

NO. 74931-5-I

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

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JONATHAN GREENBERG,

Appellant,

v.

SEATTLE SCHOOL DISTRICT

Respondent,

FILED  
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Court of Appeals  
Division I  
State of Washington

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**BRIEF OF RESPONDENT SEATTLE SCHOOL DISTRICT**

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## I. INTRODUCTION

Appellant Jonathan Greenberg has appealed the trial court's dismissal of his action that requested either a writ of certiorari or a declaratory judgment. Greenberg sought to utilize these extraordinary remedies to challenge the decision of a mutually agreed-to arbitrator who adjudicated his grievance over discipline imposed on him by Respondent Seattle School District No. 1 ("the District") based on Greenberg's creation of a hostile environment for one of his students. Because Greenberg did not meet the fundamental jurisdictional and substantive requirements for the court to issue either a writ or a declaratory judgment, the trial court's order of dismissal should be affirmed.

## II. STATEMENT OF THE CASE

### A. Relevant Undisputed Facts

On May 30, 2013, District Superintendent Jose Banda found that there was probable cause to involuntarily transfer Greenberg from the Center School to Hamilton International Middle School based upon Greenberg's violation of District Policy 3207, which prohibits harassment, intimidation, and bullying of students.<sup>1</sup> CP 224-25. Greenberg's union filed grievances

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<sup>1</sup> A Caucasian student had complaint regarding Greenberg, because the student felt singled out in his classroom specifically for being Caucasian and not a person of color. The District conducted an investigation and determined that Greenberg's methods

on his behalf on June 6, 2013 and August 15, 2013 invoking Article X, Section D, Step 4 of the collective bargaining agreement (“CBA”), which required binding arbitration from which there is no appeal. *Id.* Anthony D. Vivenzio of the American Arbitration Association was appointed to serve as the arbitrator. CP 225. A two-day hearing occurred on March 10 and 11, 2014. *Id.* During the course of the hearing, Greenberg’s union representative stipulated on the record that the arbitrator had the authority to frame the issue for his resolution:

THE COURT: Will you agree that I will be able to frame the issue myself based upon what you’ve indicated and upon the evidence itself winds up revealing to me?

MR. JACKSON: Yes.

MR. BOYER: Absolutely.

THE COURT: That means the extent that we’re casting this as a disciplinary matter, that would mean the burden of proof and going forward would be upon the employer in this matter, and they will be proceeding after I’m finished with this. Will you stipulate that if a remedy is granted by me I may retain jurisdiction for an appropriate period, typically up to 60 days, to be able to help implement that if there’s a dispute as to the implementation of the remedy?

MR. JACKSON: I would agree.

MR. BOYER: Absolutely.

MR. KOPP: Yes.

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of teaching had created a hostile environment for the student. Firkins Decl., Ex. B (Arbitrator’s Decision, p. 5).

CP 233.

On August 12, 2014, the arbitrator issued a written decision. CP 176-203. As the arbitrator's decision reflects, the formulation of the issue for his resolution as proposed by Greenberg was:

Did the Seattle School District meet its burden of just cause in its disciplinary actions transferring Mr. Greenberg to a different school and in issuing him a letter of reprimand, and if they did not, what should the appropriate remedy be?

CP 178 (emphasis added). The arbitrator framed the issue in substantially the same manner as suggested by Greenberg as follows:

Did the Employer have just cause to discipline Jonathan Greenberg by transferring him from the Center School to another school and issuing a letter of reprimand? If not, what is the appropriate remedy?

*Id.* (emphasis added). The arbitrator found that the District had just cause to suspend Greenberg for ten (10) working days, but not to transfer him from the Center School. CP 198. The arbitrator also retained jurisdiction for two months in order to resolve any disputes regarding the remedy he had imposed:

5. The Arbitrator shall retain jurisdiction of this matter until 4:30 p.m. October 13, 2014, solely to resolve disputes regarding the remedy directed herein, if any. If the Arbitrator is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. on October 13, 2014, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by

that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

CP 203.

During the ensuing two-month period, neither Greenberg nor his union objected to the suspension or challenged the arbitrator's authority to impose it. By letter of August 20, 2014, the District notified the arbitrator and Greenberg that the District intended to implement the arbitrator's decision. CP 236-39. The District provided a draft letter imposing the ten-day suspension authorized by the arbitrator. *Id.* On September 12, 2014, the arbitrator approved the District's proposal for implementing his decision. CP 225. Greenberg failed to raise any objection to the arbitrator's authority to determine the appropriate remedy or to approve the District's decision to impose a ten-day suspension. *Id.* On September 18, 2014, the District notified Greenberg that it intended to impose the ten-day suspension authorized by the arbitrator "at a time determined by the Assistant Superintendent for Human Resources." CP 205-06. The letter sent to Greenberg was substantially the same as the draft letter that was previously provided to Greenberg and approved by the arbitrator. *Id.* During the ten-day period following his receipt of the letter, Greenberg never requested a hearing under RCW 28A.405.300 - .310.

Greenberg requested and was granted leave without pay that extended from September 2014 until January 2015. CP 226, 244-48. On December 16, 2014 – almost three months after being notified by the Superintendent of his intention to impose the suspension authorized by the arbitrator – Greenberg sent the District a letter requesting a statutory hearing pursuant to RCW 28A.405.300 relating to the ten-day suspension. CP 210. The District notified Greenberg’s attorney by letter of December 22, 2014 that the ten-day suspension was not subject to further review and that, even if it was reviewable under RCW 28A.405.300, Greenberg’s request for a hearing under that statute was untimely.<sup>2</sup> CP 241-42. Despite the arbitrator’s decision authorizing the ten-day suspension, on January 28, 2015 the Superintendent effectively rescinded the suspension, notifying Greenberg as follows:

As you know, the District is following the arbitrator’s decision and has reassigned you back to The Center School. Thus, the request by SEA and your colleagues that a suspension not be imposed runs contrary to the arbitrator’s decision. In the best interest of The Center School students and without modifying the Arbitrator’s decision, I will consider that you served your 10-day suspension while you were out on leave from September 1, 2014 to January 30, 2015. As such, you are required to report to work and start teaching classes on February 2, 2015.

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<sup>2</sup> Under RCW 28A.405.310, a request for a statutory hearing must be made within ten days of the employee’s receipt of the District’s decision.

CP 250. Thus, despite the arbitrator's finding that Greenberg created a hostile learning environment for a student based upon her race in violation of District policy, Greenberg was not administratively transferred, he did not serve a suspension, and he received no actual discipline for his misconduct.

**B. Procedural History**

On December 23, 2014, Greenberg filed a document in King County Superior Court entitled, "Application for Writ of Review and Complaint for Declaratory Relief" that combined his application for writ of certiorari under chapter 7.16 RCW and/or Article IV, § 6 of the Washington constitution and a request for declaratory judgment under chapter 7.24 RCW. CP 263-267. Greenberg's application for a statutory writ was not supported by an affidavit as required by RCW 7.16.050.

Greenberg waited for nearly six months before filing a motion for summary judgment on June 16, 2015. CP 274-283. The District opposed Greenberg's requests for a writ or declaratory judgment based upon multiple grounds, many of which were jurisdictional. CP 478-495. On July 16, 2015, the court struck Greenberg's summary judgment motion, because Greenberg had not complied with the King County Superior Court's local rule governing cases that involve statutory writs, LCR 98.40. CP 3. Referring Greenberg to the local rule, the Chief Civil Judge explained in her order that Greenberg must contact the court to schedule a

hearing and that a finding of adequate cause was required before a case schedule could be issued or dispositive motions could be heard. CP 3.

Greenberg then waited almost eight more months before taking any further action. He finally filed a motion for adequate cause on March 3, 2016. CP 4-14. Contrary to the express requirement of LCR 98.40, neither Greenberg's application nor his motion for adequate cause provided "a legal memorandum explaining why there is no adequate remedy at law." LCR 98.40 (c)(2). This is a requirement of not only the local rule, but also RCW 7.16.040.<sup>3</sup> Greenberg's motion for adequate cause also failed to address his alternative request for a constitutional writ of certiorari.

The District filed a response to Greenberg's motion for adequate cause, opposing it on multiple grounds. CP 211-223. Contrary to Greenberg's assertions in his opening brief on appeal, the District's response to his motion below opposed his requests for a statutory or constitutional writ of certiorari and his claim for a declaratory judgment. *Id.* Moreover, the District's response to his motion requested that the court not only deny the motion but also dismiss the suit, framing the issue as follows: "Should the court deny Plaintiff's motion for adequate cause

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<sup>3</sup> The statute only allows the Superior Court to grant a writ of certiorari when "there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." RCW 7.16.040.

and dismiss this case?” CP 214. On March 16, 2016, the court denied Greenberg’s motion for adequate cause and dismissed the case. CP 256-57.

### **III. ISSUES RELATING TO GREENBERG’S ASSIGNMENT’S OF ERROR**

- A. Did the trial court correctly dismiss Greenberg’s case based on lack of subject matter jurisdiction?
- B. Did the trial court correctly dismiss Greenberg’s case on the merits?

### **IV. ARGUMENT**

Greenberg’s lawsuit, which requested that the court grant three extraordinary remedies, was properly dismissed. Contrary to Greenberg’s characterization, the court’s dismissal was not done *sua sponte*, but rather after a hearing on Greenberg’s motion for adequate cause in accordance with the superior court’s local rule. The District’s opposition to Greenberg’s motion for adequate cause established not only that Greenberg’s claims lacked merit, but also that the court lacked jurisdiction to afford the relief requested. The trial court’s dismissal should be affirmed.

#### **A. The Trial Court’s Dismissal Was Neither *Sua Sponte* Nor Governed by CR 41**

As a preliminary matter, this court should reject Greenberg’s contentions that the trial court dismissed his action *sua sponte* or that the

court lacked authority to dismiss the action. The trial court dismissed the case after both parties submitted briefing on the issue of whether Greenberg had adequate cause to proceed with his claims. The District opposed Greenberg's motion and argued that the case should be dismissed.

Where a mode of proceeding is not specifically pointed out by a statute, the superior court may adopt local rules that establish "any suitable process or mode of proceeding." RCW 2.28.150. A superior court's local rules must not conflict either statutes or court rules that are adopted by the Washington Supreme Court. *Harbor Enters. v. Gudjosson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991). Here, LCR 98.40 is an appropriate local rule, because it does not conflict with any rule or statute and no other procedural rules for writ proceedings are set forth in chapter 7.16 RCW.

Greenberg acknowledges that it is proper for the court to utilize such a procedural rule as a "gate keeping" measure to ensure that there is some basis for the court to entertain a party's claims. Opening Brief, p. 11. Here, Greenberg did not satisfy the threshold jurisdictional requirements for either a writ of certiorari or a declaratory judgment, and his action was therefore properly dismissed. In denying Greenberg's motion for adequate cause, the trial court implicitly found that Greenberg's case was frivolous and that there was no basis to allow it to

proceed forward for discovery or trial. Common sense dictates that if Greenberg did not establish adequate cause for his claims to proceed to a discovery phase and/or trial, dismissal was in order.

Greenberg also spends a great deal of his opening brief parsing through CR 41 and then wrongly insinuating that this rule somehow restricted the trial court's authority to dismiss his claims. That rule expressly provides that it "is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise." CR 41 (b)(2)(D). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." CR 12 (h)(3) (emphasis added). Thus, even if this court views the trial court's dismissal as one that was done *sua sponte*, a court has the power to dismiss an action *sua sponte* where it determines there is a lack of subject matter jurisdiction. *See, e.g., Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 985 (9<sup>th</sup> Cir. 2003); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9<sup>th</sup> Cir. 1974).

Although the trial court did not disclose which specific grounds raised by the District it adopted in dismissing Greenberg's case, an appellate court may affirm a trial court's decision based on any ground supported by the record whether or not it was actually relied upon by the

trial court. *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965); *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); *Bremerton Concrete Prods. v. Miller*, 49 Wn. App. 806, 810, 745 P.2d 1338 (1987); *see also* RAP 2.5 (a). Here, there were multiple grounds for dismissal raised by the District, many of which were jurisdictional in nature. This court should affirm the dismissal based upon any or all of the issues raised by the District below.

**B. Applicable Standards of Review**

The court should affirm the dismissal of all Greenberg's claims, but there are differences in the applicable standards of review. The writ of certiorari under RCW 7.16.040 is an "extraordinary remedy" granted by statute. *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010). It "should be granted sparingly." *City of Seattle v. Williams*, 101 Wn.2d 445, 455, 680 P.2d 1051 (1984). The extent of a Superior Court's authority to grant a writ of certiorari is a question of law, which is reviewed *de novo*. *Fed. Way Sch. Dist. v. Vinson*, 172 Wn.2d 756, 764-65, 261 P.3d 145 (2011).

Although Greenberg has not briefed the issue in either his motion for adequate cause or his opening brief, in his application he made a request in the alternative for a constitutional writ of certiorari under the common law. "The grant of the common law writ is always discretionary

with the superior court as part of its inherent powers; it cannot be mandated by anyone, including a higher court. . . .” *Bridle Trails Community Club v. Bellevue*, 45 Wn. App. 248, 253, 724 P.2d 1110 (1986). Any review of a constitutional writ of certiorari by an appellate court is for an abuse of discretion. *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 142, 231 P.3d 840 (2010).

Additionally, Greenberg requested a declaratory judgment. “In declaratory judgment actions, appellate review may ensue in two situations. First, under the Uniform Declaratory Judgments Act, trial courts have discretion to determine whether to entertain a declaratory judgment action. Accordingly, an appellate court may be called upon to determine whether the trial court erroneously exercised its discretion either to consider or refuse to consider such an action. Second, in cases in which a court decides the declaratory judgment action on its merits, an appellate court may be called upon to determine the propriety of the lower court’s grant or denial of declaratory relief.” *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990). Where the trial court has exercised its discretion to refuse to entertain a declaratory judgment action, the trial court’s refusal should be reviewed for an abuse of that discretion. *Lewis County v. State*, 178 Wn. App. 431, 435, 315 P.3d 550 (2013); *WSFE v. State*, 107 Wn. App. 241, 244, 26 P.3d 1003 (2001). If the trial court has

decided the declaratory judgment action on the merits, any factual findings are reviewed under the substantial evidence standard and conclusions of law are reviewed de novo. *Nollette*, 115 Wn.2d at 600.

**C. The Trial Court Correctly Dismissed Greenberg's Action in its Entirety On Jurisdictional Grounds**

Greenberg fails to satisfy several fundamental requirements for seeking either a writ of certiorari or a declaratory judgment. These fundamental requirements are jurisdictional in nature, and thus the trial court was correct in dismissing this action without proceeding to the merits of any of Greenberg's claims.

**1. The Superior Court Lacked Jurisdiction, Because There is No Justiciable Controversy**

Washington courts "steadfastly adhere to 'the virtually universal rule' that there must be a justiciable controversy before the jurisdiction of a court may be invoked." *Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n.*, 150 Wn.2d 612, 622, (2003)(citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). Absent an issue of major public importance, a justiciable controversy must exist before the court's jurisdiction may be invoked under the Uniform Declaratory Judgment Act. *Clallam County Sheriff's Guild v. Bd. of Clallam County Comm'rs.*, 92 Wn.2d 844, 849, 601 P.2d 943 (1979); *Nostrand v. Little*, 58 Wn.2d 111, 121, 361 P.2d 551 (1961). Similarly, the doctrines of mootness and standing

prohibit writs of review where no controversy remains for the court to decide or where there is no perceptible harm to the petitioner. *State ex. rel. Burnham v. Superior Court*, 180 Wash. 519, 522, 41 P.2d 155 (1935); *Newman*, 156 Wn. App. at 142-43 (discussing requirements of standing). “There is . . . no authority which would warrant a writ to issue for the purpose merely of giving a court an opportunity to determine an abstract question of right and wrong.” *State ex rel. Case v. Mead*, 52 Wash. 533, 536, 100 P. 1033 (1909). Given that the questions of justiciability and mootness go to the court’s jurisdiction, they may be raised at any time. *Citizens for Financially Responsible Gov’t v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983); *Wash. Beauty College v. Huse*, 195 Wash. 160, 166, 80 P.2d 403 (1938).

A justiciable controversy is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Washington State Republican Party v. Washington State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 284, 4 P.3d 808 (2000) (quoting *Washington State Coalition for the Homeless v. Dept. of Social and Health Services*, 133 Wn.2d 894, 917, 949 P.2d 1291 (1997)). Here, there is no existing dispute

that is direct or substantial, because the District considers Greenberg to have already served his suspension when he was on voluntary leave. Greenberg continues to make the frivolous assertion that he is being subjected to discipline twice for the same misconduct. Greenberg has effectively never been subjected to any disciplinary sanction whatsoever. Greenberg was never transferred from the Center School, and he never has been nor ever will be required to serve the ten-day suspension authorized by the arbitrator. The trial court correctly dismissed all of Greenberg's claims, because without the existence of a live dispute over some substantial issue, jurisdiction was lacking.

**2. The Superior Court Lacked Jurisdiction, Because Adequate Remedies Were Available to Greenberg**

King County Superior Court's local rule governing writ proceedings required Greenberg to include a "[l]egal memorandum explaining why there is no adequate remedy at law" with his motion for adequate cause. LCR 98.40 (c). This provision of the rule mirrors the requirements for both statutory and constitutional writs that there must be no other avenue of review or adequate remedy at law before the court will provide these extraordinary remedies. *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 634 P.2d 296 (1981); *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 626, 246 P.3d 822 (2011) (quoting *Torrance v. King County*,

136 Wn.2d 783, 791, 966 P.2d 891 (1998)). “In its simplest form, the writ of review is a procedure used to review the acts and decisions of an inferior tribunal *when no other remedy is available.*” *New Cingular Wireless PCS v. City of Clyde Hill*, 185 Wn.2d 594 (2016).

Greenberg’s claim for a declaratory judgment requires a showing of the same element: “a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him.” *Sorenson v. Bellingham*, 80 Wn.2d 547, 559, 496 P.2d 512 (1972) (quoting *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961)). While CR 57 provides that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate,” the Washington Supreme Court has held this exception will only be applied in limited situations in the discretion of the trial court, noting “the courts will be circumspect in granting such relief.” *Ronken v. Bd. of Comm’rs*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977). Additionally, if other remedies were available but are no longer available because of the plaintiff’s inaction, the court may find that the plaintiff is not entitled to pursue a declaratory judgment action. *See, e.g., City of Fed. Way v. King County*, 62 Wn. App. 530, 536, 815 P.2d 790 (1991) (declaratory relief challenging legislative declaration of emergency untimely when filed after time period in which referendum could be filed and after time period for filing writ of

certiorari). “The lesson of [*Ronken* and subsequent cases applying CR 57] is that while declaratory relief may be available if the court finds that the other available remedies are unsatisfactory, such situations justifying exceptional treatment are very rare.” *Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 106, 38 P.3d 1040 (2002).<sup>4</sup>

Despite the express requirement that Greenberg establish the absence of an adequate remedy at law, Greenberg failed to brief this issue whatsoever in his motion for adequate cause in the trial court. CP 4-14. Greenberg was provided an adequate remedy when he participated in a hearing in front of the arbitrator to address the District’s decision to impose discipline on him. At the arbitration hearing, Greenberg was able to submit evidence and testimony with the assistance of his union representative. Greenberg proposed and the arbitrator agreed that the arbitrator should decide whether he should be transferred to another school, and if not, what the appropriate remedy should be. CP 178. The CBA grievance hearing provided an adequate remedy, making the requested extraordinary remedies requested in Greenberg’s subsequent lawsuit improper.

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<sup>4</sup> Contrary to Greenberg’s suggestion, the Washington Supreme Court’s decision in *New Cingular Wireless PCS*, 185 Wn.2d 594, does not affect the court’s analysis of the propriety of a declaratory judgment action in this case. There, the court held that a cellular service provider was not precluded from seeking a declaratory judgment to challenge a city fine based on the fact that it had not sought review by statutory writ. *Id.* at 605. Here, neither a writ nor a declaratory judgment was appropriate, because Greenberg had adequate remedies by way of either the CBA grievance procedure or a statutory hearing.

On appeal, Greenberg claims that a suspension, in contrast to a transfer of his position, was a sanction that required that he be given a statutory hearing under RCW 28A.405.300 rather than an opportunity for a grievance hearing with an arbitrator. However, the CBA language that Greenberg relies upon<sup>5</sup> to make this argument simply indicates that he must elect his remedies – a grievance or a statutory hearing – and is not entitled to elect both. This interpretation is consistent with the long established doctrine requiring election of remedies. *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959). Greenberg elected arbitration.

Greenberg now wants a second hearing with another decision-maker where he would call the same witnesses and present the same evidence about the same facts and events. Greenberg does not dispute that the same underlying conduct – his creation of a hostile environment for one of his students – is at issue. Greenberg’s request flies in the face of the policies of judicial economy and finality that Washington courts endeavor to serve. *See, e.g., Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004) (res judicata and collateral estoppel doctrines are applied to avoid multiplicity of actions and promote judicial economy and finality). Moreover, an adequate remedy is all that

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<sup>5</sup> Greenberg relies upon a provision in the CBA stating that the grievance procedure “shall not apply to matters covered by statutory due process procedures.” Appellant’s Opening Brief, pp. 13-14 (citing CP 49).

is required for the court properly to decline a petition for writ of certiorari and to refuse to entertain a declaratory judgment action. Greenberg does not have a right to the perfect remedy, the remedy of his choice, or the second bite at the apple that he seeks in this matter.

However, even if the court accepts Greenberg's assertion that he had a right to a hearing under RCW 28A.405.300 to address the imposition of the suspension authorized by the arbitrator, Greenberg did not timely avail himself of that remedy in accordance with the statute's requirements.<sup>6</sup> Greenberg was notified by letter of the District's intention to impose the ten-day sanction in accordance with the arbitrator's decision on September 18, 2014. Under the statute, Greenberg would have been required to serve his request for a hearing on the District within ten days. RCW 28A.405.300. Greenberg did not make any request for a statutory hearing until December 16, 2014, over two months past the time allowed under the statute. CP 210. Greenberg fails to explain why he waited almost three months to request the hearing he now claims to be entitled. Either of the remedies – arbitration or a statutory hearing – were more than adequate, and Greenberg shows no facts or legal authorities

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<sup>6</sup> When a certificated teacher makes a timely request for a statutory hearing under RCW 28A.405.320, the statute outlines procedures for selection of a Hearing Officer, who determines whether the District's decision to impose discipline is supported by probable cause. RCW 28A.405.310. The Hearing Officer's decision is, in turn, subject to judicial review. RCW 28A.405.320; RCW 28A.405.360.

indicating otherwise. Given that it is undisputed that adequate remedies were available to Greenberg, he is not entitled to either a declaratory judgment or a writ.

**3. The Superior Court Lacked Jurisdiction, Because Greenberg's Claims are Preempted by Federal Law**

CBA's are governed by § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185. In order to promote uniform federal labor law, § 301 completely preempts state law claims "founded directly on rights created by collective bargaining agreements," and also claims "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar v. Williams*, 482 U.S. 386, 394, 96 L.Ed 2d. 318, 107 S.Ct. 2425 (1987). Where federal preemption under § 301 applies it deprives the Superior Court of subject matter jurisdiction, and thus the issue may be raised at any time. *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 357, 35 P.3d 389 (2001).

The only exception to the rule of preemption is for "non-negotiable state law rights" which are "independent of any right established by contract." *Miller v. AT&T Networks Sys.*, 850 F.2d 543, 546 (9<sup>th</sup> Cir. 1988) (finding handicap discrimination claims brought under Oregon statute not preempted). Greenberg's arguments below and on appeal make it abundantly clear that this exception does not apply here. Where a state law

claim requires the court to interpret a provision of the CBA to resolve the dispute, the claim is preempted. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 690 (9<sup>th</sup> Cir. 2001)(citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 100 L.Ed. 2d 410, 108 S.Ct. 1877 (1988)). Greenberg's motion for adequate cause below was based exclusively on his contention that "[t]he collective bargaining agreement did not authorize the arbitrator to impose disciplinary measures that adversely affect a teacher's contract." CP 9 (emphasis added). On appeal, Greenberg again cites to the CBA and asks this court to interpret it to hold that the arbitrator exceeded his authority. Appellant's Brief, p. 15. To grant Greenberg the relief he requests, the court must interpret the CBA to determine the meaning of the exclusion Greenberg relies upon for "matters covered by statutory due process procedures." Opening Brief, p. 16. Thus, none of Greenberg's claims is completely independent of the CBA. Rather, Greenberg's claims require the court to interpret the CBA and are therefore preempted. The Superior Court's order of dismissal should thus be affirmed on this jurisdictional ground, as well.

**4. The Superior Court Lacked Jurisdiction to Issue a Statutory Writ of Certiorari, Because the Arbitrator Was Not an Inferior Tribunal, Board, or Officer**

RCW 7.16.040 sets out several factors that must be satisfied for the superior court to grant a statutory writ of certiorari, including that the action to be reviewed was done by "an inferior tribunal, board or officer"

that was “exercising judicial functions.” RCW 7.16.040. “If any of the factors are absent, there is no jurisdiction for review.” *Bridle Trails*, 45 Wn. App. 248 at 252. Just as he did below, in his opening brief on appeal Greenberg completely ignores the statutory prerequisite for issuing a statutory writ of certiorari that the action being challenged must be one of “an inferior tribunal, board or officer.” RCW 7.16.040.

The Washington Supreme Court has made clear that an arbitrator selected pursuant to the provisions of a CBA is not “an inferior tribunal, board or officer” whose actions can be reviewed by a writ of certiorari. *Williamson*, 96 Wn.2d at 152. In *Williamson* the court was asked to review the actions of an arbitrator selected pursuant to a contractual agreement, and it determined that “there was no ‘tribunal, board or officer’ involved as contemplated by RCW 7.16.040.” *Id.* *Williamson* governs this case and makes clear that the trial court lacked jurisdiction to entertain a statutory writ of certiorari. The trial court thus correctly dismissed this claim.

**5. The Superior Court Lacked Jurisdiction to Issue a Writ of Certiorari, Because Neither the Arbitrator Nor the District Was Exercising Judicial Functions**

Burying it in a footnote, Greenberg barely addresses the fundamental requirement for a statutory writ of certiorari that the inferior tribunal, board or officer have been “exercising judicial functions.”

Opening Brief, p. 13, fn. 4. Courts have used a four-factor test to determine whether an action is judicial:

(1) whether a court could have been charged with making the decision, (2) whether the action is a type that courts have historically performed, (3) whether the action involves the application of existing law to past or present facts for the purposes of declaring or enforcing liability, and (4) whether the action resembles the ordinary business of the courts as opposed to that of legislators or administrators.

*Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992). The above factors do not support Greenberg's claim that either the arbitrator or the District itself in this case was exercising judicial functions.

Greenberg quotes a portion of the Washington Supreme Court's decision in *Williamson* out of context as support for the assertion that the arbitrator was exercising a judicial function. Opening Brief, p. 13, fn.4. However, when the entirety of the relevant passage from the opinion is read, *Williamson* supports the District's position rather than Greenberg's:

Whether there was, in fact, an exercise of a judicial function in this case is less clear. Arbitration has been viewed as both nonjudicial or the exercise of a judicial function depending upon the context of the question. For example, when discussing "due process" in the arena of arbitration, we have drawn upon the underlying requirement of English and American jurisprudence to declare that parties have a fundamental right to be heard and to present evidence, after reasonable notice of the time and place of hearing. *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 516 P.2d 1028 (1973). On the other hand,

when dealing with the actual nature of arbitration itself we have not considered the function judicial. Rather, it has been deemed a substitute for judicial action. It is a procedure designed to reach settlement of controversies, by extrajudicial means, before they reach a point at which one must resort to judicial action. *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 132, 426 P.2d 828 (1967). In short, the very purpose of arbitration is to avoid courts and the formalities, the delay, the expense and the vexation of ordinary litigation.

*Williamson*, 96 Wn.2d at 152-53. While the *Williamson* court expressly declined to decide this issue, the above passage suggests that the court was convinced that an arbitrator does not perform a judicial function. The Court of Appeals has subsequently applied this reasoning to hold that arbitrators who hold grievance hearings pursuant to CBAs do not perform a judicial function. *Jones v. Pers. Res. Bd.*, 134 Wn. App. 560, 572-73, 140 P.3d 636 (2006); *see also Dept. of Agriculture v. State Pers. Bd.*, 65 Wn. App. 508, 514, 828 P.2d 1145 (1992) (“Since the very purpose of arbitration is to submit disputes to a process that is less formal, speedier, and generally less vexatious than litigation, it is unlikely that the Personnel Board here was performing a judicial function when it served as the agreed-upon arbitrator.”). The arbitrator’s function in this case was thus not judicial and cannot be reviewed by writ.

Greenberg wrongly cites *Francisco v. Bd. of Directors of Bellevue Public Sch. Dist. No. 405*, 85 Wn.2d 575, 580, 537 P.2d 789 (1975), for

the proposition that “the District’s decision to impose a suspension was judicial in nature.” Opening Brief, p.14, fn. 4. There is no merit to this reading of *Francisco*. The court in *Francisco* was referring to the nature of a school board’s function when deciding a statutory appeal under former Chapter 28A.58 RCW (now codified, as amended, at Chapter 28A.405 RCW). Unlike in *Francisco*, in this case there was no School Board appeal hearing and the District was thus not serving in any type of judicial capacity.<sup>7</sup> Moreover, Washington courts have been clear that a school district’s personnel decisions are administrative rather than judicial in nature. *Williams v. Seattle School Dist.*, 97 Wn.2d 215, 220, 643 P.2d 426 (1982) (writ of certiorari properly unavailable because school district’s transfer of assistant principal to subordinate teaching position was not judicial); *Odegaard v. Everett School Dist. No. 2*, 55 Wn. App. 685, 690 780 P.2d 260 (1989) (writ of review unavailable because school district’s demotion of principal was not judicial). Thus, any claim by Greenberg that the District itself performed a judicial function reviewable by writ of certiorari is without merit. Because Greenberg’s request is not for review of a judicial function by either the arbitrator or the District, the trial court lacked jurisdiction to issue a statutory writ of certiorari.

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<sup>7</sup> In 1977, the relevant statute was amended such that appeals are now heard by hearing officers instead of by the School Board. Laws of 1977 ex.s. Ch. 7§ 2.

#### **D. Dismissal on the Merits Was Correct**

As explained previously, even if the court looks past the fundamental jurisdictional defects at issue, on the merits Greenberg's claims fail, as well. Greenberg's action requesting a writ and/or declaratory judgment was untimely and precluded by his own stipulation to the arbitrator's authority that he now seeks to challenge. Additionally, Greenberg's interpretation of the CBA to require that he be given a second statutory hearing to address the remedy fashioned by the arbitrator is simply wrong.

##### **1. Greenberg's Claims Were Untimely and Barred by Laches**

A petition for writ of certiorari must be filed within a "reasonable time" after the act complained of has been done. *Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 718-19, 695 P.2d 994 (1985). "A reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period because chapter 7.16 RCW does not prescribe a limitation period." *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000). In *Coupeville School Dist. v. Vivian*, 36 Wn. App. 728, 677 P.2d 192 (1984), the court held that the reasonable time for a writ of certiorari seeking review of a hearing officer's reinstatement of a school teacher pursuant to RCW 28A.405 was thirty days. *Id.* at 730. Thirty days

was similarly the reasonable time for seeking a writ in the case at bar. The court should look to either the thirty-day time limitation for appealing civil judgments provided for in RAP 5.2(a) or the thirty-day time period in RCW 28A.405 as the most closely analogous rules and/or statutes.<sup>8</sup>

Greenberg was on notice of the arbitrator's decision in August of 2014 and subsequently the District's decision to impose the ten-day suspension in September of 2014. Inexplicably, Greenberg did not file this action until December 23, 2014, long past any reasonable time period for seeking a writ or a declaratory judgment. Moreover, Greenberg failed to file the required motion for adequate cause until over a year after he filed his complaint and application for a writ. Greenberg's delay was unreasonable and justified dismissal of his application for writ.

Greenberg's requests for a declaratory judgment and/or a writ were also barred under the doctrine of laches. "Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." *Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that

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<sup>8</sup> In *Wilkinson*, the court applied a 90-day limitation period based on an analogy to former RCW 7.04.180. *Wilkinson*, 139 Wn.2d at 844. However, this statute was repealed effective January 1, 2006.

cause of action; (3) damage to the defendant resulting from the unreasonable delay. *Id.* Laches is a defense to both declaratory judgment actions and petitions for certiorari. *Id.* (laches barred writ of certiorari); *Neighbors & Friends v. Miller*, 87 Wn. App. 361, 373-74, 940 P.2d 286 (1997) (laches barred declaratory judgment).

Here, all three elements of the doctrine were satisfied to bar Greenberg's claims. Greenberg had actual notice of the arbitrator's invitation to the parties to make any challenge to the remedy he imposed for a period of two months after his decision. Greenberg failed to take any action whatsoever to exercise his rights at the appropriate time or in an appropriate forum. The District relied upon the finality of the imposition of the ten-day suspension. Requiring it to continue to litigate the issue prejudices it. This court should consequently uphold the trial court's dismissal based on the untimeliness of Greenberg's commencement of any action in court.

**2. Greenberg's Claims Are Barred by His Stipulation to the Arbitrator's Authority to Fashion an Appropriate Remedy and the Doctrine of Equitable Estoppel**

Greenberg, through his union representative, stipulated on the record to the arbitrator's authority to fashion an alternative remedy. Moreover, the arbitrator's formulation of the issue, which included deciding what alternative remedy might be appropriate, mirrored the issue statement proposed by Greenberg himself. Greenberg cannot now be permitted to

challenge the arbitrator's authority to decide an alternative remedy after proposing that the arbitrator should decide this issue, stipulating on the record to the arbitrator's authority to decide the issue, and declining to raise any objection to the alternative remedy imposed by the arbitrator even after being expressly invited to do so.

“The parties are bound by their consent to have the arbitrator fashion an appropriate remedy.” *Clark County Pub. Utils. Dist. No. 1 v. IBEW, Local 125*, 150 Wn.2d 237, 249, 76 P.3d 248 (2003). As Greenberg's opening brief concedes, in *Clark County* the Washington Supreme Court upheld an arbitrator's imposition of a remedy not originally contemplated by the parties, because “the contract did not specify a means of devising an appropriate remedy, and the parties specifically charged the arbitrator with the challenging task of fashioning one.” *Id.* at 250. The same is true here. Greenberg's own issue statement at the arbitration – which was adopted by the arbitrator – suggested that the arbitrator should determine what alternative remedy was appropriate, and Greenberg then stipulated to the arbitrator's authority to resolve this issue. Greenberg cannot now take back his own proposal and stipulation for no other reason that he does not like the result. Greenberg is bound by the decisions that he made below even if his current appellate counsel disagrees with them.

Moreover, if Greenberg's claims are not barred *ipso facto* by his clear stipulation to the arbitrator's authority, they are barred by equitable estoppel. The doctrine of equitable estoppel is based on the view that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). Equitable estoppel has three elements:

(1) an admission, statement, or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.

*Id.* All of these elements are satisfied in the case at bar.

Greenberg stipulated that the arbitrator could frame the issue for his decision. Based on that stipulation, the arbitrator determined that he had the authority to determine not only whether the District had probable cause to transfer Greenberg, but also what other remedy would be appropriate in the absence of probable cause for the transfer. Greenberg then never raised any objection to the remedy after the arbitrator issued his decision even after being expressly invited to do so. The District and the arbitrator relied on Greenberg's stipulation and reasonably believed that he would comply with the arbitrator's decision given that he never challenged it during the arbitration process. Had the issue been raised below, the arbitrator could

have addressed it and likely resolved the issue short of the court's involvement. The District is now placed in the position of having to continue litigation of a matter that was conclusively resolved almost a year ago based on the absence of any objections to the arbitrator's decision during the following two-month period when he retained jurisdiction to entertain such objections. This court should affirm the trial court, because Greenberg is equitably stopped from backing out of his prior stipulation in order to attempt a second bite at the apple.

**3. Neither the Facts Nor the Law Support Greenberg's Claims**

Finally, Greenberg's claim that the arbitrator exceeded his authority under the CBA and that he is entitled to a separate hearing under RCW 28A.405.300-310 is based on a misapprehension of the law. Greenberg relies extensively on a statute that by its express terms does not apply here, and he misinterprets the CBA in a manner that contradicts well-settled labor law. The arbitrator properly imposed a suspension as an alternative remedy to the the transfer that the District proposed. Greenberg's assertion that he is entitled to two separate hearings where the same evidence would be presented to establish the same facts finds no support in the law.

**a. The Uniform Arbitration Act, Chapter 7.04A RCW, Does Not Apply**

Greenberg disingenuously cites RCW 7.04A.230 (1)(d), a provision of the Uniform Arbitration Act (“UAA”), and cases decided under that statute<sup>9</sup> for the contention that the superior court had the authority to vacate the arbitrator’s decision. The UAA expressly states, “This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees.” RCW 7.04.030 (4) (emphasis added). Thus, the statute Greenberg relies upon and the cases which interpret it have absolutely no application to either the CBA or the arbitrator’s decision at issue. The UAA does not govern this case.

**b. Neither the CBA Nor Chapter 28A.405 RCW Makes Any Distinction Based on “Adverse Employment Actions”**

Greenberg repeatedly makes an unsupported distinction between “adverse employment actions,” which he claims mandate a statutory hearing under RCW 28A.405, and other types of employment actions, which he claims are subject to grievance procedures under the CBA. An “adverse employment action” is an element of a discrimination claim under RCW 49.60. *See, e.g., Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004). However, no such claim is at issue here. Neither chapter

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<sup>9</sup> Opening Brief, pp. 13-15 (citing *Cummings v. Budget Tank Removal & Event Servs., LLC*, 163 Wn. App. 379, 260 P.3d 220 (2011) and *Boyd v. Davis*, 75 Wn. App. 23, 876 P.2d 478 (1994)).

28A.405 RCW nor the CBA even use the term “adverse employment action.”

Greenberg unjustifiably cites *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 719 P.2d 98 (1986), for the proposition that “[i]nvoluntary transfer and a written reprimand are not adverse employment actions.” Opening Brief, p.14. *Meyer* involved claims by a tenured university professor alleging defamation, violations of the open public meetings act, and violations of his constitutional rights under 42 U.S.C. § 1983. There was no discussion of the concept of an “adverse employment action” in the opinion, much less in the context of either a CBA or chapter 28A.405 RCW. *Meyer* is completely inapposite to any issue in this case. Neither *Meyer* nor the discrimination law concept of an “adverse employment action” has any application in this matter.

**c. Greenberg Elected His Remedy When He Chose Arbitration**

The purpose of the doctrine of election of remedies is to prevent double redress for a single wrong. *Lange v. Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). “[T]hree elements must be present before a party will be held bound by an election of remedies. Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them.”

*Id.* The Washington Supreme Court has previously held that where employees pursued a grievance through their CBA, they could not subsequently seek the same remedy available in a statutorily created administrative hearing. *State ex. rel. Barb Rests. v. Wash. State Bd. Against Discrimination*, 73 Wn.2d 870, 878, 441 P.2d 526 (1968). Here, Greenberg chose to pursue arbitration, and this court should uphold the dismissal of his claims for a writ or declaratory judgment based on the doctrine requiring election of remedies.

**d. Greenberg's Reading of the CBA is Contrary to Well-Settled Labor Law**

Greenberg argues that the court should read Article X, Section F of the CBA, which provides that the “arbitrator shall have no power to alter, add to, subtract from, or modify the terms of [the CBA],” to mean that the arbitrator lacked the authority to authorize a suspension in lieu of a transfer to another school as a sanction for subjecting a student to a hostile environment. Opening Brief, p. 15. This flawed reading of the CBA ignores well-settled labor law:

Arbitrators also may reduce the penalty imposed by management if, given the facts of the case, including the grievant's seniority and work record, it is clearly out of line with generally accepted industrial standards of discipline. The oft-included language denying the arbitrator the power to “[a]dd or subtract from or modify the terms of” the agreement does not preclude arbitral discretion to reduce the penalty imposed.

ALAN M. RUBEN, HOW ARBITRATION WORKS 1234-35 (Sixth Ed. 2003) (citing cases and authorities)(emphasis added). Greenberg relies on the exact provision of the CBA that the above well-known labor law treatise indicates does not deprive the arbitrator of the ability to impose a reduced penalty. Where prior judicial constructions have been given to words and phrases in a contract, the court presumes that the prior construction is what was intended by the parties. *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 92, 882 P.2d 703 (1994).

Given that the arbitrator imposed the ten-day suspension as a reduced penalty in accordance with the above labor law authorities, this case is not analogous to the non-binding out-of-state decisions Greenberg cites. Opening Brief, pp. 19-20.<sup>10</sup> These cases each involve two separate and discrete acts of discipline by the employer for the same employee misconduct where the second discipline was not a reduced penalty authorized by an arbitrator as part of the arbitration process that the employee elected. Moreover, as previously discussed, Greenberg's assertion that he is being disciplined twice for the same offense is

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<sup>10</sup> *Dept. of Envi'l. Protection v. Barker*, 654 So.2d 594 (Fla. 1995); *State Dept. of Trans. v. State Career Services Comm.*, 366 So.2d 473 (Fla. Dist. Ct. App. 1979); *Cf. Ladnier v. City of Biloxi*, 749 So.2d 139, 153 (Miss. App. 1999)(refusing to apply double jeopardy rule where civil service commission whose decision was being reviewed "specifically found that [the employee] had not been disciplined by the previous administration.").

baseless. Greenberg was never transferred from the Center School, and he effectively was never required to serve the ten-day suspension authorized by the arbitrator. Not only has Greenberg not been disciplined twice, he was never disciplined at all.

As Greenberg's opening brief acknowledges, Washington courts "will not overturn the arbitrator's remedy when it is drawn from the essence of the collective bargaining agreement." *Clark County*, 150 Wn.2d at 249. Here, the arbitrator properly considered Greenberg's grievance, determined that he violated District policy, and imposed a reduced sanction.

#### V. CONCLUSION

Given the lack of any remaining justiciable controversy, the fact that federal law preempts Greenberg's claims, and the lack of several elements required for the issuance of a writ, the trial court lacked jurisdiction to entertain any of the relief Greenberg requested. Moreover, Greenberg's stipulation to the arbitrator's authority to fashion a remedy and the untimeliness of his action preclude the relief requested.

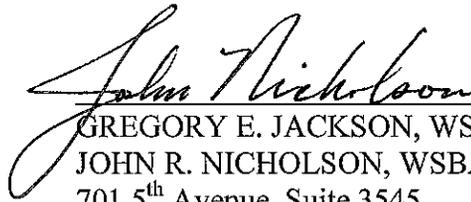
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Additionally, Greenberg's claims were not cognizable on the merits. Greenberg's action below was properly dismissed, and the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of July, 2016.

FREIMUND JACKSON & TARDIF, PLLC

A handwritten signature in cursive script, reading "John R. Nicholson", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

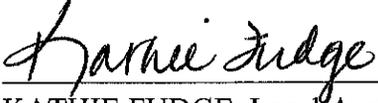
On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of Brief of Respondent Seattle School District to the following parties:

Tyler K. Firkins	<input checked="" type="checkbox"/>	U.S. Mail
Stephanie Beach	<input type="checkbox"/>	Facsimile
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I declare under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 22<sup>nd</sup> day of July, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
KATHIE FUDGE, Legal Assistant