

HOUSE BILL REPORT

E2SHB 3026

As Passed Legislature

Title: An act relating to school districts' compliance with state and federal civil rights laws.

Brief Description: Regarding school district compliance with state and federal civil rights laws.

Sponsors: House Committee on Ways & Means (originally sponsored by Representatives Santos, Quall, Chase, Upthegrove, Kenney, Hunt, Nelson, Lias, McCoy, Hudgins, Simpson and Darneille).

Brief History:

Committee Activity:

Education: 1/29/10, 2/2/10 [DPS];

Education Appropriations: 2/4/10 [DPS(ED)];

Ways & Means: 2/8/10, 2/9/10 [DP2S(w/o sub ED)].

Floor Activity:

Passed House: 2/13/10, 59-35.

Senate Amended.

Passed Senate: 3/5/10, 30-18.

House Concurred.

Passed House: 3/8/10, 62-35.

Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Adds a new chapter to the school code paralleling the current Sexual Equality chapter and prohibiting discrimination on the basis of race, creed, religion, color, national origin, sexual orientation including gender expression or identity, veteran or military status, disability, or the use of a trained guide or service animal by a person with a disability.
- Tasks the Office of the Superintendent of Public Instruction (OSPI) with developing rules and guidelines to eliminate such discrimination. Authorizes the OSPI to enforce and obtain compliance with the law and the rules developed thereunder.
- Allows private court actions to be brought for violations of the chapter and rules developed thereunder and permits the recovery of damages and equitable relief.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON EDUCATION

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Quall, Chair; Maxwell, Vice Chair; Priest, Ranking Minority Member; Hope, Assistant Ranking Minority Member; Dammeier, Fagan, Hunt, Johnson, Liias, Orwall, Probst, Santos and Sullivan.

Staff: Cece Clynch (786-7195).

HOUSE COMMITTEE ON EDUCATION APPROPRIATIONS

Majority Report: The substitute bill by Committee on Education be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Haigh, Chair; Probst, Vice Chair; Priest, Ranking Minority Member; Hope, Assistant Ranking Minority Member; Carlyle, Haler, Hunter, Kagi, Maxwell, Quall, Rolfes and Wallace.

Minority Report: Do not pass. Signed by 2 members: Representatives Anderson and Nealey.

Staff: Ben Rarick (786-7349).

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Education. Signed by 16 members: Representatives Linville, Chair; Ericks, Vice Chair; Sullivan, Vice Chair; Dammeier, Assistant Ranking Minority Member; Cody, Conway, Darneille, Haigh, Hunt, Hunter, Kagi, Kenney, Kessler, Pettigrew, Priest and Seaquist.

Minority Report: Do not pass. Signed by 6 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Chandler, Hinkle, Ross and Schmick.

Staff: Ben Rarick (786-7349).

Background:

Achievement Gap Oversight and Accountability Committee.

The 2008 Legislature commissioned five studies to analyze the differences in academic achievement and educational outcomes among various subgroups of students. These differences are referred to as the achievement gap. The commissioned studies drew from research, best practices, and personal, professional, and cultural experiences, and came up with various recommendations to close the achievement gap.

In 2009 the Legislature created the Achievement Gap Oversight and Accountability Committee (Committee) to synthesize findings and recommendations from the 2008 studies

into an implementation plan, and recommend policies and strategies to close the achievement gap. The Committee is comprised of six legislators, a representative of federally recognized tribes in Washington, and four members representing African-Americans, Hispanic Americans, Asian Americans, and Pacific Islander Americans. The Committee is tasked with reporting annually to the Legislature on the strategies to address the achievement gap and improvement of education performance measures for groups of students.

The Committee met eight times during 2009. To the Legislature, the Committee recommended "that OSPI be given legal authority to take affirmative steps to ensure that school districts comply with state and federal civil rights laws. RCW 28A.640 (the sex equity law) should be updated to include other federal and state protected classes."

State Civil Rights Laws.

Washington Law Against Discrimination.

The Washington Law Against Discrimination (WLAD) recognizes the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability. The right includes: "The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." Schools are recognized in both statute and regulation as places of public accommodation and, thus, are barred by this law from discriminating on the basis of any of the above listed protected classes.

The WLAD created the Human Rights Commission (HRC). Any person claiming to be aggrieved by an alleged unfair practice may file a complaint with the HRC. Currently, upon receipt of an individual complaint that appears to fall within the WLAD, the OSPI advises the complainant to contact the HRC. Additionally, whenever the HRC has reason to believe that any person has been engaged in or is engaging in an unfair practice, the HRC may itself issue a complaint.

The HRC must investigate complaints and issue written findings of fact as well as a finding as to whether there is or is not reasonable cause to believe that an unfair practice has been or is being committed. Upon a finding of reasonable cause, the HRC staff must endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached, the HRC issues an order setting forth the terms of the agreement. If no agreement is reached, the HRC requests the appointment of an administrative law judge (ALJ) to hear the complaint. An ALJ is empowered to award damages, to require that wrongful conduct cease and desist, and to order affirmative action so as to effectuate the purposes of the law. There is a right of judicial review from the ALJ's final order.

In addition, rather than go through the HRC complaint process, a complainant may instead file a civil suit against the alleged wrongdoer. Available relief includes an injunction against further violations, the recovery of actual damages, and reasonable attorneys' fees.

Sexual Equality in Public Schools.

Discrimination on the basis of sex for any student in grades kindergarten through grade 12 of the Washington public schools is expressly prohibited by the sexual equality law. There is overlap with the WLAD, in that discrimination on the basis of sex is expressly prohibited under each and both apply to schools.

Under the sexual equality law, the OSPI is charged with developing regulations and guidelines to eliminate sex discrimination as it applies to employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students. The OSPI is also charged with developing criteria for use by school districts in developing sexual harassment policies, and districts are required to adopt and implement such a policy.

The OSPI is specifically required to monitor compliance by districts, establish a compliance timetable and regulations for enforcement, and establish guidelines. Pursuant to rules adopted by the OSPI, each district must appoint an employee who is responsible for monitoring and coordinating compliance, including taking and investigating complaints and providing a written report to the district superintendent. The district superintendent must respond in writing to the complainant within 30 days of receipt of the complaint, setting forth whether the district denies the allegations or spelling out the nature of the corrective actions deemed necessary. If the complainant remains aggrieved, he or she may appeal to the school board. Upon receipt of a complaint, the school board must schedule a hearing and render a written decision.

There is a right of appeal to OSPI from a school board's decision. Such appeals must be conducted de novo, which means that the parties present evidence afresh rather than putting the record from the board before the OSPI. The OSPI is also explicitly empowered to enforce and obtain compliance by appropriate order, which may include the termination of all or part of moneys to the offending district, the termination of specified programs in which violations are flagrant, the institution of a mandatory affirmative action program, and the placement of the offending district on probation with appropriate sanctions until compliance is achieved.

Similar to the WLAD, an aggrieved person has the right to bring a civil action in superior court. Both civil damages and appropriate injunctive relief are available. There is no right to recover attorneys' fees as there is under the WLAD.

This 1975 law is specifically supplementary to, and does not supersede, existing law and procedures and future amendments thereto relating to unlawful discrimination based on sex.

Harassment, Intimidation, and Bullying Prevention Policies.

Each school district is required to adopt a policy that prohibits the harassment, intimidation, or bullying of any student. The OSPI is charged with providing a model harassment, intimidation, and bullying prevention policy as well as disseminating training materials. The Washington State School Directors Association (WSSDA) is charged with developing a model cyber bullying policy.

The OSPI model policy and procedure includes informal and formal complaint processes that can be adopted and implemented at the school district level. The OSPI Safety Center website, which hosts the model policy and procedure, notes that each school board adopts its own discipline policies and that, with certain limited exceptions such as in the case of sex discrimination, the OSPI has not been authorized to enforce local rules adopted by each individual school board.

Federal Civil Rights Laws.

Section 504 of the Rehabilitation Act of 1973 and Individuals with Disabilities Act.

Section 504 and the Individuals with Disabilities Act (IDEA) require school districts to provide students with disabilities a free appropriate public education. The IDEA requires an individualized education program (IEP) to be developed that outlines what special education and related services are that will be provided. Section 504 does not require an IEP, but school districts must be able to demonstrate what special education, or regular education and related aids and services, are being provided to a child with a disability.

There are a range of options for addressing individual complaints and conflicts under these laws, including complaints alleging an act of discrimination on the basis of disability:

- collaborative problem solving;
- mediation. Funded by the OSPI, mediation is available statewide at no charge to parents or districts;
- citizen complaint to the OSPI about alleged district violation. The OSPI investigates to determine whether a violation has occurred. If there is not enough information, the OSPI staff visit the district. The OSPI issues a final decision within 60 days, unless there has been an extension of time. Either the complainant or the district may ask the U.S. Department of Education to review the final decision;
- citizen complaint to the U.S. Department of Education, Office for Civil Rights (OCR). A complainant may choose, but is not required, to first utilize the institution's grievance process; and
- due process hearing may be requested by a parent of a student with disabilities, the adult student, or a school district. Any such request is directed to the OSPI. Hearings are conducted by administrative law judges appointed by the OSPI. Any party aggrieved by the final decision may appeal to the courts. The prevailing party may recover attorneys' fees.

Title VI of the 1964 Civil Rights Act.

This federal law prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal funds. Agencies and institutions that receive federal funds covered by Title VI include the 50 state education agencies and their sub-recipients, as well as many other entities.

The OCR's principal enforcement activity is through investigation and resolution of complaints filed by individuals alleging discrimination. The OCR also conducts a compliance review program of selected recipients in order to identify and remedy

discrimination that may not be addressed through complaint investigations. Compliance reviews differ from complaint investigations in that the OCR has discretion in selecting the institutions it will review. Additionally, through a program of technical assistance, the OCR provides guidance and support to recipient institutions to assist them in voluntarily complying with the law.

Title IX of the 1972 Education Amendment.

Title IX of the Education Amendments was enacted in 1972. Since then, all institutions receiving federal assistance for educational programs or activities have been obligated to protect against discrimination on the basis of sex. The law is probably best known for enforcing equity in sports, however, its text addresses all educational resources, programs and activities.

Title IX regulations require recipients to designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of discrimination on the basis of sex in educational programs and activities. These are similar to the requirements imposed under Washington's sexual equality law.

Means of Ensuring Compliance.

State law specifically confers authority upon the OSPI to represent the state in the receipt and administration of federal funds. Pursuant thereto, the OSPI has adopted regulations that provide for a citizen complaint process relative to violations of certain federal education laws, including Title IX, by recipients of federal funds. Also included in these OSPI regulations is a provision indicating that, if compliance is not achieved, the OSPI may initiate fund withholding, fund recovery, or any other sanctions deemed appropriate.

The federal government requires that the OSPI provide written assurances of both state and local compliance with several civil rights and access laws, including Title VI, Title IX, Section 504, the Age Discrimination Act of 1975 and, if applicable, the Boy Scouts of America Equal Access Act of 2001, as well as regulations, guidelines, and standards adopted under all these statutes. Included in this assurance form is a provision indicating that noncompliance may result in the termination of funds, the denial of future funds, a court order requiring compliance, or other judicial relief.

Summary of Engrossed Second Substitute Bill:

The Legislature recognizes that the school code currently includes a chapter recognizing the deleterious effect of discrimination on the basis of sex, specifically prohibiting such discrimination in the state's public schools, and requiring the OSPI to monitor and enforce compliance. The Legislature further finds that the common school code does not include specific similar acknowledgment of the right to be free from discrimination on other bases, nor do the common school laws specifically direct the OSPI to monitor and enforce compliance with various other federal and state civil rights laws. Finally, the Legislature acknowledges the request from the Committee to specifically authorize the OSPI to take affirmative steps to ensure that school districts comply with all state and federal civil rights laws, similar to its authority with respect to discrimination on the basis of sex.

A new chapter is added to the school code, prohibiting discrimination on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability. The new chapter is modeled after the sexual equality chapter already in the school code. The OSPI is tasked with developing rules and guidelines to eliminate discrimination as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students.

The OSPI is to monitor and enforce compliance with the chapter and the rules developed thereunder. Similar to orders issued under the sexual equality chapter, the OSPI order may include, but is not limited to, termination of all or part of state apportionment or categorical monies to the offending school district, termination of specified programs in which violations may be flagrant, institution of corrective action, and the placement of the offending school district on probation with appropriate sanctions until compliance is achieved.

Similar to the parallel provision found in the sexual equality chapter, any person aggrieved by a violation of the new chapter, or the rules developed thereunder, has a right of action in superior court for civil damages and such equitable relief as the court determines, but there is no right to recover attorneys' fees. The chapter is supplementary to and does not supersede existing law and procedures relating to unlawful discrimination.

The bill is made null and void unless funded in the budget.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony (Education):

(In support) The Achievement Gap Oversight and Accountability Committee learned that the OSPI did not have enforcement powers with respect to certain persons and groups covered by anti-discrimination laws. In contrast, the Sexual Equality laws found in the school code do provide for enforcement by the OSPI. Patsy Mink, first Asian female in Congress from Hawaii, authored Title IX after she, herself, could not get into law school because she was a woman. Were she discriminated against on the basis of sex today in Washington, she would be able to avail herself of the assistance of the OSPI. If, however, she were discriminated against on the basis of color, she could not rely on the clout of the OSPI. While there may be some concerns about providing such enforcement power, it is a power that the OSPI already has with respect to gender discrimination. Very few building administrators respond appropriately with respect to students with disabilities. The OSPI should be playing a leadership role in this area. An outside audit found that students with disabilities are twice as likely to be expelled and suspended than others and students of color are over-identified as

disabled. Although the Seattle Public Schools have made some changes, problems persist. Data regarding the selection of highly capable students provides evidence of endemic and pervasive discrimination. Students of color and students with disabilities are being excluded. The 1970s saw the positive effect of Title IX on the numbers of girls participating in sports, but there has been a recent six year decline in these numbers. The OSPI is not enforcing these laws as it should. The system is not working for students of color. This would get us closer to addressing the inequities in the system. The OSPI must have the teeth to enforce. There must be education as well as enforcement. Prior to the advent of Mothers Against Drunk Drivers (MADD) there were drunk driving laws on the books, but it took MADD's push for accountability to get the proper attention and focus. The Washington Education Association (WEA) has, over the years, had many continuing resolutions on these issues. Although the WEA has some concerns about some of the particulars, it wants to work with the proponents.

(In support with concerns) Civil rights is a priority of the OSPI, and the office is supportive of the bill. Civil rights laws are important in addressing the dropout issues. The Assistant Attorney General for the OSPI has expressed concerns about the possible liability exposure posed by this bill as well as by similar provisions in the existing Sexual Equality laws. In addition, this bill will necessitate additional staff and resources for the OSPI during these difficult fiscal times.

(With concerns) Section 5, which allows civil suits, raises concerns about the possible fiscal impacts upon the OSPI and the school districts. School districts cannot purchase insurance coverage for discrimination claims. Just because a suit is filed does not mean that the school district has acted wrongfully; it will still cost money to defend. By way of example, there is one school district that has won at every level, so far, but the claimants continue to appeal and meanwhile the district continues to have to pay for the costs of legal defense. Certainly, civil rights laws should not be weakened, but this bill raises concerns about liability exposure and costs.

(Opposed) None.

Staff Summary of Public Testimony (Education Appropriations):

(In support) This bill represents one recommendation made by the Achievement Gap Oversight and Accountability Committee. During committee meetings the Office of the Superintendent of Public Instruction (OSPI) indicated that it had authority to enforce gender equity laws but did not have the authority to enforce prohibitions against other forms of discrimination. This is a new parallel chapter to the current Sexual Equality chapter. The size of the fiscal note is astonishing for two reasons: (1) the OSPI already is monitoring and enforcing the Sexual Equality chapter; and (2) the OSPI is already required by the federal government to assure that it and the sub-recipients of federal funds comply with existing anti-discrimination laws. So presumably there is already monitoring being done. It is very important to affirm that this state will not allow discrimination. In a few weeks is the Day of Remembrance which commemorates an order issued by President Franklin D. Roosevelt that sent persons of Japanese ancestry to concentration camps in violation of their civil rights. For the first time in over 40 years in the education arena, with this Achievement Gap Committee there has come a feeling of encouragement that the achievement gap will be

closing. Although Asian Americans are usually at the top of the chart when it comes to achievement, there is a hidden achievement gap among Asian American children. There is a need to take a broad look at what the current system is not allowing in terms of achievement. If the system that is currently in place were working, there would not be the number of discriminatory actions that are seen. Districts are not addressing discriminatory practices as they should. This bill will provide one more tool to hold districts accountable and ensure that the OSPI has the tools it needs. High expectations, clear expectations, and clear consequences are set for students. Schools should have to adhere to the same. In one instance, a teacher told a student to go back to the Philippines where he belonged. Even after this was reported to the principal, the student was moved to another classroom, and nothing else was done.

(Opposed) None.

Staff Summary of Public Testimony (Ways & Means):

(In support) This bill represents one recommendation made by the Achievement Gap Oversight and Accountability Committee (Achievement Gap Committee). During committee meetings the Achievement Gap Committee heard from the OSPI that it had authority to enforce gender equity laws but did not have the authority to enforce prohibitions against other forms of discrimination. This is a new parallel chapter to the current Sexual Equality chapter. It's important to note that the bill really only restates existing discrimination laws, but in a way that clarifies the OSPI's enforcement role. As you heard from staff, this is a subjective fiscal note that requires a lot of assumptions. Presumably there is monitoring already being done, so it is not clear why the costs are high. It is very important to affirm that this state will not allow discrimination. Laws are meaningless without enforcement. If the system that is currently in place were preventing discrimination, this bill would have no cost.

(Opposed) None.

Persons Testifying (Education): (In support) Representative Santos, prime sponsor; Anne Sheeran; Janet Anderson, Seattle Special Education Parent Teacher and Student Association; Lynne Tucker, NorthWest Exceptional Children; Mark Ross Miller; Uriel Iniguez, State of Washington Commission on Hispanic Affairs; Christie Perkins, Washington State Special Education Coalition; and Lucinda Young, Washington Education Association.

(In support with concerns) Robert Harkins, Deputy Superintendent of Public Instruction.

(With concerns) Jerry Bender, Association of Washington School Principals.

Persons Testifying (Education Appropriations): Representative Santos, prime sponsor; Frieda Takamura, Commission on Asian Pacific American Affairs; and Ben Ibale, Filipino American Educators of Washington.

Persons Testifying (Ways & Means): Representative Santos, prime sponsor.

Persons Signed In To Testify But Not Testifying (Education): None.

Persons Signed In To Testify But Not Testifying (Education Appropriations): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.