WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

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A brief summary of legal developments relevant to Washington public school districts from the previous calendar month.

Ninth Circuit Court of Appeals

First Amendment

Lathus v. City of Huntington Beach
No. 21-56197 (01/05/23)

The Ninth Circuit Court of Appeals held that it was not a violation of the First Amendment for a city councilperson to dismiss a volunteer that she had appointed to a citizen's advisory board based on the volunteer's political speech, which the councilperson found objectionable. Huntington Beach City Councilperson Kim Carr appointed Shayna Lathus, a private citizen, to serve on the City's Citizen Participation Advisory Board (CPAB), which advises on policy matters on behalf of the appointing councilpersons. City code allows councilmembers to remove their appointees at any time without cause. Shortly after her appointment to the CPAB, Lathus was photographed at an immigrants' rights rally standing near individuals whom Carr believed to be "Antifa." Carr demanded that Lathus draft a public statement denouncing Antifa, and Lathus did so. However, Carr determined Lathus's statement was not sufficient, and she removed Lathus from the CPAB, citing her desire to distance herself from individuals who do not immediately denounce hateful, violent groups. Lathus sued the City, claiming that she was retaliated against for exercising her First Amendment rights to free speech. Lathus also claimed that Carr's demand for her to write a public statement constituted unconstitutionally compelled speech in violation of the First Amendment. The district court dismissed the complaint, holding that Carr was permitted to consider the political ramifications of Lathus continuing to serve on her behalf on the CPAB. The Ninth Circuit affirmed, holding that through her appointment on the CPAB, Lathus was effectively a "political extension" of Carr. As a result, the Court held that the appointees speak on behalf of the councilmembers that appoint them, and it is constitutionally permissible for councilmembers to distance themselves from appointees who might pose a political liability based on appointees' speech.

Supervisory Employees

NLRB v. Aakash, Inc.
No. 22-70002 (1/27/23)

The Ninth Circuit Court of Appeals held that registered nurses (RNs) at a California rehabilitation center could not be excluded as "supervisory" from a bargaining unit that included nursing aids because the RNs did not have sufficient authority to independently discipline or direct the nursing aids. Aakash operates a nursing

facility. The management team includes a Director of Nursing, an Assistant Director of Nursing, and a Director of Staff Development. Approximately 90 nurses work at the facility, including six RNs and 60 nursing assistants. The Director of Staff Development sets the work schedule for the nursing assistants. However, at the start of each shift, an RN completes an assignment sheet, pairing each scheduled nursing assistant with a group of patients. Discipline at the facility has been rare, but on one occasion, an RN verbally warned a nursing assistant that it was misconduct to fall asleep while on the job, and the RN notified the Director of Staff Development that she had witnessed a nursing assistant being asleep at work. In 2020, the union representing the nursing assistants filed a petition to include the RNs in its bargaining unit. Aakash challenged the RNs' eligibility for inclusion, asserting that the RNs are supervisory, and therefore, ineligible for inclusion. The National Labor Relations Board ("Board")—which oversees collective bargaining in the private sector and whose opinions the Washington Public Employment Relations Commission often looks to for guidance—disagreed, and allowed the RNs to vote on whether they wished to be included in the bargaining unit. The RNs voted to be represented by the union, and requested that Aakash recognize the new bargaining unit and bargain with the union. Aakash refused, and the union filed a refusal to bargain unfair labor practice (ULP) complaint with the Board. The Board found that Aakash had committed a refusal to bargain ULP, and it rejected Aakash's claim that the RNs should have been excluded from the bargaining unit as supervisory. The Ninth Circuit Court of Appeals affirmed the Board's decision, holding that the RNs did not engage in sufficient supervisory functions or exercise independent judgment to be considered "supervisory" and thus excluded from the bargaining unit. The Court reasoned that the RNs' duties of assigning nursing assistants to patients within the scheduling parameters already set by a supervisor did not call upon the RNs to use sufficient independent judgment to be considered supervisory. Similarly, the Court held that the RNs had no authority to discipline nursing assistants, but instead could only report misconduct to a supervisor for investigation and review. As a result, the Court held that Aakash was required to recognize the bargaining unit to include the RNs and to bargain with the union in good faith.

Note: Washington collective bargaining laws for public employees, Chapters 41.56 and 41.59 RCW, are slightly different than the National Labor Relations Act in that they exclude supervisors from being in the same bargaining unit as the employees they supervise but do not exclude them from having bargaining rights.

Individuals with Disabilities Education Act

D.O. v. Escondido Union School District
No. 21-55498 (1/31/23)

The Ninth Circuit Court of Appeals held that a California school district's four-month delay in proposing a student autism assessment was not a violation of the Individuals with Disabilities Education Act (IDEA). Student D.O. began receiving special education services in the Escondido Union School District (District) shortly before he began kindergarten in September 2012. D.O. demonstrated a need for, and received, significant mental health services and behavioral intervention. The District reevaluated D.O. in 2015, and that evaluation did not indicate that D.O. had autism. However, in 2016, D.O.'s mother had an outside provider, Dr. Margaret Dyson, evaluate D.O. for autism. Dr. Dyson attended an Individualized Education Program (IEP) meeting held in December 2016, and she informed the District that based on her assessment, D.O. met the criteria for Autism Spectrum Disorder. Following the meeting, the District asked D.O.'s mother to provide a copy of Dr. Dyson's report once it became available. Even though D.O.'s mother was provided a copy of the report in December 2016,

she did not provide the District a copy of the report until July 2017. Instead, in March 2017, D.O.'s mother filed a due process complaint with the California Office of Administrative Hearings, alleging that D.O. had autism and that the District failed to timely assess him in all areas of suspected disability. After D.O.'s mother filed her complaint, in April 2017, the District provided D.O.'s mother a proposed autism assessment plan. The District also renewed its request for Dr. Dyson's report, explaining that assessment instruments for Autism Spectrum Disorder restrict how frequently any particular assessment could be re-administered and still be considered valid. As a result, the District team needed a copy of Dr. Dyson's report to identify the specific tests used and ensure that the District did not improperly administer assessments that could only be given once per year. After being provided a copy of Dr. Dyson's report, the District completed the assessment in October 2017, and the results showed that D.O. did not qualify for special education services for autism. D.O.'s mother did not dispute this determination and as a result, D.O.'s special education placement remained unchanged. An administrative law judge (ALJ) found that the District's duty to propose an autism assessment was triggered in December 2016, when D.O.'s mother notified the District that D.O. had been diagnosed with autism. Nonetheless, the ALJ determined that the District's four-month delay in proposing an autism assessment was reasonable and not in violation of the IDEA given the parent's delay in providing a copy of Dr. Dyson's report and the need for the District to determine which assessments were already administered. The district court reversed, and held that it was a procedural violation of the IDEA for the District to wait four months to propose an autism assessment, noting that the District did not propose the assessment until after the parent had filed a due process hearing request. The district court further held that this procedural violation resulted in a denial of a Free Appropriate Public Education (FAPE) because the IEP goals "were likely inappropriate" without sufficient evaluative information. The Ninth Circuit reversed and agreed with the ALJ that it was not a procedural violation for the District to wait four months to propose an autism evaluation. The Court reasoned that the parent had inexplicably failed to provide the District a copy of Dr. Dyson's report shortly after receiving it, which prevented the District from determining which assessment instruments could be administered to D.O. and still be considered valid and reliable. The Court further held that even if the District's delay was a procedural violation of the IDEA, it would not have amounted to a denial of FAPE because it was undisputed that the District's assessment showed that D.O. did not qualify for special education services for autism, and his placement remained unchanged following the assessment results. As a result, the Court reversed the district court and directed it to enter judgment in favor of the District. Judge Sanchez dissented in part and would have held that the District's delay in proposing an autism assessment was unreasonable because the District was still required to act even if D.O.'s mother was uncooperative. Nonetheless, Judge Sanchez agreed with the majority's conclusion that there was no denial of FAPE because the delay did not result in a loss of educational opportunity or educational benefit for D.O.

Washington Court of Appeals

Public Records Act

Conklin v. University of Washington
No. 83200-0-I (1/3/23) (unpublished)

The Washington Court of Appeals held that the University of Washington (UW) violated the Public Records Act (PRA) when it narrowly searched its Graduate Medical Education Office (GME) for certain records related to its surgical

fellowship program in response to a public records request. After being denied acceptance to a surgical fellowship program at UW, Jeremy Conklin made four separate PRA requests, seeking agreements between UW and outside organizations, Medicare funding information, and documents related to physician applications to any residence or fellowship program at UW. The records manager responsible for processing Conklin's requests described the first request as one of the "broadest and most complex" PRA requests she had ever encountered, and it required her to review tens of thousands of documents and create exemption logs that were hundreds of pages. Additionally, many of the responsive records were held by different offices across the university, including the GME, the School of Medicine, and the Dean's office. As a result, UW provided the records in installments, releasing the first installment 307 days following the request, and releasing a second installment after another 282 days. Conklin made his second PRA request in May 2018 (while the first was still pending), and he similarly sought agreements between UW and "any other organization" related to training of medical residents and fellows. Combined, the two requests generated more than 105,000 responsive pages. However, in responding to the second request, UW only searched the GME for responsive records, even though it had searched other offices for similar records, including fellowship applications, responsive to the first request. On November 16, 2020, UW transmitted to Conklin what it believed to be the final installment of responsive records to the second request, and it closed that request. In responding to the remaining PRA requests, UW provided copies of agreements to Conklin that would have been responsive to his second request, which UW had closed. Conklin filed a lawsuit in superior court, arguing in part that UW had violated the PRA by failing to provide records within a reasonable time and by failing to disclose certain agreements responsive to his second records request. Following a trial based on witness affidavits, the trial court found that UW had not violated the PRA. The Washington Court of Appeals reversed in part, holding that UW had failed to conduct an adequate search for records responsive to the second request when it only searched for the responsive agreements in the GME. The Court reasoned that the records officers should have searched for fellowship applications in other offices, including those in the School of Medicine, because there was evidence that the records officer was alerted to the possibility that such applications could be found outside of the GME while responding to Conklin's first PRA request. However, the Court rejected Conklin's argument that the 307 and 282 days it took the UW to respond to the requests was per se unreasonable given the complexity of the request and the numerous public records requests UW was processing at the time. The Court declined to consider Conklin's argument that the UW violated the PRA by not sufficiently budgeting its public records office in a manner that would allow for reasonable PRA response times, given that Conklin did not raise the argument until his reply brief.

Public Records Act

Cousins v. Department of Corrections
No. 56996-5-II (1/31/23)

The Washington Court of Appeals held that the one-year statute of limitations for filing a lawsuit under the Public Records Act (PRA) does not "restart" if the agency later "reopens" a previously closed request. Terry Cousins made a public records request to the Department of Corrections (DOC) in July 2016, seeking all records related to her sister's incarceration. DOC produced responsive records in seven installments between November 2016 and January 2019. The letter enclosing the seventh installment stated that Cousins's request was "now closed." Following receipt of the closing letter, Cousins repeatedly

notified DOC that she believed certain responsive records were missing. In response, DOC informed Cousins that her records request "is and remains closed." Approximately 18 months after receiving the closing letter, Cousins again emailed DOC and identified five categories of records that she believed were missing. In response to this email, DOC "re-opened" Cousins's request and conducted an additional search for the records Cousins reported were missing. That search resulted in an additional 1,000 records being identified as responsive to Cousins's original request, and the DOC disclosed these additional records through 10 additional installments from October 2020 through August 2021. Before the DOC had finished producing the additional 10 installments of records, Cousins filed a public records lawsuit, arguing that the DOC had failed to adequately search for and produce records responsive to her records request. The DOC moved for judgment as a matter of law, arguing that the PRA's one-year statute of limitations barred the lawsuit because it had closed Cousins's request two years before Cousins filed her lawsuit. The superior court agreed, ruling that the case must be dismissed because Cousins was required to file her lawsuit within one year of the DOC closing the request. The Court of Appeals affirmed, reasoning that the Washington Supreme Court has previously held that the PRA's statute of limitations begins to run on the agency's "definitive, final response to a PRA request," which here, meant that the timeline began upon issuance of the January 2019 letter stating that Cousins's request was "now closed." The Court rejected Cousins's argument that the statute of limitations should have "restarted" once the DOC "re-opened" her request, reasoning that she was on notice in January 2019 that the DOC did not intend to provide any additional records, and therefore, she could have filed a PRA lawsuit within one year from then.

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