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Supreme Court No. 1033311
Court of Appeals No. 58383-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

M.G.

Petitioner,

v.

BAINBRIDGE ISLAND SCHOOL DISTRICT, a municipal
corporation; and WASHINGTON OFFICE OF
SUPERINTENDENT OF PUBLIC INSTRUCTION, a public
agency

Respondents.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF PARTIES

Bainbridge Island School District (“the District” or “Respondent”) responds to Petitioner M.G.’s (“M.G.” or “Petitioner”) Petition for Review.

II. CITATION TO THE COURT OF APPEALS DECISION

M.G. v. Bainbridge Island School District, et.al., No. 58383-6-II (July 16, 2024) Unpublished Opinion (APP 1-9).

III. INTRODUCTION

This matter is not a civil lawsuit, nor a review of an enforcement action as was *Mercer Island School District v. OSPI*, 186 Wn. App. 939, 347 P.3d 924 (2015) cited by petitioner.¹ This petition for review arises from M.G.’s appeal to the superior court pursuant to RCW 28A.645.010 for review

¹Of note, Petitioner has also filed a separate civil suit arising from the same factual background at issue here, Kitsap County Superior Court Cause No. 23-2-00048-18 (*M.G., Samantha Gerlach and Suzanne Gerlach v. Bainbridge Island School District #303, Washington State HOSA, Naszya Bradshaw, Eleanor Wilson and Does 1 – 100*), decisions in which are currently under appeal (COA No. 59178-2), as well as a suit alleging violation of the public records act RCW 42.56, Kitsap County Superior Court Cause No. 23-2-01398-14 (*Suzanne Gerlach v. Bainbridge Island School District #303*.)

of an administrative decision by the Bainbridge Island School Board (“the Board”) regarding a Harassment Intimidation and Bullying Complaint (“HIB Complaint”) involving M.G., the son of Attorney Gerlach. APP 046-066. RCW 28A.645.010 *et seq.* is a limited jurisdiction statutory scheme providing the superior court jurisdiction to review a school board decision when petitioned to do so by an aggrieved party. *See* RCW 28A.645.010. Case law cited to by both parties and the COA acknowledges that the reviewing court stands in the same position as the school board and reviews the school board’s decision *de novo*. *Porter v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 872, 879, 248 P.3d 1111 (2011); APP 004-005 (Court of Appeals Decision).

The superior court properly reviewed the Board’s decision and affirmed the decision. APP 004. M.G. then sought review by the Court of Appeals. *Id.* However, in his appellate brief, rather than assigning error to the School Board decision and providing argument regarding why the Board’s decision

was arbitrary and capricious or contrary to the law such that the Court of Appeals could review the decision *de novo*, M.G.'s appeal assigned error to and argued about decisions made by the superior court and failed to assign error to the Board's decision or include any argument related specifically to the Board's decision. *See* APP 4 - 6 (Court of Appeals decision, in particular at footnote 4, p. 6)

The appellate court issued a decision including that M.G. failed to properly assign error to the Board's decision or provide argument alleging why the Board's decision was arbitrary and capricious or contrary to the law. Accordingly, the COA affirmed the superior court decision which had *de novo* affirmed the decision of the School Board. APP 009.

The error in M.G.'s appeal was not a mere technical failure as argued in his Petition for Review, rather, it was a wholesale failure to address the only decision the appellate court had jurisdiction to review, the underlying decision of the

School Board as to M.G.'s March 2021 alleged HIB Complaints. APP 005-006.

This matter does not involve constitutional law. There is no issue of substantial public interest as the appellate court decision is limited to Gerlach's failure to comply with the proper procedures for appealing the facts of this case and M.G.'s opening brief. The decision at issue does not conflict with any published Court of Appeals or Washington Supreme Court decision. In fact, M.G. agreed throughout his briefing that pursuant to applicable case law the appellate court standard of review was *de novo*, which is the principle underlying its decision. There are no relevant applicable grounds for this Court to grant M.G.'s petition for review and thus the petition should be denied.

IV. ISSUE STATEMENT

Whether this Court should decline to review the COA's unpublished decision because the decision is not in conflict with any other appellate court decision or decision of the

Washington Supreme Court. Further, the COA's decision is limited to the unique procedural facts of this case and does not involve a constitutional question or any question important to a substantial portion of the public.

V. STATEMENT OF THE CASE

A. Factual Background.

M.G. is a former student of Bainbridge Island High School ("BHS") within the District. APP 001. He has been represented by his father, Marcus Gerlach, III ("Gerlach"), a licensed attorney, throughout these proceedings. *Id.*

In March 2021 Gerlach served the District with a HIB Complaint on behalf of M.G. wherein he alleged multiple incidents of cyber harassment and bullying. APP 011-012 (Investigator's Report).

B. Procedural History.

Although not required by Board Policy, the District retained an outside attorney investigator to investigate Gerlach's cyber-bullying/HIB Complaints as demanded by

Gerlach. *See* APP 038-042 (Procedure 3706 at “I”); APP 010-031 (Investigator’s Report).

The investigator reviewed all of the materials submitted by Gerlach as well as the District’s related files, interviewed multiple BHS administrators, and assessed whether the evidence supported a finding that District Policy 3706 had been violated. APP 010-031 (Investigator’s Report).

The investigator concluded in a detailed report that the HIB Complaint was not supported. *Id.* In consideration of all the evidence, the investigator did not believe the complained of incidents met the definition of HIB set forth in District Policy and Procedure 3706. *Id.* (Investigator’s Report); *See also* APP 003.

The District’s Assistant Superintendent issued a letter to Gerlach informing him of the results of the investigation and notifying him that based on the outside investigation the District determined the cyber-bullying/HIB allegations in

M.G.'s HIB Complaint were found not to be credible and no violation of District Policy 3706 had occurred. APP 003.

Pursuant to District policy, Gerlach appealed to the Bainbridge Island School Board, which, following its own review of the cyber-bullying/HIB Complaint and attached materials, the investigator's report, and a hearing, upheld the decision that no violation of Policy 3706 had occurred. APP 004. As acknowledged in M.G.'s petition, the School Board's hearing was not recorded because recording was not required by Board Policy 3706 or Washington law. APP 032-045 (Board Policy and Procedure 3706); RCW 28A.600.477 et seq. ("prohibition of harassment, intimidation, and bullying").

As described in the foregoing section, Gerlach then filed an appeal of the Board's decision in Kitsap County Superior Court, which affirmed the School Board's finding that HIB had not occurred. APP 004. Gerlach next appealed to the Court of Appeals. *Id.* However, rather than appropriately petition the Court of Appeals for *de novo* review of the School Board

decision, Gerlach filed an opening brief arguing a plethora of errors, mainly by the superior court. APP 007-008. To the extent any argument about the School Board's decision was made, the argument was alleging bias and attacking credibility determinations, which are not issues within the jurisdiction of the appellate court. *Id.* The Court of Appeals affirmed the superior court decision in an unpublished decision. APP 009.

The Court of Appeals' decision correctly recognized its limited jurisdiction in the type of proceeding at issue here, a review of a school board administrative decision.

VI. ARGUMENT

M.G.'s petition fails to address the standards governing acceptance of review by this Court as set forth in RAP 13.4(b).

Instead, in his petition he asks this Court to assign error: (1) to the superior court reviewing the Board's decision as he petitioned them to do arguing the lack of transcripts of the Board's hearing precluded the superior court's review of the

Board decision; and (2), to the appellate court's alleged failure to adequately review his opening brief.

Gerlach also argues that the appellate court's decision was in direct conflict with *Mercer Island School District v. OSPI*, 186 Wn. App. 939, 347 P.3d 924 (2015). This is the only reason for review offered that addresses any of the potential grounds for review set forth in RAP 13.4(b). However as set forth more fully below, the *Mercer Island School District* matter is an appeal of a superior court decision overturning an Office of Superintendent of Public Instruction finding that the Mercer Island School District exercised deliberate indifference to incidents of racial harassment in an administrative enforcement proceeding. It is not analogous to the present matter and thus not in conflict with the appellate court decision at issue herein.

A. The Court of Appeals Correctly Interpreted RCW 28A.645.020.

M.G.'s first assignment of error is confusing and difficult to follow. He asserts error in the superior court having reviewed the Board's decision, arguing the lack of transcripts of the Board's hearing precluded the superior court's review of the Board decision. In his argument section the assignment of error morphs into an allegation the Board failed to comply with the statute providing the superior court limited jurisdiction to review a school board decision, RCW 28A.645.010, by failing to record their review of the District's HIB decision.

However, this alleged error offers no argument or analysis as to why review should be accepted pursuant to RAP 13.4(b). Nevertheless, in abundance of caution, Respondent addresses the inaccuracy in M.G.'s substantive argument. Contrary to M.G.'s assertions, RCW 28A.645.010 *et. seq.*, by its plain language, is a statutory scheme governing the assignment of limited jurisdiction to review school board decisions to the superior court. *See* RCW 28A.645.010 *et. seq.*

The statute governs procedure relating to said petitions for review, not school board hearing procedures. *Id.* To that end, RCW 28A.645.020 does not require that a School Board must record this type of hearing. Instead, it states that when an appeal of decision has been filed the school board, “shall file the complete transcript of the evidence and the papers and exhibits...” *Id.* which was done here. The District certified the evidence considered by the School Board in reaching its decision long ago. A transcription of the School Board’s hearing did not exist because it the hearing was not recorded and thus not available to be transcribed.

Notably, in *Goodman v. Bethel Schl. Dist.*, 84 Wn.2d 120, 524 P.2d 918 (1974), cited by petitioner, at issue was appellant’s request to exclude a statement of facts filed by the Board on review the Court held it would be illogical to require the District to produce something and then require the trial court to totally disregard it. *Id.* at 127-128. It does not stand for a principle that School Board’s must record all their activities.

In *Hattrick v. North Kitsap School Dist. No. 400*, 81 Wn.2d 668, 504 P.2d 302 (1972) again, the issue was inclusion in the record of something that existed. In *Hattrick*, the Court held a reporter's notes should have been transcribed. *Id.* This contrasts with the present case where petitioner is arguing something should exist that does not, a verbatim transcript of the School Board hearing.

Consequently, even if this Court reached the merits of this assigned error, M.G.'s Petition should be denied.

B. There is No Evidence the Appellate Court Failed to Adequately Review M.G.'s Opening Brief.

M.G.'s next argument also fails to address any of the requirements for review set forth in RAP 13.4(b). After offering faulty argument asserting the school board should have recorded its hearing, M.G. next alleges the appellate court did not adequately review his brief. This requested finding of error should be denied.

The appellate court decision makes clear that it did observe M.G.'s references to the school board in his briefing but that its role is not to address witness credibility or to substitute its own judgment as to the findings of fact. APP 008. What M.G. asked the appellate court to do was beyond its jurisdiction. The Court of Appeals decision is clear in stating its only potential role would have been reviewing the Board's decision *de novo* based on an arbitrary and capricious standard.

C. Contrary to Gerlach's Argument, the Court of Appeals Decision does not Conflict with the *Mercer Island School District v. OSPI*, 186 Wn. App. 939, 347 P.3d 924 (2015).

M.G.'s third and final stated issue is the only issue that arguably addresses a potential ground for review set forth in RAP 13.4(b). M.G. alleges the decision at issue is in direct conflict with *Mercer Island School District v. OSPI*, 186 Wn. App. 939, 347 P.3d 924 (2015). Specifically, he asserts that the *Mercer Island* decision established school district liability wherein an administration fails to take reasonable actions

considering known circumstances and that the Court of Appeals came to the opposite conclusion in the case at hand. This argument fails because even a cursory review of the opinion at issue and the *Mercer Island* decision reveals that neither decision stands for the principle Gerlach argues.

The appellate court decision of which M.G. seeks review upholds earlier case law finding that the standard of review in addressing a petition for review of a school board administrative decision is a *de novo* review of the school board decision. APP 004. The COA determined that Gerlach failed to properly seek *de novo* review of the school board decision. APP 007-009. Instead, he asked the COA to find numerous errors in decisions by the superior court. *Id.* To the extent he addressed the school board decision it was with allegations of bias and unfair credibility determinations rather than seeking a *de novo* review. *Id.*

The *Mercer Island School District* matter arose from a review of an administrative enforcement proceeding conducted

by the Office of Superintendent of Public Instruction (“OSPI”).
See Mercer Island S.D., 186 Wn. App. 939, 944, 959, 347 P.3d 924 (2015). OSPI held an administrative hearing regarding Mercer Island School District’s alleged improper handling of several incidents of student-on-student racial harassment pursuant to enforcement provisions of the Equal Education Opportunity Law (“EEOL”), RCW 28A.642 *et seq.* *Id.* OSPI, via the administrative law judge (“ALJ”) designated by OSPI, concluded the Mercer Island School District had displayed deliberate indifference toward racial harassment. *Id.* The ALJ ordered the Mercer Island School District to provide various training and presentations to reduce harassment, intimidation and bullying, particularly regarding race. *Id.* at 958-959. The Mercer Island School District appealed to the superior court pursuant to the Administrative Procedure Act, RCW 34.05 *et. seq.*, arguing the facts did not support the legal conclusions of the ALJ and the superior court agreed. *Id.* at 959. The appellate

court reversed the superior court reinstating the original decision of OSPI. *Id.* at 944.

M.G. has provided no credible argument the present decision conflicts with the *Mercer Island S.D.* decision or any other decision of the appellate courts or this Court.

VII. CONCLUSION

The Court of Appeals correctly applied the R.A.P., relevant case law and statutes to this review of a school board administrative action. There is no constitutional question at issue. The Court of Appeals decision is not in conflict with any appellate court or Supreme Court decision. The appellate court decision is specific to M.G.'s petition and opening brief filed in the appellate court. As such there is no applicable ground for review, M.G.'s petition should be denied.

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I CERTIFY PURSUANT TO RAP 18.17(b) that the foregoing Response to Petition for Review contains 2505 words.

Dated this 14th day of October, 2024.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

M.G.

Petitioner,

v.

BAINBRIDGE ISLAND SCHOOL DISTRICT, ET AL.

Respondents.

**RESPONDENT BAINBRIDGE ISLAND SCHOOL
DISTRICT'S APPENDIX TO RESPONSE TO PETITION
FOR REVIEW**

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PREG O DONNELL ET AL

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July 16, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

M.G.

No. 58383-6-II

Appellant,

v.

BAINBRIDGE ISLAND SCHOOL
DISTRICT, A Municipal Corporation,
CHRISTINA HULET, ROBERT
CROMWELL, MARK EMERSON, SANJAY
PAL, District Directors AND WASHINGTON
OFFICE OF SUPERINTENDENT OF
PUBLIC INSTRUCTION, A Public Agency,

UNPUBLISHED OPINION

Respondents.

CRUSER, C.J.—Marcus Gerlach filed a harassment, intimidation, or bullying (HIB) incident report form (HIB complaint) with the Bainbridge Island School District on behalf of his son, MG. The HIB complaint alleged that MG was the target of multiple incidents of harassment at Bainbridge High School (BHS) between December 2019 and March 2021. In the HIB complaint, Gerlach asserted that multiple teachers, school and district officials, and members of the Bainbridge Island School Board, failed to uphold district policy in allowing harassment and bullying to occur. In response to the complaint, the district hired a third party to investigate all of the allegations that Gerlach raised. The investigation culminated in a detailed report, which ultimately found that the allegations were not credible and no harassment, bullying, or policy violations had occurred. The district agreed with the report, finding the allegations were not

credible and no policies were violated. Gerlach, on behalf of MG, appealed to the board which affirmed the district's findings. Gerlach then appealed to the superior court.

The superior court reviewed the board's decision de novo and found that MG's allegations were not supported by the evidence. The court affirmed the district's and the board's finding that no harassment or bullying occurred. MG now appeals to this court. We sit in the position of the superior court, meaning that we review the board's decision, not that of the superior court. Because this case involves an appeal from a decision made by an administrative agency acting in an administrative capacity, the applicable standard of review is whether the board acted arbitrarily, capriciously, or contrary to law. However, MG assigned error and made argument about only the actions of the superior court, ignoring the board's decision. Because MG failed to assign error to or make any argument about the board's decision, we are unable to review the merits of MG's appeal. As such we decline to reach the merits of the case.

FACTS

I. HIB COMPLAINT

In March 2021, Marcus Gerlach¹ (MG's father and attorney) filed an HIB complaint with the district. In the complaint, Gerlach alleged four incidents of harassment and bullying. First, Gerlach alleged that two students stalked and sexually harassed MG during an afterschool club. Then, approximately two months after the afterschool club incident, a different student (who was not involved in the first incident) alleged that MG had harassed her. According to Gerlach, these

¹ When Gerlach filed the HIB complaint on MG's behalf, he was acting as MG's father rather than MG's attorney. As such, discussion of the complaint refers to Gerlach as the primary actor. Discussion of the appeal to the superior court and the subsequent appeal to this court will refer to MG as the primary actor, as he is the named plaintiff and appellant and Gerlach is officially acting in his capacity as MG's attorney throughout court proceedings.

accusations were made in retaliation for the afterschool club incident. Next, according to the complaint, approximately one year after the afterschool club incident and alleged retaliation, MG was the target of a cyberbullying attack on social media. Gerlach claimed that the social media posts aimed to interfere with MG's academic and extracurricular performance. Finally, according to the complaint, BHS students reported MG's conduct to the college that MG planned to attend in an effort to sabotage his academic career.

In addition to outlining the alleged instances of harassment and bullying against MG, Gerlach raised a number of complaints regarding how the harassment was handled by teachers, district officials, and board members. According to Gerlach, because of the shortcomings and failures of BHS teachers, the afterschool club sponsor, associate principals, and the district at large, MG had to endure uncomfortable and unfair situations in addition to the alleged harassment. Gerlach closed his complaint by requesting a discussion regarding "a mutually agreeable neutral, third-party to investigate the alleged retaliation against [MG] . . . and provide a comprehensive report" to Gerlach. Clerk's Papers (CP) at 1580.

II. INVESTIGATION & OUTCOME

The district hired Jeffery Ganson to investigate the allegations that Gerlach raised in his HIB complaint. Ganson wrote a detailed 21-page report summarizing the complaint, the records he reviewed, and the interviews he conducted. Ganson found that Gerlach's allegations lacked factual support and were not credible.

The deputy superintendent of the district wrote to Gerlach in September 2021, informing him of the results of the investigation. Based on the results of the investigation, the district found that Gerlach's factual assertions were not credible and that no policy violation had occurred.

III. PROCEDURAL HISTORY²

Gerlach, on behalf of MG, appealed the district’s decision to the school board. The board affirmed the district’s finding that Gerlach’s factual assertions were not credible and that no violation of policy occurred. MG then appealed to the superior court. The superior court reviewed the board’s decision de novo and affirmed the board’s decision. MG now appeals to this court.

ANALYSIS

I. STANDARD OF REVIEW

MG states that “[w]hen reviewing an administrative decision, the Court of Appeals sits in the same position as the superior court.” Br. of Appellant at 41. He reiterates this position in his supplemental brief, stating that we must review the board’s decision.

The district agrees that we sit in the same position as the superior court, explaining that where an appellant appeals the decision of a school board first to a superior court and then to an appellate court, “the Appellate Court does not defer to the Superior Court’s rulings, but rather, stands in the shoes of the Superior Court reviewing the school district’s decision on the administrative record under the controlling standard of review.” Resp. Br. of Bainbridge Island Sch. Dist. at 19 (citing to *Porter v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 872, 879, 248 P.3d 1111 (2011)).

² In his petition for review at the superior court, MG named the Office of Superintendent of Public Instruction (OSPI) as a party to the appeal. However, the superior court granted a motion to dismiss OSPI as a party on April 7, 2023. MG does not raise arguments in his opening brief against the superior court’s order dismissing OSPI as a party. We agree with OSPI that OSPI is not a party in this appeal, as the superior court dismissed OSPI from the case and MG waived any issue involving OSPI by failing to assign error to the superior court’s order in his opening brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.3d 549 (1992).

We agree with the parties that we stand in the same position as the superior court and that we review the board's decision, not the superior court's decision. This is in accord with *Porter*, 160 Wn. App. at 879, as well as *Mercer Island School District v. Office of the Superintendent of Public Instruction*, 186 Wn. App. 939, 960, 347 P.3d 924 (2015), and *City of Seattle v. Public Employment Relations Commission*, 160 Wn. App. 382, 388, 249 P.3d 650 (2011).³

II. MG'S ARGUMENTS

Despite agreeing that we sit in the same position as the superior court and that we review the decision of the board, MG confusingly focuses all of his assignments of error and arguments on the decision *of the superior court*. He does this in spite of repeatedly asserting that our review is “de novo.” Br. of Appellant at 19; Second Reply Br. of Appellant at 25; Suppl. Br. of Appellant at 11-12. MG failed to assign error to the board's decision and fails to include any argument related

³ In *City of Seattle*, Division One of this court explained that “[i]n reviewing an agency's order, the appellate court sits in the same position as the superior court. Review is therefore limited to the record of the administrative tribunal, not that of the trial court.” 160 Wn. App. at 388 (footnotes omitted). Two cases involving school board decisions affirmed this understanding of the appellate court's role. *Porter*, 160 Wn. App. at 879 (holding that in an appeal challenging a school board's decision to implement new text books, the appellate court “stands in the same position as the superior court”); *Mercer Island Sch. Dist.*, 186 Wn. App. at 960 (holding that the appellate court stands in the shoes of the superior court in reviewing a school board's finding that evidence did not support allegations of racial harassment against a student).

specifically to the board's decision.⁴ This failure makes us unable to review the merits of MG's claims.

A. Legal Principles

Rule 10.3 in Washington's Rules of Appellate Procedure (RAP) governs the content that parties must include in their briefs. In relevant part, it requires parties to include "a separate concise statement of each error," and present "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(4), 10.3(a)(6). "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g).

The supreme court explained in *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995), that

[i]n a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced . . . there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

B. Application

MG acknowledges and argues that we sit in the same position as the superior court in reviewing the administrative decision, and asserts that we should review the administrative

⁴ Rather than assigning error to decisions made by the board, MG assigns error to the superior court's dismissal of school board members, the judge's decision not to recuse herself from the case, and the court's denial of MG's motion to compel a complete record, including Zoom transcripts. Because this court stands in the same position as the superior court, and our review is limited to the whether the board acted arbitrarily, capriciously, or contrary to law, we do not reach MG's arguments regarding the superior court's decisions on recusal, dismissal of school board members, and availability of discovery. See *City of Seattle*, 160 Wn. App. at 388; *Porter*, 160 Wn. App. at 879-80; *Francisco v. Bd. of Dirs. of Bellevue Pub. Sch., Dist. No. 405*, 85 Wn.2d 575, 578-79, 537 P.2d 789 (1975); *Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 254-55, 758 P.2d 7 (1988).

decision “de novo.” Br. of Appellant at 19, 31, 41. But because MG does not inform us how he believes the board erred, his brief does not comply with the rules set out in RAP 10.3.

“In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced,” an appellate court can consider arguments by an appellant who fails to properly assign error. *Olson*, 126 Wn.2d at 323. Such is not the case here, however. MG’s arguments lack clarity and focus exclusively on the decision of the superior court, which we do not review.

MG assigns error to the court orders from the superior court regarding the dismissal of individual respondents, and the denial of motions to compel, a motion for sanctions, and a motion to disqualify the superior court judge. His five principle assignments of error are predicated on decisions of the superior court, not the board. The remaining assignments of error focus on the findings of fact and conclusions of law made by *the superior court*. MG introduces his assignments of error regarding specific conclusions of law by stating that “[t]he COL failed to cite a case or a legal standard to support the COL. BISD [Bainbridge Island School District], SBM [School Board Members] and [Judge] Adams [the superior court judge] erred in concluding the following” Br. of Appellant at 8. However, merely including a sentence saying that the district and the school board “erred” without following it up with argument about *how* the board erred is not sufficient to warrant our review. *See* RAP 10.3(a)(4), 10.3(a)(6).

To the extent that MG makes any argument related to the decision of the board, he does so by attacking how the board and district weighed the evidence before them and evaluated the credibility of witnesses. However, the board’s credibility determinations and weighing of evidence

are not reviewable. “We do not weigh witness credibility or substitute our judgment for the agency’s findings of fact.” *Goldsmith v. Dep’t of Soc. & Health Servs.*, 169 Wn. App. 573, 584, 280 P.3d 1173 (2012).

Moreover, the majority of MG’s references to errors made by the district or board are made under the umbrella of his arguments regarding how the superior court erred in reaching certain findings of fact and conclusions of law. Additionally, when MG does reference the decision of board, he often fails to provide sufficient citations to the record and/or to appropriate authority.⁵

⁵ As an example, in arguing that the superior court erred in reaching the conclusion that the record “supports the School Board’s decision that no HIB had occurred,” MG states that district officials “acted with deliberate indifference when [the district’s] female students disrupted MG’s right to a free appropriate and public education.” CP at 596; Br. of Appellant at 57-58. He goes on to state that “[t]he sexual harassment of M.G. from 2019 to 2021 was ‘sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services activities or opportunities offered by a school district.’ ” Br. of Appellant at 59 (quoting *Mercer Island*, 186 Wn. App. at 964). Although he cites to *Mercer Island* and to *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), he does not tether these legal citations to anything in the record that would support his claims.

In another instance, while arguing that the superior court improperly dismissed individual board members from the case, MG states that the district “had actual knowledge of the severe, persistent and pervasive sexual harassment of M.G. and acted with deliberate indifference,” and claims that members of the board “breached their fiduciary duties.” Br. of Appellant at 18. For support, he cites to unsupported conclusions from *his own brief* filed with the superior court in opposition to respondents’ motion to dismiss individual district officials and board members from the case.

In sum, we cannot review MG's appeal without putting our thumb on the scale and raising assignments of error on his behalf and making his arguments for him. We decline to do so.⁶

CONCLUSION


We decline to review the merits of MG's claims because he focuses his assignments of error and arguments on the decision of the superior court rather than of the board. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


CRUSER, C.J.

We concur:


GLASGOW, J.


CHE, J.

⁶ We asked the parties to provide supplemental briefing on several questions related to the standards governing our review, the primary question being whether the board was acting in an administrative or quasi-judicial capacity in making its decision. The district persuasively argued that the board acted in an administrative capacity, requiring us to review the board's decision for whether it was arbitrary, capricious, or contrary to law. *See Francisco*, 85 Wn.2d at 578-80; *Haynes*, 111 Wn.2d at 254-55; *Porter*, 160 Wn. App. at 879-80. MG largely failed to answer the questions we asked, and with regard to the primary question he simply stated that "[t]he [p]etition for [r]eview was clearly judicial," and focused on the fact that the orders from the superior court were judicial in nature, rather than addressing the board's decision. Suppl. Br. of App at 5-7. Because we are unable to review the merits of MG's claims, however, we need not address this question.

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September 9, 2021

Mark O'Donnell
Preg O'Donnell Gillett
901 Fifth Avenue, Suite 3400
Seattle, WA 98164

**Re: Bainbridge Island School District
Gerlach Investigation**

Dear Mr. O'Donnell:

In April 2021, I was asked by your office to assist with investigation of a complaint filed with the Bainbridge Island School District by Marcus Gerlach II ("Gerlach"), the father of Marcus Gerlach III ("Marcus"), a student who attended Bainbridge High School ("BHS"). The complaint generally alleges a failure by BHS staff to appropriately respond to alleged harassment of Marcus by peers. This letter reports my investigative steps and findings. It is not intended as a full recitation of the facts gathered. I base my conclusions on a preponderance of the evidence standard, under which I accept an allegation as fact when it is more probably true than not true based on available evidence.

Summary of Complaint

Gerlach filed with the District two Harassment, Intimidation or Bullying (HIB) Incident Reporting Forms, each with attachments summarizing the complaint along with a number of exhibits purporting to support the allegations in the complaint. Each form is undated, the second being characterized as an "amended" complaint. This investigation focuses on the allegations set forth in the amended complaint.¹ Notably, Gerlach never responded to multiple efforts to schedule interviews of him and Marcus to gather more detail about their allegations, so this investigation was completed without their input other than as set out in the complaint and other correspondence.²

¹ I was provided with the amended complaint at the outset of this investigation. When I was subsequently provided with the original complaint, I reviewed it closely in comparison with the amended complaint and found no material differences in the principal allegations.

² My understanding is that Gerlach objected to my performing this investigation on the basis that I and members of my current and former law firms have represented public school districts in Washington, from which Gerlach imputes a bias in favor of school districts. I understand that Mr. Gerlach also expressed concern to District legal counsel that my law partner represented the City of Bainbridge Island in a

The complaint begins in the context of Marcus's participation in a BHS student club, Health Occupations Students of America ("HOSA")³, asserting that in early December 2019, BHS teacher and HOSA advisor Charisa Moore called Marcus's parents on a weekend to discuss allegations that two younger female student participants in HOSA (Students 1 and 2 herein⁴) made against Marcus. The complaint characterizes Moore's tone during this call as "excited" and alleges that she was "extremely concerned" about what Students 1 and 2 had been posting about Marcus on social media. The complaint alleges that Moore stated that she had viewed "postings" on the Students' devices and that she was "so disturbed by what she saw and read that she did not initially know what to do," and that Moore had contacted Marcus's parents to assure them that she would take appropriate action to stop the harassing conduct of the girls.

The complaint goes on to recount Moore describing the girls "using sexually explicit terms to describe and demean Marcus;" describing the girls' conduct as "abhorrent;" repeatedly expressing shock and surprise that they were using profanity to

lawsuit—though it should be noted that the City of Bainbridge Island and Bainbridge Island School District are separate legal entities. (According to a news account, Gerlach made a complaint against the City of Bainbridge Island in 2013 but, as here, refused to be interviewed by the outside investigator assigned by the City. <https://www.bainbridgereview.com/news/investigation-finds-no-evidence-to-support-allegations-of-misconduct-by-city-of-bainbridge-island-employee/>) Finally, it is my understanding that Gerlach stated that he would participate in the District's investigation of his complaint only if the investigation was conducted by a person selected by him.

I do not serve as general or special legal counsel for public school districts, nor does my current law firm. I also have not personally represented the Bainbridge Island School District in any capacity, though members of my prior law firm did so, most recently in 2013. My only direct dealing with the District is that in 2021 I investigated another complaint filed with the District. At the outset of that investigation, I did not know any District officers or employees, and that matter did not entail rendering of legal advice to the District.

Over my 25-year career I have conducted investigations of many dozens if not hundreds of diverse matters, including workplace misconduct, discrimination, harassment, whistleblower retaliation and torts including student injury and death. My current investigations practice is limited to conducting neutral fact-finding investigations for agencies with whom I do not have, and do not intend to have, an attorney-client relationship. My prior experience representing public school districts and other municipalities for over two decades equips me to understand the legal and practical contexts in which matters requiring investigation arise, while the fact that I do not have or contemplate attorney-client relationships with the entities for whom I conduct investigations allows me to frankly assess and render findings regarding investigative matters. I firmly believe that a municipality is best served by transparent and candid findings, even when those findings may not reflect the agency's views or support its legal positions. That is the approach I have taken for this investigation.

³ The organization is now known as Future Health Professionals, but the term HOSA is used herein consistent with the nomenclature used in the complaint and by all witnesses.

⁴ The names of students other than Marcus are omitted herein; a key of students names is furnished in a separate document.

describe Marcus on social media; characterizing both girls as obsessed with Marcus; and stating that she had observed photographs of Marcus taken by the girls in the school hallways without his knowledge or consent. Later, the complaint recounts a meeting between Gerlach, Marcus and Moore away from the BHS campus, quoting Moore as “admitt[ing] that [Students 1 and 2] used sexually explicit language to describe Marcus” and that both seemed obsessed with Marcus.

The complaint then quotes from District Policy 3706, related to HIB, making specific reference to language addressing the impacts of HIB on disabled students:⁵

If allegations are proven that a student with an Individual Education Plan (IEP) or Section 504 Plan has been the aggressor or target of harassment, intimidation or bullying, the school will convene the student’s IEP or Section 504 team to determine whether the incident had an impact on the student’s ability to receive a free, appropriate public education (FAPE). The meeting should occur regardless of whether the harassment, intimidation or bullying incident was based on the student’s disability. During the meeting, the team will evaluate issues such as the student’s academic performance, behavioral issues, attendance, and participation in extracurricular activities. If a determination is made that the student is not receiving a FAPE as a result of the harassment, intimidation or bullying incident, the district will provide additional services and supports as deemed necessary, such as counseling, monitoring and/or reevaluation or revision of the student’s IEP or Section 504 plan, to ensure the student receives a FAPE.

The complaint then refers to Moore telling Students 1 and 2 that their conduct towards Marcus was “harassment.” Specifically, the complaint states that Student 2 “had a post/snapchat regarding Marcus,” and that both girls admitted to “making up posts to get Marcus to feel sorry for her.” Thus, the complaint asserts that Moore should have caused a Section 504 team meeting to be held to discuss the harassment and its impact on Marcus’s education, and that Marcus’s parents “detrimentally relied upon Moore’s express assurances to take all necessary action at BHS to prevent [Students 1 and 2] from stalking or harassing Marcus in the future.”

The complaint goes on to assert that District Procedure P3706 required a prompt investigation and report of findings to Marcus’s parents and alleges that BHS

⁵ Although the specific qualifying information was not available to me, I understand from witnesses that Marcus had a Section 504 accommodation plan.

administrators were not aware of the girls' harassment of Marcus until a February 2020 meeting.

The complaint next states that Moore required the girls to write a note to her about their actions, but that Marcus didn't receive a letter of apology from them and asserts that during the annual HOSA qualifying competition—a formal testing process—Marcus was required to be in the same room as the girls, who allegedly engaged him in conversation during the examination, resulting in Marcus being uncomfortable and distracted.

The complaint then skips forward a couple of months, to an instance in which another female BHS student (Student 3) alleged that Marcus had sexually assaulted, harassed and coerced her, about which Marcus's parents met with BHS Associate Principal Warren Read in February 2020. At that meeting, the complaint recounts that Gerlach informed Read that Marcus had been the subject of "sexual harassment" by Students 1 and 2, of which Read had been unaware. The complaint then makes the claim that the February 2020 allegations against Marcus "appeared to be retaliation against Marcus following the December 2019 alleged harassment by" Students 1 and 2, later suggesting that Student 3 was a "surrogate" of Students 1 and 2, then cites District Procedure P3706's prohibition on retaliation against a person who is the subject of harassment.

The complaint next turns to Marcus's participation in HOSA testing in February 2021, and states that "days before" Marcus was to participate, he was the subject of anonymous accusations posted on social media, one allegedly disparaging Marcus and referencing IIOSA and suggesting the potential for abuse of HOSA participants while traveling for club activities. The complaint suggests that the posts were intended to interfere with Marcus's participation, and notes that Read assured Marcus's parents that the HOSA advisors would be instructed to keep Students 1 and 2 away from Marcus. The complaint alleges that less than a week later, HOSA advisor Sharon Tu'inukaufe emailed Marcus and Student 1 about HOSA testing, and that later the same day, Student 1 emailed Marcus. The complaint next states that Marcus withdrew from HOSA but does not allege that this was a result of this interaction.

The complaint goes on to allege that these anonymous postings were by BHS students, referencing a particular female student (Student 4); referencing her participation in other school activities; and asserting that she was engaged in the unlawful practice of law because she offered to assist other students in telling their stories of sexual harassment and abuse. The complaint alleges that Student 1 followed Student 4's suspected social media account (which did not use her name) and goes on to detail

Student 4's apparent involvement in an informal student group called "Let's Talk Sexual Harassment," which group included other BHS students as participants.

The complaint next identifies another social media account entitled "bhspredators" and claims that it "appears to be sanctioned by BHS" because the account used a BHS logo. The complaint notes that the account "may" include stories about Marcus but is heavily redacted, and that Student 2 followed the account. The complaint asserts that the District could be liable for alleged harassment or defamation by the account because of the account's use of the BHS logo.

Next, the complaint notes that Marcus shared with Read and BHS Associate Principal Joe Power that he had been accepted to Washington State University (WSU) for Fall 2021, and claims that within days, BHS students made allegations against Marcus and contacted WSU to suggest that it obtain a copy of a BHS file on Marcus.

The complaint closes by citing a statute governing school districts' responses to allegations of HIB; notes that Moore notified Marcus's parents of Marcus's harassment by Students 1 and 2 but asserts that she failed to report it to BHS administrators; suggests that Student 3's subsequent accusation of sexual harassment by Marcus was retaliatory on the behalf of Students 1 and 2 "or their surrogates;" asserts that "at least one BHS staff/teacher has expressed prejudicial and biased comments to BHS administration regarding Marcus;" and requests an independent investigation of the complaint by a neutral third-party investigator.

Records Reviewed

I was provided and reviewed in close detail a large volume of documents through the course of this investigation. In summary, these include:

- Policy 3706, Procedure P3706 and the associated incident reporting form
- A large volume of records that I understand to have been responsive to a records request submitted to the District by Gerlach, including:
 - District staff notes of discussions with Gerlach, Marcus and other students and parents
 - A variety of mostly anonymous social media posts, some specifically referencing Marcus and many referencing unnamed persons
 - Written allegations about Marcus's conduct by various girls, including Student 3
 - Email correspondence pertaining to Marcus and other students
- Gerlach's original and amended complaints and accompanying exhibits

- Other correspondence Gerlach sent to the District and to a HOSA organization

Witness Interviews

Due to the ongoing COVID-19 pandemic, all witness interviews were conducted by videoconference (Zoom). No technology or other issues materially interfered with the conduct of interviews. Interviews were not recorded; this report is based upon detailed notes I took contemporaneously with each interview. The following interview summaries are presented generally in the order in which interviews were conducted, starting on June 4, 2021, and completing on June 9, 2021.

Charisa Moore – Teacher and HOSA Advisor

Moore was accompanied by union representative Lisa Hale for her interview. Moore described HOSA as a club focused on careers in the healthcare field, with students studying one of a variety of disciplines and then testing for competency in that discipline in order to qualify for a state tournament held in March each year. Moore described a formal testing process proctored in the school library.

Turning to the events of December 2019 between Marcus and Students 1 and 2, Moore told me that both girls were in her biology class and meet in her classroom early in the morning to talk and work, and that she observed as drama started cropping up. Moore described Student 1 as constantly emotional and sometimes crying. Eventually, the girls suggested to Moore that Student 1 was being harassed by Marcus, showing Moore an image of such purported harassment on one of their phones. Moore could not remember what was depicted but recalled that it struck her as rude and harassing of Student 1 by Marcus, noting that Student 1 “really liked him.” She thought the post referred to Student 1 as a “fat bitch” or words to that effect.

Moore confronted Marcus about the purported post, and he had no idea what she was referring to and assured her he had not made the post. Moore then confronted the girls about the post, and they told Moore that they had fabricated the post in order to make Marcus feel sorry for Student 1; Moore characterized this as “manipulation.” Moore later met with Student 2 (Student 1 being absent the day in question) and told her that she was at risk of removal from HOSA and told her that the girls needed to write an apology letter. It was Moore’s impression that Student 2 was the “main person” behind the posting, as she had told Moore that she made it. Moore notes that she spoke with Student 1 about the same on a later date, and notes that she also spoke with school counselor Nicole Wescott about this situation.

Moore stated that she talked with Marcus throughout her handling of this issue, and that the impression that she got from him was that things were fine. She assumed that the girls had apologized to him. She noted that Marcus told her he wouldn't be present as frequently as he was trying to avoid the girls.

When I asked Moore whether she had reported this series of events to BHS administration, she told me that she had, to Read. She also noted her understanding that Wescott had also emailed Read about the situation. Moore specifically recalled discussing the apology letter with Read and conveying her sense from Marcus that things seemed to be fine. To Moore, the issue appeared to have been resolved.

Moore confirmed that she did speak with Marcus's parents about this situation, noting that Marcus's older sister had participated in HOSA and the parents liked to attend the HOSA tournaments. Marcus's parents did not express concern to her regarding how the matter had been handled.

I asked Moore whether she had met with Gerlach and Marcus off-campus in February 2020, and she confirmed that she had. She explained that Gerlach called her and asked to meet in person. Moore had a Saturday morning meeting at The Marketplace at Pleasant Beach and thought she could briefly chat with Gerlach there. They met, and Gerlach told Moore that a law enforcement officer would be calling her and that Gerlach wanted her to tell the officer what had transpired with Students 1 and 2. Moore did receive a call from Officer Ledbetter the following week. The officer stated that he was investigating a situation, and Moore told him about the events between Marcus and Students 1 and 2. The officer told her that his investigation did not involve those students and asked whether Moore had information about any other female students in relation to Marcus; she said no.

I asked Moore about Gerlach's characterization of her impressions of and reaction to the fabricated post about Marcus by Students 1 and 2. She disagreed that she had characterizing the girls' actions as sexual harassment and stalking; she viewed it as harassment without a sexual element. She disagreed with Gerlach's characterization of her as "excited," calling this an embellishment and clarifying that she simply wanted Marcus's parents to be aware of what had happened. She noted that Gerlach referenced the girls having gone to his house, of which she was unaware.

Moore also contradicted Gerlach's statement that she had been so disturbed by what she saw (the fake posting) that she didn't know what to do, countering that she did know what to do: She called the girls in and confronted them about their actions; talked to Wescott and Read about the situation; and informed Marcus's parents. She stated that she

and Tu'inukaufe agreed that they would keep Marcus and the girls apart. In response to Gerlach's claim that she characterized the girls as using sexually explicit terms to describe and demean Marcus, she told me she had "no idea where that comes from." To Gerlach's claim that the terms were so humiliating that she only shared some with him, Moore replied, "I don't know what he's talking about." When asked about Gerlach's claim that she characterized the girls' conduct as "abhorrent," Moore replied that she didn't think she would have said that. When asked about Gerlach's claim that she was shocked that the girls would use profanity in reference to Marcus on social media, Moore told me that she didn't know what he was referring to and, notably, had never seen a posting *about* Marcus, only the fake posting purported to be *from* him. She "never saw the reverse, ever."

She also disagreed with Gerlach's assertion that there were multiple photographs, stating that she only saw a single photograph, the one in the fake posting, on Student 2's phone. She recalled that this photo depicted both Marcus and Student 1. She was clear that she had seen "no other photos," and nothing that looked as if the girls were stalking Marcus or photographing him without his knowledge. Moore did agree with the Gerlach complaint's characterization of Student 1 as obsessed with Marcus but disagreed that the same was true of Student 2.

I asked Moore about Gerlach's claim that Marcus had been required to sit in the same room with Students 1 and 2 during the 2020 HOSA testing. She told me that the students sign up for their own testing slots and have the flexibility to choose from among a number of days. Testing is not a group activity but done individually. While other students might be in the library at the same time, students participating in HOSA testing are separated by at least 10 feet. She also noted that she could not address Gerlach's claim that Students 1 and 2 were present for and interacted with Marcus during testing, as she as a HOSA advisor would not be allowed to be present but noted that a proctor monitored all testing. She did relay that Marcus "did fine" and that the advisors only learn whether the student passes (qualifies for the state competition) or not.

Finally, Moore was aware that Marcus had a Section 504 accommodation plan that included typical attention-related accommodations such as extended time for work and preferential classroom seating. Any connection between Marcus's qualifying disability and the allegations in Gerlach's complaint was unclear to her.

Sharon Tu'inukaufe – Teacher and HOSA Advisor

Tu'inukaufe was accompanied by Hale for her interview. Along with Moore, Tu'inukaufe has served as a HOSA advisor for several years. Asked about the 2019 events

between Marcus and Students 1 and 2, Tu'inukaufe told me that Moore had told her about the situation. Tu'inukaufe never observed any problematic interactions between these students, but Moore advised her it would be best to keep the girls and Marcus separated. Tu'inukaufe disagreed with Gerlach's characterization of the girls having sexually harassed Marcus, asserting that this "greatly exaggerated" the actual situation, which she felt Moore had handled well.

I asked Tu'inukaufe about Gerlach's claim that Marcus had been required to sit in the same room with Students 1 and 2 during the 2020 HOSA testing. Like Moore, she told me that the students have a number of different testing opportunities and can choose when they test, and that advisors can assist with scheduling but cannot be present for testing, which is closely monitored by a proctor, Kathy Ellison, BHS Librarian. The proctor ensures that there is no interaction between students during testing.

Turning to the 2021 HOSA testing, I asked Tu'inukaufe about her email to Marcus and Student 1. She explained that a new guideline this year required students testing in a particular discipline to take the test in the same 24-hour period as all other students testing in that same discipline. She was aware that a student had started testing in the discipline of Medical Terminology, and because both Marcus and Student 1 were also on the list of students that would test in that discipline, she needed to advise them to begin the testing on time. Tu'inukaufe was aware of the guidance to keep Marcus and Student 1 away from one another, but both needed to be told to start the test. She was not aware that Student 1 had responded to Marcus. When I relayed the content of Student 1's email to Marcus⁶, Tu'inukaufe did not find it problematic or inappropriate. Tu'inukaufe was unaware of social media posting about Marcus around the time of HOSA testing and noted that Marcus never expressed any concern about his testing situation in 2020 or 2021.

Warren Read – BHS Associate Principal

When I asked Read about the 2019 issue between Marcus and Students 1 and 2, he told me that he thought he had first heard about the situation in February 2020, when Student 3 had come forward with allegations of sexual assault, harassment and coercion against Marcus. That matter was referred to law enforcement⁷, and Read met with Gerlach, who made a comment about Student 3's allegations having something to do with

⁶ The full text of Student 1's February 1, 2021, email to Marcus reads: "Hi, it's [Student 1], sorry to bother you but since we are testing tomorrow I believe I was suppose [sic] to email you since we are in the same testing category. To my understanding the rest of the people testing for medical terminology took it today, so we will be testing at 2:30 tomorrow. Good luck! -Sincerely, [Student 1]"

⁷ Student 3's allegations against Marcus include a claim that he engaged or attempted to engage in nonconsensual sexual intercourse with her at BHS.

a situation between Marcus and some girls in HOSA. Read did not know what Gerlach was referring to. In following up with Moore, he learned about the fake social media post concocted by Students 1 and 2, and Moore's handling of that situation. When Read subsequently met with Gerlach in person, Gerlach again asked about a connection between that situation and Student 3's allegations, to which Read responded there was none. Student 3 was a senior, not in HOSA; Students 1 and 2 were substantially younger, and there was no evidence that their social circles overlapped.

Read acknowledged that it was possible that Moore had reached out to him and described the issue with Students 1 and 2 previously, and that he had simply forgotten about it. He noted that as Moore described the events, she seemed like she thought she had done so previously. It is worth noting that Moore's perception and characterization of those events differs markedly from Gerlach's characterization; she likely would have described a more innocuous series of events, absent Gerlach's seemingly embellished claims of stalking, sexually explicit language, and the like, and this may explain Read's not having recognized the situation that Gerlach described.

In any event, even in pressing Read about a connection between the 2019 issues with Students 1 and 2 and Student 3's 2020 allegations, Read did not recall Gerlach raising any concerns about whether and how the 2019 issue had been addressed. As to Student 3's allegations, Read relayed that he and other staff had met with her on multiple occasions to hear her concerns. Noting the gravity of some of her allegations, they inquired whether she had made a report to law enforcement, and she responded that she had. Student 3 did mention that other friends of hers had had negative experiences with Marcus. She detailed some of those, but none involved Students 1 or 2.

When I asked whether Read had any concerns with how the 2019 issues had been addressed, he stated a concern that it hadn't been brought to him at the time (though again, he acknowledges that Moore may have done so and it slipped his memory). He felt that while the girls' actions were not of a sexual nature, they were a form of bullying, and so he would have spoken to them and their parents about it. That said, it seemed to him that the matter had been addressed adequately in the sense that there was no continuation of issues between Marcus and the girls. He noted that he had had one prior interaction with Student 1, in which she struck up a conversation with him, mentioned a male "friend" on social media and asked Read if he could tell the boy to unblock her. (Read did not know whether this involved Marcus, though there is no evidence or allegation that it did.) Read declined but mentioned the interaction as a "window into her social maturity."

Turning to early 2021, Read described a "random blast of social media," with one or more people posting accusations about a number of boys at BHS. Read and Power

reached out to parents of identifiable boys to alert them to what was happening. Read thought that Marcus's was among those accused, though he did not recall whether Marcus's name was used; specifically, he recalled an anonymous post that appeared to be from Student 3 as it seemed to describe her allegation that Marcus engaged or attempted to engage in nonconsensual sexual intercourse with her at BHS. Read was aware of no indications that Students 1 or 2 were involved in these postings.

Power and Read both met with Gerlach, who shared a particular concern that a student group called Students Against Sexual Assault was a forum for students to make such accusations. Read assured him that was not happening and that the group was used to discuss due process and appropriate ways of handling issues of sexual assault and harassment—and that the social media postings were not among them. Read recalled Gerlach referring to the upcoming HOSA test in relation to the social media postings. Asked about Gerlach's assertion that the postings were timed to interfere with Marcus's participation in HOSA testing, Read had no reason to believe that was the case, particularly in light of the fact that the posting made reference to a number of boys and not just or particularly Marcus.

When asked about Gerlach's assertion that BHS administrators—and particularly he—might have been responsible for students becoming aware of Marcus's admission to WSU, Read responded that he first learned of Marcus's admission to WSU when he learned that someone had made a report about Marcus to WSU. Read didn't believe that he had learned about the admission from Marcus or his parents, though he allowed that it was possible that Marcus had mentioned it and he had not recalled it. In any event, Read denies disclosing Marcus's WSU admission to any students or parents. He also denied that Marcus's student records were intentionally "papered" with allegations against him in order to harm his college prospects, noting that student files reflect events as they occur, which includes allegations of misconduct. Read stressed that Student 3 had been upset with school staff for not being able to do more about her allegations (which were made about two years after the alleged events) and had expressed to Wescott that she was unhappy that Read had not done more. Read therefore asserts that any suggestion that he collaborated with Student 3 or others in this regard doesn't make sense.

Joe Power – BHS Associate Principal

Power told me that while Marcus was in the alphabetical group of students assigned to him, he had had little interaction with Marcus, saying that Marcus keeps his nose clean. While Power was for this reason aware of the 2019 issue with Students 1 and 2 and the 2020 allegations of Student 3, he had not been directly involved in either situation. He was similarly "on the periphery" of the 2021 issue of anonymous social

media postings but did sit in on a meeting between Read and Marcus's parents. Power was aware of the reason for that meeting but had not seen the posts personally. His sense was that Marcus had been mentioned in posts, but that may be the result of Gerlach's statements.

Power acknowledged that he had been aware of Marcus's admission to WSU, though he didn't recall specifically how he had learned about it. He denied sharing that information with anyone and denied knowledge of any other staff member having done so. He also denied that there was any effort to "paper" Marcus's student records with derogatory information.

Nicole Wescott - School Counselor

Wescott has been Marcus's assigned school counselor since his freshman year at BHS. She noted that the first time they met was uncomfortable, as there had been reports from other students during the first week of school that Marcus had been saying that he wasn't doing well and that he was going to hurt himself. She called Marcus to the office, ensured that he was not in fact suicidal, and spoke and bonded with him at length. (I note here the similarity between this instance and reports of multiple girls about their interactions with him in documents furnished to me, which include allegations of manipulation and coercion through threats of self-harm.)

Wescott told me that she wasn't directly involved in the 2019 situation involving Students 1 and 2, but that Moore had shared information about it with her. Wescott was also apparently Student 3's first point of contact when she brought forth allegations of sexual assault, harassment and coercion against Marcus. Wescott was unaware of any connection between Students 1 and 2 and Student 3. When asked about her understanding of why Student 3 brought her allegations when she did (about two years after the alleged events), she thought that Student 3 had been concerned about Marcus's leadership role in HOSA and aware of concerns expressed by other girls about Marcus's treatment of them.

Wescott had no contact with Gerlach or Marcus during the 2020-2021 school year, when Marcus was participating in a Running Start program away from BHS.

Student Interviews Attempted

Based upon the evidence available to me, I saw no need or predicate for an interview of Students 1 or 2 but was asked by District legal counsel to attempt such interviews. I was provided contact information for the parents of both students and left detailed messages requesting interviews but received no responses.

Assessment of Complainant Credibility

An extensive review of documentary evidence and witness statements calls into serious question the credibility of Gerlach's allegations and assertions, many of which are entirely speculative and some of which objectively lack credibility. These concerns are only exacerbated by Gerlach's refusal to make himself or Marcus available to be interviewed, which would have provided an opportunity for Gerlach to clarify his allegations—and, more importantly, would have allowed Marcus himself to articulate his perceptions of events and the manner in which they impacted him.

Gerlach's Complaint

First, various statements in the complaint itself are unsupported by any evidence or otherwise lacking credibility. For example, Gerlach offers absolutely no evidence of any connection between Students 1 and 2 and Student 3, much less evidence to support that Student 3's 2020 allegations against Marcus were in retaliation for his issues with Students 1 and 2 in 2019.

In addition, in an attempt to connect Student 4 (whom he assumed to be behind an anonymous social media account) with his retaliation theory, Gerlach points to a post on that account; that post reads:

If you guys want, I will take your stories and compose a letter to the school with your demands. I will be your Alexander Hamilton.

Anything y'all need. I don't have much to offer except my writing skills, and maybe a few connections. But I'm here for you and I want to help you. You can message me on my insta

I'd want ALL of your input on what I write, so if y'all could all talk to each other that'd be greatly appreciated.

No detail spared. No grievance unaired. If you want, I will write it for you. I will represent you. I am not a lawyer, but I am a writer, and a survivor myself. I am here for you.

BELIEVE WOMEN.

BELIEVE SURVIVORS.

Despite the poster's clear disclaimer that "I am not a lawyer, but I am a writer," Gerlach, a lawyer, asserts that this constitutes the unauthorized practice of law. By any objective standard, the student was not, by merely offering to assist others with writing accounts of their abuse, practicing law. (Gerlach also points to the fact that Student 1 apparently followed that social media account, without any explanation as to how that demonstrates a coordinated effort to retaliate against or target Marcus.)

Similarly, Gerlach points to another social media account, "bhspredators," that was used to air concerns about the conduct of boys at BHS. While pointing to no evidence that the account mentioned or targeted Marcus, Gerlach asserts that because the account used a BHS logo (and offering no evidence that this was authorized by BHS), BHS sanctioned and was responsible for its content, including liability for defamation and harassment. Again, by any objective standard, having intellectual property such as a logo misappropriated by a third party without authorization does not result in liability on the part of the owner of that intellectual property.

Additional Correspondence from Gerlach

Other correspondence from Gerlach similarly calls the credibility of and evidentiary support for his allegations into further question:

- In a March 16, 2021, letter to District legal counsel, Gerlach states: "Apparently, BHS students contacted WSU, directly and requested WSU obtain a recently-created file on Marcus" The use of the word "apparently" suggests that this allegation is speculative and not based on identifiable evidence.
- In a May 21, 2021, letter to District legal counsel, Gerlach states: "BISD initially attempted to use a compromised Title IX investigator, who was also employed by the Washington School [sic] Risk Management Pool (WSRMP) to investigate a claim of negligence against BISD's employees, administrators and staff. WSRMP insures BISD against negligence claims. BISD's investigator, who also is the WSRMP Executive Director, assumed that the conflict of interest was permissible. . . . BISD's Erin Murphy (Murphy) had an obvious conflict of interest that precluded Murphy from investigating the complaint. BISD's School Board members (SBM) knew, or should have known that Murphy was an Executive Director with WSRMP and that some of the investigations conducted by Murphy are likewise compromised." Whether intentional misrepresentation or not, this statement contains multiple layers of falsity: First, at all times relevant to this matter, Deborah Callahan has been Executive

Director of WSRMP. Callahan has never been proposed as an investigator in this matter. Second, Erin Murphy, a Deputy Superintendent for the District, is not employed by WSRMP in any capacity. Murphy does serve on the Executive Board of WSRMP, as a representative of medium-sized school districts. Third, Murphy's role representing school district interests on the WSRMP Executive Board in no way undermines her qualifications to serve as the District's Civil Rights Coordinator, in which capacity she may appropriately investigate complaints of civil rights violations and similar matters.

That letter goes on to claim that the District "is now threatening and coercing the complainant, who was already targeted in a harassing, intimidation and bullying incident, to submit to a defense deposition as part of the interview process, or be excluded from participating in the process in violation of P3706." This statement is plainly false; I was retained to and have undertaken a neutral and independent investigation and have never suggested that Gerlach or Marcus be deposed—and as an attorney, Gerlach surely knows the meaning of the word "deposition."

Finally, the letter makes the following claim: "BISD's defense attorney also intends to proceed with the 'investigation' without complying with P3706: I. Step3, #5. BISD's SBM employee appears to be violating SBM's own Policies and Procedures. If BISD's SBM intend to comply with P3706, then 'the investigation shall include, at a minimum an interview with the complainant.' This mandatory interview will only occur when BISD engaged Investigator Necochea." The suggestion appears to be this investigation violates District policy because it omits an interview of Gerlach or Marcus, when I have repeatedly requested the opportunity to interview both of them, and Gerlach has refused—insisting on the right to choose who investigates his own complaint.

- Finally, in a June 3, 2021, letter to District legal counsel, Gerlach states: "In February 2021, the HOSA girl [Student 1] directly contacted Marcus. Read knew, or should have known that BISD Policies and Procedures required Read to: 1) File a HIB when Read learned that the two HOSA girls targeted Marcus; 2) Conducted [sic] an investigation of the alleged retaliation and; 3) Prevent continuing harassment to Marcus with a no-contact order against the HOSA girls and confirmation via Moore and [Tu'inukaufe] that the no-contact order would be followed." The obvious implication here is that Student 1's February 2021 email to Marcus was harassing. By any objective standard, it was not.

Gerlach's demonstrated penchant for evidence-free speculation and material misrepresentation seriously call into question any uncorroborated factual claim made in his complaint.

Evidence Contradicting Gerlach's Allegations

Gerlach's allegations are also materially contradicted by other evidence, including witness statements. First and foremost, Moore directly, materially and credibly contradicts Gerlach's characterization of her perception of and reaction to the 2019 actions of Students 1 and 2 towards Marcus:

- Gerlach characterizes the girls' actions as sexual harassment and stalking; Moore, who observed it firsthand, disagrees and viewed it as harassing without a sexual element, and observed no evidence of stalking.
- Gerlach characterizes Moore as "excited" when she notified him of the situation; she calls this an embellishment.
- Gerlach characterizes Moore as having been so disturbed by what she saw (the fake posting) that she didn't know what to do; Moore clearly describes the specific steps she took in response to the situation—steps that achieved the purpose of ending and preventing further harassment of Marcus by the girls.
- Gerlach claims that the girls used sexually explicit terms to describe and demean Marcus; Moore has "no idea where that comes from."
- Gerlach claims that the girls used profanity and terms so humiliating in reference to Marcus that Moore only shared some of them with him; Moore does not know what he is talking about, as the only name-calling involved was the fake posting concocted by the girls suggesting that Marcus called one of the girls fat. Marcus was never called anything derogatory by the girls.
- Gerlach claims that Moore characterized the girls' conduct as "abhorrent;" Moore disagrees and doesn't believe she would have used that term.
- Gerlach claims that the girls possessed multiple photographs of Marcus taken without his knowledge or consent; Moore only saw one photograph and no evidence that the girls were stalking Marcus or photographing him without his knowledge.

Gerlach's complaint hinges in large part upon his assertion that the subsequent testimonials of girls about Marcus's conduct towards them were false, and retaliatory for his having been a victim of harassment in 2019. While the scope of this investigation does not include determination of the truth or falsity of those allegations, ample evidence suggests that such reports may well have been truthful and accurate. First, Student 3—with no known connection to Students 1 and 2—made a facially credible report that Marcus engaged in coercion and unwanted, nonconsensual sexual touching including engaging or attempting to engage in intercourse with her at BHS; Student 3 reported the same to law enforcement.

Second, accounts of other girls about Marcus's conduct bear similarities; in particular, Marcus is repeatedly described as using threats of self-harm as a form of coercion with girls. That pattern is also borne out in Wescott's first meeting with Marcus, which was the result of students reporting that Marcus was threatening to harm himself—a threat that turned out to be untrue.

Third, Moore clearly had the impression that such reports were likely true. In an email to Wescott on January 25, 2021, Moore wrote: "Is anyone reaching out to Mark and helping him get counseling so these patterns will stop happening? I don't know how many women he has abused, but just one is enough to warrant help. These girls [sic] lives will be forever changed and more to come if he does not get help. Not to mention going to prison some day."⁸

The evidence available to me does not demonstrate that girls' reports of Marcus's conduct towards them have been false.

Summary of Findings

Response to Actions of Students 1 and 2

District Policy 3706 adopts the statutory definition of harassment, intimidation or bullying ("HIB"); prohibits it; and when it occurs, states the following about appropriate interventions:

Interventions are designed to remediate the impact on the targeted student(s) and others impacted by the violation, to change the behavior of the aggressor, and to restore a positive school climate. The district will consider the frequency of incidents, developmental age of the student, and

⁸ This may be what Gerlach refers to when in the complaint he states, "at least one BHS staff/teacher has expressed prejudicial and biased comments to BHS administration regarding Marcus."

severity of the conduct in determining intervention strategies. Interventions will range from counseling, correcting behavior and discipline, to law enforcement referrals.

The policy also addresses additional requirements when a disabled student is involved:

If allegations are proven that a student with an Individual Education Plan (IEP) or Section 504 Plan has been the aggressor or target of harassment, intimidation or bullying, the school will convene the student's IEP or Section 504 team to determine whether the incident had an impact on the student's ability to receive a free, appropriate public education (FAPE). The meeting should occur regardless of whether the harassment, intimidation or bullying incident was based on the student's disability. During the meeting, the team will evaluate issues such as the student's academic performance, behavioral issues, attendance, and participation in extracurricular activities. If a determination is made that the student is not receiving a FAPE as a result of the harassment, intimidation or bullying incident, the district will provide additional services and supports as deemed necessary, such as counseling, monitoring and/or reevaluation or revision of the student's IEP or Section 504 plan, to ensure the student receives a FAPE.

The policy is supplemented by Procedure P3706. It provides that, "Any school staff who observes, overhears or otherwise witnesses harassment, intimidation or bullying or to whom such actions have been reported must take prompt and appropriate action to stop the harassment, intimidation, or bullying and to prevent its reoccurrence." Specific to staff intervention, and consistent with the policy, the procedure states:

All staff members shall intervene when witnessing or receiving reports of harassment, intimidation or bullying. *Minor incidents that staff are able to resolve immediately*, or incidents that do not meet the definition of harassment, intimidation or bullying, *may require no further action* under this procedure, other than tracking, to ensure they are not repeated. (Emphasis added.)

Similarly, in identifying the specific procedural steps applicable to addressing HIB concerns, the procedure states:

All staff are responsible for receiving oral and written reports. Whenever possible staff who initially receive an oral or written report of harassment, intimidation or bullying will attempt to resolve the incident immediately. *If*

the incident is resolved to the satisfaction of the parties involved, or if the incident does not meet the definition of harassment, intimidation or bullying, *no further action may be necessary* under this procedure. Any oral or written reports of adult-to-student harassment, intimidation or bullying shall be reported to the district compliance officer.

All reports of *unresolved, severe, or persistent harassment, intimidation or bullying will be recorded on a district Incident Reporting Form and submitted to the principal* or designee, unless the principal or designee is the subject of the complaint. (Emphasis added.)

Only in cases of “unresolved, severe, or persistent” HIB must staff complete a reporting form, triggering a formal investigation. Thus, the policy and procedure set forth a practical and functional approach to addressing HIB promptly and in the moment when possible.

As a threshold matter, I analyze whether the actions of Students 1 and 2 towards Marcus—falsifying a social media post that depicted him commenting on Student 1’s weight—constituted HIB. As noted above, Policy 3706 includes the statutory definition of HIB:

“Harassment, intimidation, or bullying” means any intentional electronic, written, verbal, or physical act including, but not limited to, one shown to be motivated by any characteristic in RCW 28A.640.010 and 28A.642.010, or other distinguishing characteristics, when the intentional electronic, written, verbal, or physical act:

- (A) Physically harms a student or damages the student’s property;
- (B) Has the effect of substantially interfering with a student’s education;
- (C) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
- (D) Has the effect of substantially disrupting the orderly operation of the school.

RCW 28A.600.477(5)(b). While it is clear that Marcus was the subject of an intentional electronic and written act, he was not physically harmed nor was his property damaged by Students 1 and 2. There is no evidence that their conduct substantially interfered with Marcus’s education, as he hadn’t even been aware of it until Moore brought it to his attention and then promptly addressed it with the girls. There is no evidence that this single instance, quickly addressed by Moore, was so severe, persistent or pervasive that it created an intimidating or threatening educational environment for Marcus. Nor is there

evidence that this instance substantially disrupted the orderly operation of the school. As such, I find that the conduct of Students 1 and 2 towards Marcus did not constitute HIB.⁹

In any event, the evidence establishes that when Moore became aware of the social media post purporting to depict Marcus harassing Student 1 (by calling her fat), she promptly confronted Marcus about it, an appropriate intervention under the policy and procedure. When Marcus denied knowledge of or involvement in the posting, Moore promptly confronted Students 1 and 2 about it, and quickly obtained their admission that the post was a fabrication intended to make Marcus feel sorry for Student 1, and so Moore counseled the girls about the inappropriateness of their actions. This prompt, in-the-moment intervention is consistent with the policy and procedure, and in fact resulted in no further inappropriate conduct by Students 1 and 2 towards Marcus. Marcus himself acknowledged this in a February 14, 2021, meeting with Read.¹⁰ As such, even if the conduct of Students 1 and 2 had constituted HIB, this was not the kind of “unresolved, severe, or persistent” HIB that would have required further reporting or investigation, but rather the kind of “minor incidents that staff are able to resolve immediately,” which “may require no further action under this procedure, other than tracking, to ensure they are not repeated.”

That said, Moore credibly asserts that she informed Read of the situation at the time, and while Read does not recall this happening, he acknowledges that it might have, noting that when Moore later relayed the events to him, she appeared to believe that she

⁹ Procedure P3706 attempts to differentiate each term encompassed within HIB, though it appropriately notes that “this differentiation should not be considered part of the legal definition of these behaviors.” “Harassment refers to any malicious act, which causes harm to any person’s physical well being. It can be discriminatory harassment, malicious harassment, or sexual harassment.” There is no evidence that the actions in this harmed Marcus’s physical wellbeing; he was not even aware of them until Moore called the post to his attention. “Intimidation refers to implied or overt threats of physical violence.” Marcus was not subjected to threats. “Bullying refers to unwanted aggressive behavior(s) by another youth or group of youths that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm on the targeted youth including physical or educational harm. Bullying can also occur through technology and is called electronic bullying or cyberbullying.” The evidence does not clearly establish a power imbalance between Marcus and Students 1 and 2 (who were younger than Marcus), other than the fact that they apparently acted in concert. It also does not establish that the conduct was repeated multiple times or “highly likely” to be repeated. Thus, nothing in the procedure’s attempt to differentiate the terms undermines the conclusion that the actions of Students 1 and 2 towards Marcus did not constitute HIB.

¹⁰ Read’s notes of that meeting, prompted by Student 3’s allegations against Marcus, include the following: “On 2/14 (10:40 a.m.) I met w/ Marcus (student) and Mr. Gerlach. I began by asking M about a situation brought to my attention re: [Students 1 and 2] (from Charisa Moore). Mr. Gerlach had mentioned this on the phone, & I’d followed up w/ Charisa. I told him I wished I’d known of it & wanted to know if there were any other issues w/ them (he said no).”

had previously told him about it. This disconnect may be the result of Moore's drastically different perception of the events than that conveyed to Read by Gerlach. It is hardly surprising that Read had not heard about Marcus being sexually harassed, stalked, surreptitiously photographed, and called profane and sexually explicit names; Moore didn't report any of that because she didn't observe any of it. What she observed was a single instance of the girls concocting a fake social media post depicting Marcus calling one of them fat, which she had addressed and resolved in the moment.

Finally, because the actions of Students 1 and 2 towards Marcus did not meet the statutory or District definitions of HIB, the provision of Policy 3706 requiring a Section 504 team meeting to be convened "if allegations are proven that a student with [a] Section 504 Plan has been the aggressor or target of harassment, intimidation or bullying" did not apply. The failure to convene such a meeting did not violate Policy 3706. In any event, given the single incident; the fact that Marcus was not even aware of the fake social media posting until Moore brought it to his attention; and the fact that there were no further issues between Marcus and Students 1 or 2 following Moore's intervention, the evidence supports a finding that Marcus's ability to receive a free appropriate public education was not impacted by this incident.

Protection From Retaliation

As discussed above, there is no evidence that Students 1 or 2 targeted Marcus with further inappropriate contact or conduct; Moore's actions adequately prevented any further problems between these students. The fact that Student 1 emailed Marcus about 2021 HOSA testing over a year later, in response to Tu'inukaufe's email to both of them, does not alter this finding, as that email was entirely appropriate and did not constitute HIB.

While Gerlach alleges that Marcus tested in the same room as Students 1 and 2 in February 2020, this does not establish retaliation. While Gerlach claims that the girls interacted with Marcus and that this distracted him, the evidence establishes that the HOSA testing protocol calls for ample student separation and close proctoring, such that substantial inappropriate conduct towards Marcus was unlikely to have occurred in this context. My inability to interview Marcus about Gerlach's claims leaves this assertion without evidentiary support.

Gerlach's claim that Student 3 reported Marcus's alleged sexual assault, harassment and coercion in retaliation for the 2019 incident with Students 1 and 2 is based entirely on Gerlach's conjecture and is unsupported by any evidence, including any evidence that Student 3 even knew Students 1 or 2. Student 3's allegations against

Marcus are facially credible, were reported to law enforcement, and are in some ways consistent with the alleged abuse reported by other girls. Specifically, a number of girls reported that Marcus used various threats, including threats of self-harm, for coercive purposes—a pattern confirmed by Wescott when she first met Marcus. Lacking evidence of falsity in any of the girls' allegations about Marcus, and lacking evidence that any of those allegations were made because of the 2019 incident¹¹, the claim that Marcus was subjected to retaliation in the form of false complaints of sexual harassment or abuse is not founded.

Disclosure of WSU Admission

No evidence supports Gerlach's allegation that BHS staff disclosed Marcus's admission to WSU to students or parents, resulting in their informing WSU of allegations against Marcus. Likewise, no evidence supports Gerlach's claim that BHS staff created a file of derogatory material about Marcus for any inappropriate purpose, though the evidence does support a finding that such materials exist as a result of what appear to be bona fide concerns about his conduct towards girls.

In summary, I find that while Students 1 and 2 falsified a social media post in Marcus's name, this did not constitute HIB under state law or District policy; that, in any event, the District responded promptly, appropriately and effectively to that incident, such that there was no further inappropriate conduct by Students 1 or 2 (or others) towards Marcus; that subsequent allegations by other girls about Marcus's conduct towards them were not retaliatory in relation to the incident with Students 1 and 2, and did not constitute HIB in the absence of evidence of falsity; and that BHS staff did nothing inappropriate with respect to Marcus's student records or his admission to WSU.

I would be happy to answer any questions you may have about the investigation and findings detailed herein at your convenience.

Sincerely,

HAGGARD & GANSON LLP



Jeffrey Ganson

¹¹ Wescott thought Student 3 was motivated to report Marcus's alleged conduct towards her by Marcus's leadership role in HOSA (which involves travel for competitions) and concern for how he treated girls. This does not establish any connection between Student 3's report and Students 1 and 2.

PROHIBITION OF HARASSMENT, INTIMIDATION OR BULLYING

The district is committed to a safe and civil educational environment for all students, employees, parents/legal guardians, volunteers and patrons that is free from harassment, intimidation or bullying. As defined in by the RCW or WACs, “Harassment, intimidation or bullying” means any intentional electronic, written, verbal, or physical act, including but not limited to, one shown to be motivated by any characteristic in RCW 28A.640.010 and 28A 642.010, or other distinguishing characteristics, when the act:

- Physically harms a student or damages the student’s property.
- Has the effect of substantially interfering with a student’s education.
- Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment.
- Has the effect of substantially disrupting the orderly operation of the school.

Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation or bullying.

“Other distinguishing characteristics” can include but are not limited to: physical appearance, clothing or other apparel, socioeconomic status and weight.

“Intentional acts” refers to the individual’s choice to engage in the act rather than the ultimate impact of the action(s).

Behaviors/Expressions

This policy recognizes that ‘harassment,’ ‘intimidation,’ and ‘bullying’ are separate but related behaviors. Each must be addressed appropriately. The accompanying procedure differentiates the three behaviors, however, this differentiation should not be considered part of the legal definition of these behaviors.

Harassment, intimidation or bullying can take many forms including, but not limited to, slurs, rumors, jokes, innuendoes, demeaning comments, drawings, cartoons, pranks, gestures, physical attacks, threats or other written, oral, physical or electronically transmitted messages or images.

This policy is not intended to prohibit expression of religious, philosophical, or political views, provided that the expression does not substantially disrupt the educational environment. Many behaviors that do not rise to the level of harassment, intimidation or bullying may still be prohibited by other district policies or building, classroom or program rules.

Training

This policy is a component of the district’s responsibility to create and maintain a safe, civil, respectful and inclusive learning community and shall be implemented in conjunction with comprehensive training of students, staff and volunteers. Specific training requirements are included in the accompanying procedure.

Prevention

The district will provide students with strategies aimed at preventing harassment, intimidation

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and bullying. In its efforts to train students, the district will seek partnerships with families, law enforcement and other community agencies.

Interventions

Interventions are designed to remediate the impact on the targeted student(s) and others impacted by the violation, to change the behavior of the aggressor, and to restore a positive school climate. The district will consider the frequency of incidents, developmental age of the student, and severity of the conduct in determining intervention strategies. Interventions will range from counseling, correcting behavior and discipline, to law enforcement referrals.

Students with Individual Education Plans or Section 504 Plans

If allegations are proven that a student with an Individual Education Plan (IEP) or Section 504 Plan has been the aggressor or target of harassment, intimidation or bullying, the school will convene the student's IEP or Section 504 team to determine whether the incident had an impact on the student's ability to receive a free, appropriate public education (FAPE). The meeting should occur regardless of whether the harassment, intimidation or bullying incident was based on the student's disability. During the meeting, the team will evaluate issues such as the student's academic performance, behavioral issues, attendance, and participation in extracurricular activities. If a determination is made that the student is not receiving a FAPE as a result of the harassment, intimidation or bullying incident, the district will provide additional services and supports as deemed necessary, such as counseling, monitoring and/or reevaluation or revision of the student's IEP or Section 504 plan, to ensure the student receives a FAPE.

Retaliation/False Allegations

Retaliation is prohibited and will result in appropriate discipline. It is a violation of this policy to threaten or harm someone for reporting harassment, intimidation or bullying, or participating in an investigation. It is also a violation of district policy to knowingly report false allegations of harassment, intimidation, and bullying. Students or employees will not be disciplined for making a report in good faith. However, persons found to knowingly report or corroborate false allegations will be subject to appropriate discipline.

Compliance Officer

The superintendent will appoint a compliance officer as the primary district contact to receive copies of all formal and informal complaints and ensure policy implementation. The name and contact information for the compliance officer will be communicated throughout the district.

The compliance officer can be contacted by calling the district office main phone line: 206-842-4714. The district compliance officer will participate in at least one mandatory training opportunity offered by OSPI

The superintendent is authorized to direct the implementation of procedures addressing the elements of this policy.

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Cross Reference	Board Policy	2161	Education of Students with Disabilities
		3211	Nondiscrimination
		3212	Gender Inclusive Schools
		3241	Student Discipline
		3700/5013	Sexual Harassment

Legal References

RCW	28A.600.477	Prohibition of harassment, intimidation, and bullying
RCW	28A.640.010	Purpose – Discrimination prohibited
RCW	28A.642.010	Discrimination prohibited – Definitions
WAC	392-190-059	Harassment, intimidation and bullying prevention policy and procedure – School districts

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PROHIBITION OF HARASSMENT, INTIMIDATION OR BULLYING

A. Introduction

Bainbridge Island School District strives to provide students with optimal conditions for learning by maintaining a school environment where everyone is treated with respect and no one is physically or emotionally harmed.

In order to ensure respect and prevent harm, it is a violation of district policy for a student to be harassed, intimidated, or bullied by others in the school community, at school-sponsored events or when such actions create a substantial disruption to the educational process. The school community includes all students, school employees, school board members, contractors, unpaid volunteers, families, patrons and other visitors. Student(s) will not be harassed because of their race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression, gender identity, mental or physical disability, or other distinguishing characteristics.

Any school staff who observes, overhears or otherwise witnesses harassment, intimidation or bullying or to whom such actions have been reported must take prompt and appropriate action to stop the harassment, intimidation, or bullying and to prevent its reoccurrence.

B. Definitions

Aggressor - is a student, staff member, or other member of the school community who engages in the harassment, intimidation or bullying of a student.

Harassment, intimidation or bullying - is an intentional electronic, written, verbal, or physical act that:

- Physically harms a student or damages the student's property.
- Has the effect of substantially interfering with a student's education.
- Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment.
- Has the effect of substantially disrupting the orderly operation of the school.

Conduct that is "substantially interfering with a student's education" will be determined by considering a targeted student's grades, attendance, demeanor, interaction with peers, participation in activities and other indicators.

Conduct that may rise to the level of harassment, intimidation and bullying may take many forms, including, but not limited to: slurs, rumors, jokes, innuendoes, demeaning comments, drawings, cartoons, pranks, ostracism, physical attacks or threats, gestures or acts relating to an individual or group whether electronic, written, oral or physically transmitted messages or images. There is no requirement that the targeted student actually possess the characteristic that is the basis for the harassment, intimidation or bullying.

Incident Reporting Form - may be used by students, families, or staff to report incidents of harassment, intimidation or bullying. A sample form is included as Exhibit A with this procedure.

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Revised: October 10, 2019; September 24, 2015

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Retaliation - occurs when an individual is intimidated, threatened, coerced, or discriminated against for reporting harassment, intimidation, or bullying, or participating in an investigation.

Staff - includes, but is not limited to, educators, administrators, counselors, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities, classified staff, substitute and temporary teachers, volunteers, or paraprofessionals (both employees and contractors).

Targeted Student - is a student against whom harassment, intimidation, or bullying has allegedly been perpetrated.

C. Behaviors / Expressions

“Harassment,” “intimidation,” and “bullying” are separate but related behaviors. Each must be addressed appropriately. Although this procedure differentiates the three behaviors, this differentiation should not be considered part of the legal definition of these behaviors. Harassment refers to any malicious act, which causes harm to any person's physical well being. It can be discriminatory harassment, malicious harassment, or sexual harassment. Intimidation refers to implied or overt threats of physical violence. Bullying refers to unwanted aggressive behavior(s) by another youth or group of youths that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm on the targeted youth including physical or educational harm. Bullying can also occur through technology and is called electronic bullying or cyberbullying.

D. Relationship to Other Laws

This procedure applies only to RCW 28A.300.285 – Harassment, intimidation and bullying prevention and RCW 28A.600.477 Prohibition of harassment, intimidation, and bullying. There are other laws and procedures to address related issues such as sexual harassment or discrimination.

At least five Washington laws may apply to harassment or discrimination:

- RCW 28A.300.285 – Harassment, intimidation and bullying
- RCW 28A.600.477- Prohibition of harassment, intimidation, and bullying
- RCW 28A.640.020 – Sexual equality
- RCW 28A.642 – Prohibition of discrimination in public schools
- RCW 49.60.010 – The law against discrimination

The district will ensure its compliance with all state laws regarding harassment, intimidation or bullying. Nothing in this procedure prevents a student, parent/guardian, school or district from taking action to remediate harassment or discrimination based on a person's gender or membership in a legally protected class under local, state or federal law.

E. Prevention

1. Dissemination

In each school and on the district's website the district will prominently post information on reporting harassment, intimidation or bullying; the name and contact information for

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making a report to a school administrator; and the name and contact information for the district compliance officer. The district's policy and procedure will be available in each school in a language that families can understand.

Annually, the superintendent will ensure that a statement summarizing the policy and procedure is provided in student, staff, volunteer, and parent handbooks, is available in school and district offices and/or hallways or is posted on the district's website.

Additional distribution of the policy and procedure is subject to the requirements of Washington Administrative Code chapter 392-405 WAC.

2. Education

Annually students will receive age-appropriate information on the recognition and prevention of harassment, intimidation or bullying at student orientation sessions and on other appropriate occasions. The information will include a copy of the Incident Reporting Form or a link to a web-based process.

3. Training

The district compliance officer will participate in at least one mandatory training opportunity offered by OSPI. Staff will receive annual training on the school district's policy and procedure, including at minimum staff roles and responsibilities, how to monitor common areas and the use of the district's Incident Reporting Form.

4. Prevention Strategies

The district will implement a range of prevention strategies including individual, classroom, school, and district-level approaches.

Whenever possible, the district will implement evidence-based prevention programs that are designed to increase social competency, improve school climate, and eliminate harassment, intimidation and bullying in schools.

F. Compliance Officer

The district compliance officer will:

1. Serve as the district's primary contact for harassment, intimidation or bullying. If the allegations in a written report of harassment, intimidation, or bullying indicate a potential violation of Policy 3706, the district staff member who receives the report must promptly notify the district compliance officer.
2. Provide support and assistance to the principal or designee in resolving complaints.
3. Receive copies of all Incident Reporting Forms, discipline referral forms, and letters to parents providing the outcomes of investigations.
4. Communicate with the school district's designated civil rights compliance coordinator. If a written report of harassment, intimidation, or bullying indicates a potential violation of the district's nondiscrimination policy [Policy 3211], or if during the course of an investigation, the district becomes aware of a potential violation of the district's nondiscrimination policy, the compliance officer must promptly notify the district's civil rights compliance coordinator. At that time, the compliance officers must promptly notify the complainant that their complaint will proceed under both this policy / procedure and

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the nondiscrimination policy / procedure. The investigation and response timeline for the nondiscrimination procedure begin when the school district knows or should have known that a written report or investigation of Harassment, Intimidation, or Bullying involves a potential violation of the district's nondiscrimination policy.

5. Be familiar with the use of the student information system. The compliance officer may use this information to identify patterns of behavior and areas of concern.
6. Ensure implementation of the policy and procedure by overseeing the investigative processes, including ensuring that investigations are prompt, impartial, and thorough.
7. Assess the training needs of staff and students to ensure successful implementation throughout the district, and ensure staff receive annual fall training.
8. Provide the OSPI School Safety Center with notification of policy or procedure updates or changes on an annual basis.
9. In cases where, despite school efforts, a targeted student experiences harassment, intimidation or bullying that threatens the student's health and safety, the compliance officer will facilitate a meeting between district staff and the child's parents/guardians to develop a safety plan to protect the student. A sample student safety plan is available on the OSPI website: www.k12.wa.us/SafetyCenter/default.aspx.

G. Staff Intervention

All staff members shall intervene when witnessing or receiving reports of harassment, intimidation or bullying. Minor incidents that staff are able to resolve immediately, or incidents that do not meet the definition of harassment, intimidation or bullying, may require no further action under this procedure, other than tracking, to ensure they are not repeated.

H. Filing an Incident Reporting Form

Incident Reporting Forms may be used by students, families, or staff to report incidents of harassment, intimidation or bullying. A sample form is included as Exhibit A with this procedure. Any student or students who believes they have been the target of unresolved, severe, or persistent harassment, intimidation or bullying, or any other person in the school community who observes or receives notice that a student has or may have been the target of unresolved, severe, or persistent harassment, intimidation or bullying may report incidents verbally or in writing to any staff member.

I. Addressing Harassment, Intimidation, or Bullying – Reports

Step 1: Filing an Incident Reporting Form

In order to protect a targeted student from retaliation, a student need not reveal his identity on an Incident Reporting Form. The form may be filed anonymously, confidentially, or the student may choose to disclose his or her identity (non-confidential).

Status of Reporter

a. Anonymous

Individuals may file a report without revealing their identity. No disciplinary action will be taken against an alleged aggressor based solely on an anonymous report. Schools may

identify complaint boxes, use online reporting processes, or develop other methods for receiving anonymous, unsigned reports. Possible responses to an anonymous report include enhanced monitoring of specific locations at certain times of day or increased monitoring of specific students or staff. (Example: An unsigned Incident Reporting Form dropped on a teacher's desk led to the increased monitoring of the boys' locker room in 5th period.)

b. Confidential

Individuals may ask that their identities be kept secret from the accused and other students. Like anonymous reports, no disciplinary action will be taken against an alleged aggressor based solely on a confidential report. (Example: A student tells a playground supervisor about a classmate being bullied but asks that nobody know who reported the incident. The supervisor says, "I won't be able to punish the bullies unless you or someone else who saw it is willing to let me use their names, but I can start hanging out near the basketball court, if that would help.")

c. Non-confidential

Individuals may agree to file a report non-confidentially. Complainants agreeing to make their complaint non-confidential will be informed that due process requirements may require that the district release all of the information that it has regarding the complaint to any individuals involved in the incident, but that even then, information will still be restricted to those with a need to know, both during and after the investigation. The district will, however, fully implement the anti-retaliation provision of this policy and procedure to protect complainants and witnesses.

Step 2: Receiving an Incident Reporting Form

All staff are responsible for receiving oral and written reports. Whenever possible staff who initially receive an oral or written report of harassment, intimidation or bullying will attempt to resolve the incident immediately. If the incident is resolved to the satisfaction of the parties involved, or if the incident does not meet the definition of harassment, intimidation or bullying, no further action may be necessary under this procedure. Any oral or written reports of adult-to-student harassment, intimidation or bullying shall be reported to the district compliance officer.

All reports of unresolved, severe, or persistent harassment, intimidation or bullying will be recorded on a district Incident Reporting Form and submitted to the principal or designee, unless the principal or designee is the subject of the complaint.

Step 3: Investigations of Unresolved, Severe, or Persistent Harassment, Intimidation and Bullying

All reports of unresolved, severe, or persistent harassment, intimidation or bullying will be investigated with reasonable promptness. Any student may have a trusted adult with them throughout the report and investigation process.

1. Upon receipt of the Incident Reporting Form that alleges unresolved, severe, or persistent harassment, intimidation or bullying, the school or district designee will begin the

investigation. The school will investigate student-to-student allegations, and the district compliance officer will investigate adult-to-student allegations. If there is potential for clear and immediate physical harm to the complainant, the district will immediately contact law enforcement and inform the parent/guardian.

2. During the course of the investigation, the district will take reasonable measures to ensure that no further incidents of harassment, intimidation or bullying occur between the complainant and the alleged aggressor. If necessary, the district will implement a safety plan for the student(s) involved. The plan may include changing seating arrangements for the complainant and/or the alleged aggressor in the classroom, at lunch, or on the bus; identifying a staff member who will act as a safe person for the complainant; altering the alleged aggressor's schedule and access to the complainant, and other measures.

If during the course of an investigation, the district employee conducting the investigation becomes aware of a potential violation of the district's nondiscrimination policy (policy 3211), the investigator will promptly notify the district's civil rights compliance officer. Upon receipt of this information, the civil rights compliance officer must notify the complainant that their complaint will proceed under the discrimination complaint procedure in WAC 392-190-065 through WAC 392-190-075 as well as the HIB complaint procedure. The notice must be provided in a language that the complainant can understand. The investigation and response timeline for the discrimination complaint procedure will follow that set forth in WAC 392-190-065 and begins when the district knows or should have known that a written report of harassment, intimidation or bullying involves allegations of a violation of the district's nondiscrimination policy.

3. Within two (2) school days after receiving the Incident Reporting Form, the school designee will notify the families of the students involved that a complaint was received and direct the families to the district's policy and procedure on harassment, intimidation and bullying.
4. In rare cases, where after consultation with the student and appropriate staff (such as a psychologist, counselor, or social worker) the district has evidence that it would threaten the health and safety of the complainant or the alleged aggressor to involve his or her parent/guardian, the district may initially refrain from contacting the parent/guardian in its investigation of harassment, intimidation or bullying. If professional school personnel suspect that a student is subject to abuse and neglect, they must follow district policy for reporting suspected cases to Child Protective Services.
5. The investigation shall include, at a minimum:
 - An interview with the complainant.
 - An interview with the alleged aggressor.
 - A review of any previous complaints involving either the complainant or the alleged aggressor.
 - Interviews with other students or staff members who may have knowledge of the alleged incident.

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6. The principal or designee may determine that other steps must be taken before the investigation is complete.
7. The investigation will be completed as soon as practicable but generally no later than five (5) school days from the initial complaint or report. If more time is needed to complete an investigation, the district will provide the parent/guardian and/or the student with weekly updates.
8. No later than two (2) school days after the investigation has been completed and submitted to the compliance officer, the principal or designee shall respond in writing or in person to the parent/guardian of the complainant and the alleged aggressor stating:
 - The results of the investigation.
 - Whether the allegations were found to be factual.
 - Whether there was a violation of policy.
 - The process for the complainant to file an appeal if the complainant disagrees with results.

Because of the legal requirement regarding the confidentiality of student records, the principal or designee may not be able to report specific information to the targeted student's parent/guardian about any disciplinary action taken unless it involves a directive that the targeted student must be aware of in order to report violations.

If a district chooses to contact the parent/guardian by letter, the letter will be mailed to the parent/guardian of the complainant and alleged aggressor by United States Postal Service with return receipt requested unless it is determined, after consultation with the student and appropriate staff (psychologist, counselor, social worker) that it could endanger the complainant or the alleged aggressor to involve his or her family. If professional school personnel suspect that a student is subject to abuse or neglect, as mandatory reporters they must follow district policy for reporting suspected cases to Child Protective Services.

If the incident cannot be resolved at the school level, the principal or designee shall request assistance from the HIB compliance officer.

Step 4: Corrective Measures for the Aggressor

After completion of the investigation, the school or district designee will institute any corrective measures necessary. Corrective measures will be instituted as quickly as possible, but in no event more than five (5) school days after contact has been made to the families or guardians regarding the outcome of the investigation. Corrective measures that involve student discipline will be implemented according to district Policy 3241 – *Student Discipline*. If the accused aggressor is appealing the imposition of discipline, the district may be prevented by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded.

If in an investigation a principal or principal's designee found that a student knowingly made a false allegation of harassment, intimidation or bullying, that student may be subject to corrective measures, including discipline.

Step 5: Targeted Student's Right to Appeal

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1. If the complainant or parent/guardian is dissatisfied with the results of the investigation, they may appeal to the superintendent or his or her designee by filing a written notice of appeal within five (5) school days of receiving the written decision. The superintendent or his or her designee will review the investigative report and issue a written decision on the merits of the appeal within five (5) school days of receiving the notice of appeal.
2. If the targeted student remains dissatisfied after the initial appeal to the superintendent, the student may appeal to the school board by filing a written notice of appeal with the secretary of the school board on or before the fifth (5) school day following the date upon which the complainant received the superintendent's written decision.
3. An appeal before the school board or disciplinary appeal council must be heard on or before the tenth (10th) school day following the filing of the written notice of appeal to the school board. The school board or disciplinary appeal council will review the record and render a written decision on the merits of the appeal on or before the fifth (5th) school day following the termination of the hearing, and shall provide a copy to all parties involved. The board or council's decision will be the final district decision.

Step 6: Discipline/Corrective Action

The district will take prompt and equitable corrective measures within its authority on findings of harassment, intimidation or bullying. Depending on the severity of the conduct, corrective measures may include counseling, education, discipline, and/or referral to law enforcement.

Corrective measures for a student who commits an act of harassment, intimidation or bullying will be varied and graded according to the nature of the behavior, the developmental age of the student, or the student's history of problem behaviors and performance. Corrective measures that involve student discipline will be implemented according to district Policy 3241 – *Student Discipline*.

If the conduct was of a public nature or involved groups of students or bystanders, the district should strongly consider school-wide training or other activities to address the incident.

If staff have been found to be in violation of this policy and procedure, school districts may impose employment disciplinary action, up to and including termination. If a certificated educator is found to have committed a violation of WAC 181-87, commonly called the Code of Conduct for Professional Educators, OSPI's Office of Professional Practices may propose disciplinary action on a certificate, up to and including revocation. Contractor violations of this policy may include the loss of contracts.

Step 7: Support for the Targeted Student

Persons found to have been subjected to harassment, intimidation or bullying will have appropriate district support services made available to them, and the adverse impact of the harassment on the student shall be addressed and remedied as appropriate.

J. Immunity/Retaliation

No school employee, student, or volunteer may engage in reprisal or retaliation against a targeted student, witness, or other person who brings forward information about an alleged

act of harassment, intimidation or bullying. Retaliation is prohibited and will result in appropriate discipline.

K. Other Resources

Students and families should use the district's complaint and appeal procedures as a first response to allegations of harassment, intimidation and bullying. However, nothing in this procedure prevents a student, parent/guardian, school, or district from taking action to remediate discrimination or harassment based on a person's membership in a legally protected class under local, state or federal law. An harassment, intimidation or bullying complaint may also be reported to the following state or federal agencies:

- OSPI Equity and Civil Rights Office (for discrimination complaints)
360.725.6162
Email: equity@k12.wa.us
<https://www.k12.wa.us/policy-funding/equity-and-civil-rights>
- Washington State Human Rights Commission
800.233.3247
www.hum.wa.gov/index.html
- Office for Civil Rights, U.S. Department of Education, Region IX
206.607.1600
Email: OCR.Seattle@ed.gov
www.ed.gov/about/offices/list/ocr/index.html
- Department of Justice Community Relations Service
877.292.3804
www.justice.gov/crt/
- Office of the Education Ombudsman
866.297-2597
Email: OEInfo@gov.wa.gov
www.governor.wa.gov/oco/default.asp
- OSPI Safety Center
360.725-6044
<https://www.k12.wa.us/student-success/health-safety/school-safety-center>

L. Other District Policies and Procedures

Nothing in this policy or procedure is intended to prohibit discipline or remedial action for inappropriate behaviors that do not rise to the level of harassment, intimidation or bullying as defined herein, but which are, or may be, prohibited by other district or school rules.

Harassment, Intimidation or Bullying (HIB)

Incident Reporting Form

Reporting person (optional): _____

Targeted student: _____

Your email address (optional): _____

Your phone number (optional): _____ **Today's date:** _____

Name of school adult you've already contacted (if any): _____

Name(s) of individual(s) you are reporting:

On what dates did the incident(s) happen (if known):

Where did the incident happen? Circle all that apply.

Classroom Hallway Restroom Playground Locker room Lunchroom Sport field
Parking lot School bus Internet Cell phone During a school activity Off school property
On the way to/from school
Other (Please describe.) _____

Please check the box that best describes what the individual(s) did. Please choose all that apply.

- ☐ Hitting, kicking, shoving, spitting, hair pulling or throwing something at the student
- ☐ Getting another person to hit or harm the student
- ☐ Teasing, name calling, making critical remarks or threatening in person, by phone, by e-mail, etc.
- ☐ Putting the student down and making the student a target of jokes
- ☐ Making rude and/or threatening gestures
- ☐ Excluding or rejecting the student
- ☐ Making the student fearful, demanding money or exploiting
- ☐ Spreading harmful rumors or gossip
- ☐ Cyber bullying (bullying by calling, texting, emailing, web posting, etc.)
- ☐ Other

If you select other, please describe: _____

Why do you think the harassment, intimidation or bullying occurred?

Were there any witnesses? Yes ☐ No ☐ If yes, please provide their names:

Did a physical injury result from this incident? If yes, please describe.

Was the target absent from school as a result of the incident? Yes ☐ No ☐ If yes, please describe

Is there any additional information?

Thank you for reporting!

-----For Office Use-----

Received by: _____

Date received: _____

Action taken: _____

Parent/guardian contacted: _____

Circle one: Resolved Unresolved

Referred to: _____

PREG O DONNELL ET AL

October 14, 2024 - 5:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: M.G., Appellant v. Bainbridge Island School District, et al, Respondents
Superior Court Case Number: 21-2-01734-5

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