only. 17

VII. CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES

Washington Cases

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) 5

Herron v. Tribune Publ'g Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987) 5

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004) 4

Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986) 5

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) 5

United States Supreme Court Cases

Board of Educ. v. Pico 457 U.S. 853, at 864, 867 (1982) 6, 10

Epperson v. Arkansas, 393 U.S. 97 (1968) 6, 11

Meyer v. Nebraska, [262 U.S. 390], 403 [(1923)] 7

Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) 7

Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) 7

Cases from Other Jurisdictions

People ex rel. Ulrich v. Board of Education, 4 N.Y.S. 102 16

Stamos v. Spring Branch Indep. Sch. Dist., 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). 17

OTHER AUTHORITIES

Washington State Constitution

Const. art. IX 13

Const. art. IX, § 1 and §2 7

Statutes

RCW 28A.150.230 7

RCW 28A.150.230 7

RCW 28A.225.160 13

RCW 28A.320.015 7

RCW 28A.320.015 (1). 8

Regulations

WAC 180-51-035 14

WAC 180-51-035(1)(b). 16

WAC 180-51-035(2) 16

WAC 392-170-015 18

WAC 392-170-037 ..... 18, 19

WAC 392-170-080 18

Other

AGO, 53-55 No. 53 (1953) 17

I. INTRODUCTION.

Appellant, Mr. Stuart McColl asks the Court of Appeals to meddle in the affairs of the Respondent, Sequim School District to further his son's athletic participation. Mr. McColl is seeking the Court to create a special grade designation for his son, Ted McColl, in violation of Sequim School District policy and commonly accepted student promotion criteria. In May 2005, toward the end of Ted McColl's fourth grade year, Mr. McColl asked the Sequim School District to allow his son to skip the fifth grade at the elementary school and begin the sixth grade program at the middle school the next fall. His request was granted by the School District, and Ted McColl completed the sixth grade in June 2006, seventh grade in June 2007 and eighth grade in June 2008. Upon his completion of the eighth grade the Sequim School District naturally promoted Ted McColl to the ninth grade. Mr. McColl is now complaining that his son should still be considered an eighth grader. Yet, Mr. McColl does not want his son to be retained or otherwise repeat any curriculum for the eighth grade. Rather, Mr. McColl wants his son to continue in his ninth grade program at the high school and objects solely to Ted McColl being considered a ninth grader for athletic and estimated graduation date

purposes. Mr. McColl's actions have been clearly motivated by a desire to have his son play middle school sports as a high school student.

II. ASSIGNMENT OF ERRORS.

The Sequim School District has not cross-appealed, believes no errors occurred, and asserts that Summary Judgment was appropriate as a matter of law. Mr. McColl does not assert any disputed facts, but he contends the superior court erred in granting Sequim School District's Motion for Summary Judgment in two areas,

(1) Mr. McColl claims it was error to conclude that his request to have Ted McColl skip the fifth grade contributed to the possibility that his son would complete his public education more quickly than the traditional student.

(2) Mr. McColl claims it was error to conclude there were no Constitutional violations, arguing his son has a Constitutional right to a public education until he is 18 years old.

III. ISSUES.

The Sequim School District restates the issues as follows:

1. Whether the Court should disturb the decision of the Sequim School District on the natural promotion of a student to the ninth grade following that student's successful completion of his eighth grade program.
2. Whether Ted McColl has a Constitutional right to be designated an eighth grade student for athletics and estimated graduation date purposes after successfully completing his eighth grade curriculum and being enrolled in the ninth grade program at Sequim High School.

IV. STATEMENT OF THE CASE.

Appellant, Mr. Stuart McColl asks that his son, Ted McColl be educated at the high school but designated an eighth grade student for the 2008-09 school year, with an estimated graduation date of 2013.[1] Yet, Ted McColl has already successfully completed his eighth grade program at Sequim School District.[2] The Sequim School District promoted Ted

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[1] Appellant's Opening Brief, pg. 1.

[2] Ted McColl's transcript shows his successful completion of the 6th, 7th and 8th grade programs at Sequim Middle School, with a cumulative grade point average of 3.766 and a class rank of 22 out of 203. CP pg. 48, Transcript of Ted McColl.

McColl to the ninth grade in June 2008. CP 44. Mr. McColl objected to this promotion, requesting that Ted McColl be enrolled in the ninth grade at the high school, but be designated an eighth grader for athletic and estimated graduation date purposes. Cert. Admin. Rec. pg 18. The Sequim School District denied Mr. McColl's request and he sought review with the Clallam County Superior Court under RCW 28A.645. Sequim School District filed a Motion for Summary Judgment in Clallam County Superior Court. CP 46. Sequim School District's Motion for Summary Judgment was granted and Mr. McColl's superior court action was dismissed following a summary judgment hearing before Judge S. Brooke Taylor on August 29, 2008. CP 04.

V. STANDARD OF REVIEW.

The appropriate standard of review for summary judgment orders is *de novo*, performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wn.2d at 861. Although the nonmoving party is entitled to have the reviewing court view the evidence in a light most favorable to him and against the moving parties, statements of ultimate fact and

conclusory statements of fact will not defeat a summary judgment motion. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). In addition, the party opposing a motion for summary judgment, may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The party opposing the motion for summary judgment must set forth specific facts rebutting the moving parties' contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables*, 106 Wn.2d at 13; *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

Since the facts are essentially undisputed by Mr. McColl, the question is simply whether the Sequim School District is entitled to summary judgment as a matter of law.

Mr. McColl wrongfully places the burden of proof on the School District, when he argues that the District must show an adequate reason to "deny Ted's Constitutional Right to access the public school system in the fall of 2012 when Ted is 17 years of age." Appellant's Opening Brief 4. The burden is actually upon Mr. McColl. He must prove that a constitutional right is being violated by the School District. Courts will not

'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts." *Board of Educ. v. Pico* 457 U.S. 853, at 864, 867 (1982) (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

VI. ARGUMENT.

A. School Boards Are Granted Broad Discretion To Adopt Appropriate Policies And Procedures Ensuring Quality In The Content And Extent Of Its Educational Programs.

Students may have a Constitutional right to some public education, but the scope and manner in which it is carried out is determined by the local School Board within the laws and regulations adopted by the State. Const. art. IX, § 2; RCW 28A.150.230.

> In accordance with the provisions of Title 28A RCW, as now or hereafter amended, each common school district board of directors shall be vested with the final responsibility for the setting of policies ensuring quality in the content and extent of its educational program and that such program provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.

RCW 28A.150.230. "The administration of the public school system shall be entrusted to such state and local officials, boards, and committees as the state Constitution and the laws of the state shall provide." RCW 28A.150.070. Furthermore, RCW 28A.330.100 grants powers to school boards, including: "[t]o, in addition to the minimum requirements

imposed by this title, **establish and maintain such grades and departments**, including night, high, kindergarten, vocational training ..., as in the judgment of the board, best shall promote the interests of education in the district. (Emphasis added.) Also, RCW 28A.320.015 provides that the board of directors may exercise "broad discretionary power to determine and adopt written policies not in conflict with other law that provide for the development and implementation of programs, activities, services, or practices that the board determines will: ...[promote the effective, efficient, or safe management and operation of the school district." RCW 28A.320.015 (1).

Courts have similarly recognized that operations of the schools should be left to the discretion of the local school authorities.

> The [United States Supreme] Court has long recognized that local school boards have broad discretion in the management of school affairs. See, e.g., *Meyer v. Nebraska,* [262 U.S. 390], 403 [(1923)]; *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925)..., reaffirmed that, by and large, 'public education in our Nation is committed to the control of state and local authorities,' and that federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.' *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 507 (1969), noted that we have 'repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.'

Board of Educ. v. Pico, 457 U.S. 853, at 864, 867 (1982)

Judge Brooke properly noted during the Summary Judgment hearing in this case, that this matter should not involve the courts, when he said:

> ... I do not find a claim here which would authorize Clallam County Superior Court to stick its nose into the legitimate business of the Sequim School District and tell them how to tell to deal with your son. There would have to be some fundamental Constitutional right that they were violating for me to do that." RP pg. 25, lines 7-12.

There is no dispute between the parties that grade level is a purely local decision. See, Appellant's Opening Brief, pg. 4.

1. Sequim School District Policy No. 2421 was properly applied.

Since the local school district has the discretion to adopt appropriate policies and procedures, the appropriate inquiry is whether Ted McColl was promoted in a manner consistent with Sequim School District policies and procedures. Ted McColl was promoted to the ninth grade by the Sequim School District based on his academic achievements and the lack of remaining curriculum available for the student in the eighth grade program. CP 44. Such promotion is routine and Sequim School District's current Policy/Procedure No. 2421—Retention & Acceleration provides for retention of a student only specific limited circumstances. CP 44. The Policy provides for retention of a student only after following an appropriate process including review by the principal and the student and may include additional academic examinations of the student. Cert.

Admin. Rec. 122. Policy/Procedure No. 2421 further provides that "[i]n the instance a request to retain a student previously accelerated is received, the same process shall be followed." Id. Appellant, Mr. McColl and his son Ted McColl has not followed the retention procedure contained in the policy and basically does not want his son retained academically.[3]

The earlier version of Policy 2421, in place at the time that Ted McColl's parents requested he skip the fifth grade, specifically stated that "[a]fter a student has successfully completed a year of study at a specific grade level, he/she will be promoted to the next grade." Cert. Admin. Rec. 123. The old policy also notes "[r]etention at the same grade may be beneficial to the student when he/she is not demonstrating minimum competency in basic skill subjects in relation to ability and grade level." Id. Once the parent's request for Ted McColl to skip fifth grade was granted, he was considered a sixth grader for all intents and purposes that year.[4]

Based upon his academic successes, Ted McColl was appropriately promoted each year, from sixth to seventh and from seventh to eighth. CP 44. The District then determined that Ted McColl met the academic

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[3] J. McColl: Well, I don't think he should be repeating classes... S. McColl: He's not taking more than one class at the Middle School. Cert. Admin. Rec. 45.
[4] Declaration of Bill Bentley, pg. 1, lines 23-25; Record, pg. 122.

requirements for promotion to the ninth grade. CP 44. Indeed, Ted McColl had a middle school (6th-8th grade) cumulative grade point average of 3.766 and a class rank of 22 out of 203 students. CP 48. In addition, the transcript shows Ted McColl has completed the appropriate middle school curriculum. Id. The parties agree there is no reason to retain Ted McColl in eighth grade based on course work.[5] Ted McColl's natural progression to the ninth grade following his successful completion of the eighth grade remains the appropriate outcome in this case. The Court should not, therefore, intervene in a decision left to the discretion of the Sequim School District that properly applied Sequim School District policies and procedures.

B. The Grade Level Determination Made By The Sequim School District Does Not Impair Any Rights Guaranteed By The Washington State Constitution Or Impair The Student's Access To A Public Education.

As noted previously, courts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless '*basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts*." *Board of Educ. v. Pico* 457 U.S. 853, at 864, 867 (1982) (citing

[5] "Hansen: And that there really isn't any reason to retain him at the eighth grade in terms of course work. S. McColl: Right. If you guys said, 'Ted, how about take three classes over at the Middle School and they [sic] you can play football?' No way!" Cert. Admin. Rec. 45.

Epperson v. Arkansas, 393 U.S. 97 (1968) (emphasis added). No such rights are at issue in this case.

1. The Washington State Constitution does not guarantee a student the right to a public education until the age of 18.

The Washington State Constitution provides in Article IX:

> **SECTION 1 PREAMBLE.** It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.
>
> **SECTION 2 PUBLIC SCHOOL SYSTEM.** The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Const. art. IX. The provisions of the Washington State Constitution do not set forth any right to a public education until the age of 18. Rather, the Constitution leaves it to the legislature to establish a general and uniform system for public schools, which includes the appropriate ages and requirements for those schools.

2. Mr. McColl has not shown that Ted McColl will be denied access to the public schools in the future.

Mr. McColl repeatedly asserts that his son will be forced to graduate early in violation of his rights. Although the Washington State Constitution does not address the ages when a public education will be

provided, RCW 28A.225.160, provides in part: "...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." Ted McColl, therefore, could be admitted to a public school where he resides, between the ages of 5 and 21. Mr. McColl has offered no evidence that the Sequim School District has or will deny Ted McColl such access to admission.

Ted McColl is currently enrolled in the Sequim School District and has been promoted to the ninth grade at Sequim High School. Mr. McColl's contentions that the Sequim School District is trying to force Ted McColl to graduate prior to reaching age 18 is not supported anywhere in the record. As such, it is mere speculation and insufficient to defeat summary judgment. Moreover, Ted McColl's promotion to the ninth grade has in no way impacted the number of years the student will be able to attend public school because the student's age controls his access to the schools, not his grade. If Ted McColl needs to attend school until age 21 to meet his graduation requirements, he will be entitled to do so. There is no evidence in the record to the contrary and the matter is governed by statute.

3. Estimated Graduation Date is simply an estimate and does not negatively impact Ted McColl.

Mr. McColl incorrectly argues that the estimated graduation date assigned to students in ninth grade forces his son to graduate in four years. An estimated graduation date is assigned to students upon entry in the ninth grade in accordance with WAC 180-51-035:

> (1) **All students entering a high school program in Washington state shall be assigned an expected graduation year** as required by federal law and this section. Once students are assigned a graduation year, they will be aligned to the requirements for that specific graduating class and subject to the provisions of this section.
>
> (a) **Students shall be assigned an expected graduation year based on the year they commence 9th grade**, or for out-of-district and out-of-state transfer students, based on local district policy: Provided, That the expected graduation year for students receiving special education services shall be assigned and based on an Individualized Education Program (IEP) team determination in the year in which the student turns sixteen.
>
> (b) **Students shall have the right and the obligation to meet the minimum graduation requirements in place for their expected graduation year designated at the time they enter a district high school, regardless of what year they actually graduate.**
>
> (2) **A student under age twenty-one shall have the right to graduate in accordance with the standards in effect for the school of graduation for any year since such student commenced the ninth grade** or the equivalent of a four-year high school program and **until the student turns age twenty-one.**
>
> ***

(Emphasis added).

Mr. McColl asserts that a later estimated graduation date (2013 instead of 2012) benefits his son. Appellant's Opening Brief pg. 4. Applying the provisions of WAC 180-51-035 to Ted McColl, however, you find that Ted McColl is actually benefited by the estimated graduation date of 2012. Ted McColl is assigned an estimated graduation date of 2012, based on entering ninth grade/starting a high school program in the fall of 2008. Ted McColl has the "right and obligation to meet the minimum graduation requirements in place" for that expected graduation year, regardless of when he actually graduates. WAC 180-51-035(1)(b). If graduation requirements become more onerous in the future, therefore, Ted McColl would not be required to meet them. Still, Ted McColl will also have the "right to graduate in accordance with the standards in effect for the school of graduation for any year since such student commenced the ninth grade...until the student turns age twenty-one." WAC 180-51-035(2). Ted McColl, therefore, also has the right to graduate under the requirements of any future graduation year after his estimated 2012 graduation year, including the 2013 graduation year requested by Mr. McColl. If, for example, the graduation requirements become less onerous, Ted McColl has the right to graduate under those lesser standards. Ted McColl is clearly benefited by having the 2012 estimated graduation date and is certainly not harmed by it.

4. The Sequim School District has not denied Ted McColl access to education in the public schools at any time.

Ted McColl has successfully participated in grades kindergarten through eighth grade, excluding the fifth grade. In May 2005, Mr. McColl requested that Ted McColl be allowed to skip the fifth grade at the elementary school and proceed immediately to the sixth grade program at the Sequim Middle School for the 2005-06 school year based on Ted McColl's strong academic skills. Cert. Admin. Rec. 110-111. The Sequim School District granted the parents request and Ted McColl did indeed skip the fifth grade and commence at the middle school in the fall of 2005. Cert. Admin. Rec. 114-115. The only grade level he has missed to this date is, therefore, the fifth grade curriculum, which was based solely on the request of the parents. Id. The Sequim School District has not, therefore, denied Ted McColl any access to education in the public schools.

5. Ted McColl has no right to retain the eighth grade designation for a grade he has already completed.

In addition to the fact that the local school district has the authority to determine the student's appropriate grade placement, Ted McColl does not have any right to repeat the eighth grade after it has already been successfully completed. According to the Attorney General, a student

who has completed the requirements of eighth grade has no right to be readmitted to the eighth grade. AGO, 53-55 No. 53 (1953), citing *People ex rel. Ulrich v. Board of Education*, 4 N.Y.S. 102 ("New York court refused to compel re-admission to the first grade of a pupil who had completed that grade.") The Attorney General rightly noted: "If the person in question desires further education he may attend high school....") Id.

6. Mr. McColl is motivated by a desire to have his son participate in eighth grade athletics as a ninth grader, which is not a constitutionally protected interest.

Mr. McColl's motivation in this case is clear and that motivation is athletic eligibility for his son. Mr. McColl has admitted that the estimated graduation date issue was driven by his athletic eligibility concerns for his son.[6] Indeed, Mr. McColl appealed the athletic eligibility determination for his son through the Washington Interscholastic Activities Association ("WIAA") and stated that he believed his only chance to prevail with the WIAA was to have his son be labeled an eighth grader for the 2008-09 school year.[7] Mr. McColl admits that he wants his son to be declared an

[6] Cert. Admin. Rec. 5: S. McColl: "...the reason I had contacted WIAA regarding the matter of my...of Ted...accelerating forward a year, they are the ones who had told me we need to retain his original graduation year, to retain his original grade, in order to protect his athletic eligibility."

[7] "By declaring him a ninth grader and then taking this as an appeal to the WIAA, we are hobbled. In fact I feel we are defectively hobbled to take that appeal into the WIAA." Cert. Admin. Rec. 34.

8th grader in name only, with his son attending classes at the high school.[8] Athletics are a privilege, not a fundamental right guaranteed by the Constitution. *Stamos v. Spring Branch Indep. Sch. Dist.*, 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).

Importantly, Ted McColl has not been denied the privilege of participating in athletics. Cert. Admin. Rec. pg. 56 and 58.[9] Rather, Mr. McColl wants the right to dictate the particular team that his son is allowed to play on (middle school not high school). Cert. Admin. Rec. pg 44-45. No such right exists. Sequim School District's decision regarding grade placement should not be set aside simply due to Mr. McColl's desire to have his son play sports at the middle school.

C. Sequim School District's Highly Capable Program Does Not Create A Substantive Right For Ted McColl To Be Declared An Eighth Grader In Name Only.

Mr. McColl's reliance on the highly capable program to support his contention that his son be declared an eighth grader in name only is misplaced. WAC Chapter 392-170 allows school districts to adopt a program for highly capable students. A district is not required to participate. WAC 392-170-015. In addition, the specifics of the program

[8] Cert. Admin. Rec. 44: "S. McColl: Just give me the eighth grade branding, and I'll take on the WIAA." See also, Cert. Admin. Rec. 45.
[9] Decision of the Sequim School District Board of Directors notes Ted McColl is welcome to participate in high school athletics.

adopted is left to the discretion of the local school district and must "recognize the limits of the resources provided by the state and the program options available to the district, including programs in adjoining districts and public institutions of higher education." WAC 392-170-080. Mr. McColl argues that WAC 392-170-037 requires highly capable programs to include a component of accelerated learning. WAC 392-170-037 simply includes a list of some of the components a school district can consider in developing their own highly capable program.

WAC 392-170-037. Definition — Program options.

> Learning opportunities shown by research and practice to be especially effective with highly capable students include, but are not limited to:
> (1) Accelerated learning opportunities;
> (2) Grouping arrangements that provide intellectual and interest peer group interactions;
> (3) Cooperative agreements between K-12 schools and institutions of higher education providing for concurrent enrollment, dual credit, and other advance and/or postsecondary options;
> (4) Programs designed to coordinate, combine and/or share resources, people and facilities within a district or building in order to maximize access to and utilization of available resources for supporting students' learning;
> (5) Mentorships and career exploration opportunities.

Sequim School District's Highly Capable Program also known as the "gifted and talented program does not contain a component that specifically accelerates...calls for grade acceleration of students. That is a parent choice." Cert. Admin. Rec. pg. 23. Of the fifty-four students

currently in the Highly Capable Program, "[n]one of those students have [sic] been accelerated by grade because of highly capable services."[10]

The parents admit that they requested acceleration for Ted McColl, asked that he skip fifth grade and that his jump over fifth grade was not part of the Sequim School District Highly Capable Program. Certif. Admin. Rec. pg. 17[11] and 122.[12] Mr. McColl's claim that the District was required to accelerate his son under the Highly Capable Program is, therefore, unfounded and the Highly Capable Program is irrelevant to the question of whether Ted McColl should be designated an eighth grader in name only. Moreover, Mr. McColl has offered no legal support to his contention that acceleration under the Highly Capable Program would require that his son be declared an eighth grader in name only.

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[10] Testimony of Patra Boots, Record pg. 24.

[11] Transcript of Board Hearing, Record: " Hansen: Well, I know he was in a highly capable program at the time, but the jumping of a grade wasn't part of that highly capable program. J. McColl: No. Hansen: That was driven by your request. J. McColl: Correct."

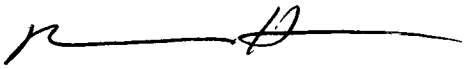
[12] Email from Mr. Stuart McColl to then Superintendent Garn Christensen, October 17, 2005: "You know me from last year because Janet and I solicited you and Patra Boots to assist us in moving my son Ted McColl up a grade, skipping 5th, and accelerating to 6th. Other than marrying my wife, and having my kids, that was probably one of the smartest things I've ever done. He is doing outstanding academically, been elected to represent his class for the ASB, and none of his teachers even knew he had skipped a grade until we brought it to his attention. So thanks for that- the system has worked very well for him."

VII. CONCLUSION.

The facts in this case are undisputed. Mr. McColl seeks his son to be retained as an 8th grader in name only. Mr. McColl initiated a process for his son to skip a grade at the school and now wants the Sequim School District to ignore his son's appropriate academic standing and grade placement for athletic reasons. Mr. McColl has not shown any Constitutional right that is impacted by the Sequim School District's appropriate application of its Policy/Procedure on student promotion/retention. The Sequim School District decision to promote Ted McColl to the ninth grade should stand and the Summary Judgment by the Superior Court affirmed.

Respectfully Submitted this 24th day of December 2008.

ROCKIE HANSEN PLLC
By:



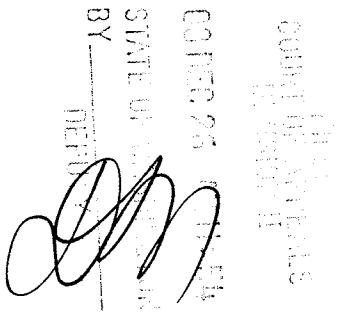
Rockie Hansen, WSBA No. 21804
Attorney for Sequim School District,
Respondent

CERTIFICATE OF SERVICE

I hereby certify that on 24th day of December 2008, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT** and the Record of Proceeding by the method indicated below, and addressed to the following:

Stuart McColl
1038 Hooker Road
Sequim, WA 98382

_____ PERSONAL SERVICE
__X__ U.S. MAIL
_____ HAND DELIVERED
_____ OVERNIGHT MAIL
_____ FACSIMILE/#



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