

## Problems to avoid in school district investigations:

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***Mercer Island Sch. Dist. v. OSPI***, 186 Wn.App. 939 (2015).

***DFA's preface:*** The portion of this case provided below is of the Court's discussion of the inadequacies of a school based informal investigation and the inadequacies of an outside investigation done by an attorney.

In this case OSPI had investigated a parent racial discrimination complaint, finding that the site administration and outside counsel had not conducted a fair and complete investigation.

The Court found that the school district's response to the allegations of discrimination had been **unreasonable and deliberately indifferent**.

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*[This excerpt from the case begins 39 pages into the decision at p. 978, focusing on the problems with the investigation]*

¶ 89 We begin with the District's informal investigations. As an initial matter, the District failed to conform in a timely manner to both the mandates of the EEOL [Washington's Equal

Education Opportunity Law] and the OSPI's May 2011 regulations. Specifically, it neglected both to amend its Nondiscrimination Policy and Procedure to extend coverage to racial discrimination and to appoint a nondiscrimination compliance coordinator. As a result of the District's failure to amend its Nondiscrimination Policy and Procedure, the Parents were not aware of their rights at the time that they filed their initial complaint on behalf of B.W. As a result of the District's failure to appoint a compliance coordinator, the coprincipals were not informed of the District's obligations under the EEOL and the OSPI's May 2011 regulations.

¶ 90 The coprincipals conducted inadequate investigations. While the District's failure to appoint a compliance coordinator may, perhaps, be partially to blame, both Budzius and Mr. Miller failed to follow the procedure under which they were purporting to investigate. For example, following the first incident, Budzius interviewed only two of the four students working together on the same group project. While Mr. Miller did manage to interview all of the students involved in the second incident, he failed to consider the two incidents in concert. Thus, as found by ALJ \*978 Mentzer, both failed to meet the minimum investigative requirements imposed by the District's procedure on "Prohibition of Harassment, Intimidation,

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and Bullying.”

¶ 91 To make matters worse, the reasons Budzius provided for not interviewing two of the four students were found by the ALJ to be not credible. Budzius stated that she believed that Student A was telling the truth and had no reason to lie, whereas she believed that B.W., who has Asperger’s syndrome and who, according to Budzius, had difficulty reading social cues, heard the word “stupid” but added “Black” in his own mind. However, Budzius could not explain how B.W.’s condition would affect his ability to hear a racial epithet and accurately report what was said.

¶ 92 In addition, Mr. Miller’s brief interviews failed to reveal critical facts that Ms. Miller [outside investigator] later uncovered—specifically, that the group had been discussing Mexico, which, as found by the ALJ, contextualized the remark made by B.W. to Student B, and gave further credence to B.W.’s allegations. Even more troubling is the fact that Mr. Miller continued to informally investigate the incident, despite the fact that R.W. had told him she wished to file a formal complaint, which would have been handled by the District, as opposed to the school. Although he continued with his informal investigation, Mr. Miller failed, ultimately, to include in his report any mention of the Moment Essay. The Moment Essay undeniably constituted

corroborating evidence of B.W.’s allegations. Yet, Mr. Miller did not address it in his report and the school’s staff proceeded to shield it from the Parents until its existence was disclosed by Ms. Miller.

¶ 93 As with the informal investigations, the formal investigation was fraught with inadequacies. Ms. Miller did not ask B.W. about the two disturbing essays he had written; she did not ask Brousseau, Budzius, or Mr. Miller to explain why they had withheld the existence of the essays from the Parents; in fact, she made no mention of \*979 B.W.’s two disturbing essays in her report;<sup>29</sup> she did not account for the conspicuous discrepancy between B.W.’s grades in other classes and his grades in the class he shared with his harasser; and she did not address the ostensible connection between the discussion of Mexico and Mexican food and the racially charged comments between Students A and B and B.W.

<sup>29</sup> She did append the essays to her report. Upon reading the report, the Parents learned, for the first time, of the existence of the second essay.

**\*\*945** ¶ 94 In addition to its failure to conduct an adequate investigation, the District failed to meaningfully and appropriately discipline Student A. In

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fact, it appears that the only discipline Student A received as a consequence of his acts of racial harassment was a reminder from Brousseau not to use race as the basis for angry comments and a request that he sign an “anti-harassment contract.”<sup>30</sup> Whether this can be characterized as “discipline” is debatable; whether the response was proportional to the harassment is not.

<sup>30</sup> The District suggests that it also disciplined Student A by suspending him for one day. The record rebuts this suggestion. Student A was suspended as a consequence of his role in the crab apple incident.

¶ 95 Furthermore, the District refused to consider any scenario in which B.W. was not to blame for the conflict with Student A. As found by ALJ Mentzer, the District’s staff believed that the conflict was due to B.W.’s social deficits. They were frustrated that, because B.W.’s Parents had withdrawn their consent to allow B.W. access to special education, they were unable to provide B.W. with assistance in overcoming his perceived social deficits. As a result, they refused to consider the possibility that B.W.’s claims of harassment could be legitimate, despite knowing that Student A had had a slew of serious behavior problems.

¶ 96 Considered together, these facts

establish that the District’s response to the harassment suffered by B.W. was clearly unreasonable. Thus, ALJ Mentzer did not err in concluding that the District was deliberately indifferent. \*980 Yet, we must also consider whether the harassment was sufficiently severe, pervasive, and objectively offensive so that it can be said to have deprived B.W. of access to the educational opportunities or benefits provided by the school.

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