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October 17, 2013

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RE: Webster v. Bainbridge Island School District
Kitsap County Sup. Ct. Cause No. 10-2-00346-2
Supplemental Letter to Verdict

Dear Counsel:

Although the agreement to resolve this matter provided that a verdict form be utilized by the decision-maker, I believe it may be helpful to the parties to explain my approach to several of the contested legal issues outlined in your briefings and oral arguments.

First, the Tegman issue was addressed by the school district as requiring a segregation of proximately caused damages where, as here, you have both intentional and negligent acts. Until further clarification by the State Supreme Court, this question is best addressed 'ad hoc'. In that regard, the more persuasive analysis is found in Rollins v. King County Metro Transit, 148 Wn. App. 370 (2009). In the latter case the court discusses the discretion of the court to fashion instructions that apply to the circumstances of a particular case. Here, I applied a 'but for' analysis, i.e., what damages are causally related to the negligence of the defendant and would not have occurred 'but for' that lack of care. Rollins, 148 Wn. App. 370 at 379,382. See also WPI 15.04. That is not to say there were not intentional acts by non-parties which caused harm to the plaintiff. Further, there were intentional harassing actions prior to the school district administrators finding out (which knowledge most likely was gained no later than the beginning of November, 2006). The damage awards here are only for harm caused *after* the school district became aware of the situation and, by its own admission, failed to intervene promptly and effectively.

A second issue relates to the claims of the parents. I agree that the school district owes no duty to the parents under the facts of this case. Jachetta v. Warden Sch. Dist., 142 Wn. App. 819 (2008). Rather, their claims are derivative and founded on a loss of consortium. RCW 4.24.010. As per WPI 32.06.01, the loss of love and companionship of the child by the parents is

to be measured under all the circumstances of the case. Although any subsequent marital problems are not part of the recovery here, it is rather painfully obvious that the disruption and chaos that this family suffered was to a large degree a direct result of the negligence of the school district. It is a common sense inference that the defendants' actions caused a negative impact on the relationship between parent and child under the Washington law of damages cited above.

A third legal issue relates to the Title IX claim. Although made moot by my finding that there was not 'deliberate indifference' by the school district, the matter of whether what happened here was sexual harassment under Title IX is worthy of clarification. Without going into the details of what are primarily uncontested facts in this case, for which several youth were convicted of crimes under state law, it is important to avoid an overly formal interpretation of sexual harassment under Title IX. I found that the male harassment of another male in this case was sex and gender based from the beginning. The sexualized behavior of the harassers was clearly based on the plaintiff's vulnerability and reaction to the numerous incidents of exposure and denigrating comments. The cases in support of this overview of Title IX claims are S.S. v. Alexander, 143 Wn. App.75 (2008); Wolfe v. Fayetteville School District, 648 F. 3rd 060 (8th Cir., 2011); and Montgomery v. Independent School District.No. 709, 109 F. Supp. 2d 1081, (D. Minn., 2000). The somewhat narrow view of sexual harassment under Title IX put forth by the defendant is inconsistent with the statutory purpose and intent in my view.

This was a difficult case. Albeit after the fact, the school district is to be commended for admitting in this proceeding its error in 'dropping the ball' when discovering the harassment and abuse directed toward one of its special education students. On reflection, there are some very important lessons from this matter. The most important lesson would be for school districts to put in place protocols to lessen the likelihood of this type of occurrence happening again. Finally, I appreciate the attorneys' professional and capable presentation of the case.

Respectfully submitted,



Judge Terrence A. Carroll, ret., Arbitrator