



MEMORANDUM

TO Dr. Tim Mills
Superintendent, Bellevue School District

FROM Rob McKenna and Brian Moran

DATE July 29, 2016

RE Review of the Washington Interscholastic Activities Association (WIAA) Report and KingCo Principal Executive Board (KPEB) Decision

I. Summary

This memorandum discusses (1) how the WIAA investigators' approach to the investigation produced a skewed report; (2) how the KPEB's Decision has given unjustified credence to the WIAA Report as the definitive take on the investigation; and (3) why the investigators' and KPEB's allegations that Bellevue School District (BSD) administrators somehow obstructed the investigation and did not adequately cooperate with it are not supported by evidence either within or outside the Report or Decision.

II. Independent Review of the WIAA Report

We reviewed the WIAA Report, dated March 22, 2016. We also reviewed thousands of pages of documents that the BSD produced upon WIAA's request, along with other relevant materials such as hundreds of emails between BSD and the investigators.

Our review assessed the WIAA investigators' claims that BSD administrators did not cooperate with the WIAA investigation and, at times, interfered with or obstructed it. We find these claims of BSD obstruction and inadequate cooperation to be inaccurate and unfair but, unfortunately, they are repeated by KPEB in its Decision without any independent verification or analysis of the claims.

For reference, we attach an index which categorizes and summarizes allegations that the investigators made in the WIAA Report. In the same index, we comment on each allegation and provide alternative considerations. Reading the Report alongside (1) the underlying evidence; (2) ongoing extensive communications from the investigation; and (3) the guidelines provided for WIAA investigations, our view is that the investigators assumed an advocacy role when they should have maintained one of a neutral fact-finder. We also conclude that any objective, thorough review of the Report's evidence and of the BSD administrators' communications with the investigators



validates BSD's contention that its administrators cooperated with the investigation to the full extent permitted by law.

A. The investigators failed to maintain a neutral fact-finding role, and the Report suffered fatal flaws because of that failure.

Specifically, the Report shows how investigator bias skews an investigation's process. When that happens, the investigation typically ends with an unbalanced and unhelpful product, such as the Report here. The investigators stated that WIAA directed them to look "under rocks, under rocks, under rocks" and to address all allegations, rumors, and innuendo lobbed at the Bellevue High School (BHS) football program over several years.

In our view, the investigators should have followed the guidelines for neutral fact-finders from Appendix 11 of the 2014-15 WIAA Handbook,¹ because that fact-finding procedure was at all relevant times part of the WIAA's investigative procedures or policies. Adhering to Appendix 11's guidelines and procedures likely would have kept the investigators focused on neutral fact-finding. Adhering to Appendix 11 also likely would have resulted in fewer adverse inference-based conclusions,² which are inappropriate to draw during an investigation of the type at issue here.

B. The investigators unfairly accused BSD officials of obstructing the investigation.

Throughout the investigation, as the investigators developed their theory of improper activities within the BHS football program, the investigators disparaged BSD administrators and employees, accusing them of interfering with the investigation. Typically, these accusations were made when BSD officials raised concerns over matters including (1) student privacy; (2) the school district's duty to follow state and federal law; and (3) concern for students' and parents' well-being once students and parents told investigators that they felt interrogated, abused, and bullied. For example, when Mr. John Harrison raised concerns about the Federal Educational and Privacy Rights Act (FERPA), 20 U.S.C. 1232(g), and student privacy, the investigators accused him of obstructing the investigation, despite conceding that they were not FERPA experts. In another example, the investigators, in a meeting with BSD officials, requested full access – including a password – to a database containing records for *all* BSD students, not just BHS student athletes. *See* JLNNotes at 4. Mr. Jeff Lowell explained that legal compliance requirements would have to be satisfied before the investigators could be allowed access to all BSD student records. *See id.* On September 18, 2015, Mr. Lowell emailed the investigators and informed them that he was "[d]etermining how to facilitate" the investigators' access to the student records database. WBE_00016.

¹ The WIAA moved Appendix 11 from the WIAA Handbook to the WIAA Executive Board policy book in June 2015. Among other things, Appendix 11 (1) requires that parents of minor students be notified if their children would be contacted for an investigation; (2) allows only witnesses with firsthand knowledge to be interviewed; (3) directs investigators to engage in fact-finding and to avoid conclusions about those facts; and (4) advises that witnesses would be given a written summary of the interview and a chance to verify its accuracy.

² Drawing an adverse inference is only proper when a party has relevant evidence *within its control* and refuses to produce it. Throughout the Report, information that was solely within the control of others (not BSD) and deemed unjustifiably withheld was adversely interpreted against BSD. This is an improper application of an adverse inference doctrine.