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

Dodge v. Evergreen School District
No. 21-35400 (12/29/22)

The Ninth Circuit Court of Appeals held that a teacher was engaged in protected First Amendment speech when he brought his Make America Great Again (MAGA) hat to "teacher-only" trainings at his school building. For the 2019-20 school year, Eric Dodge was assigned to teach at Wy'east Middle School in the Evergreen School District #114. The week before school started, Wy'east held a cultural sensitivity and racial bias training for its teachers. Dodge brought his MAGA hat to the training, placing it either on the table in front of him or on top of his backpack. After the training, the presenter complained to Wy'east Principal Caroline Garrett that she felt "intimidated and traumatized" by the presence of the hat. Other teachers who attended the training similarly reported feeling intimidated and threatened by the hat. Principal Garrett discussed the issue with the District's Human Resources Officer, Janae Gomes, who advised Principal Garrett to discuss the situation directly with Dodge and give him a "heads-up" that the hat was causing distress among his colleagues. Principal Garrett discussed the matter with Dodge, informing him that some people view the hat as a symbol of hatred and bigotry and cautioned him to exercise "better judgement" in the future. The next day, Dodge attended another teacher training, and again he placed his MAGA hat near him. After the training, Principal Garrett again talked to Dodge, and she informed him, "[n]ext time I see you with that hat, you need to have your union rep. Bring your rep because I'll have mine." Dodge interpreted this statement as a directive to not bring the hat or else face potential disciplinary action. Following this discussion, Dodge filed a harassment, intimidation, and bullying (HIB) complaint against Principal Garrett pursuant to District policy, and he asked to be transferred to another school building. The District investigated the complaint and ultimately concluded that the encounters between Principal Garrett and Dodge did not rise to the level of HIB in violation of District policy. HR Officer Gomes informed Dodge by letter that no policy violation had occurred, but she stated that the District would grant Dodge's transfer request, and it would educate all employees about "engaging in political discourse without violating constitutional rights." Dodge appealed HR Officer Gomes's denial of his HIB complaint to the school board, and the school board affirmed the denial. Dodge then filed a lawsuit against Principal Garrett and HR Officer Gomes in their individual capacities under 42

U.S.C. § 1983, claiming that their actions violated his clearly established constitutional right to free speech. Dodge also sued the District, arguing that the school board had "ratified" the unconstitutional actions of the individual defendants when it affirmed denial of his HIB complaint. The district court dismissed Dodge's lawsuit on summary judgment. The Ninth Circuit affirmed in part and reversed in part, holding that Dodge's act of bringing his MAGA hat to the training constituted protected free speech. In reaching this conclusion, the Court reasoned that the hat was private speech, not government speech, because political statements are "quintessentially a matter of public concern," and because Dodge's official job duties did not require him to bring the MAGA hat to the training. Because the hat constituted private speech, Principal Garrett could only prohibit the hat upon a showing that restriction was necessary to promote workplace efficiency and avoid workplace disruption. The Court held that such burden was not met here, emphasizing that the outrage or upset of coworkers without evidence of any actual injury does not constitute the requisite disruption needed to prohibit speech protected by the First Amendment. Further, both trainings had been completed without incident, and students and parents were not present and never complained about Dodge's MAGA hat. The Court further held that Principal Garrett was not entitled to immunity from civil suit in her individual capacity because she violated a "clearly established" constitutional right when she suggested Dodge would be disciplined if he brought the hat again. The Court acknowledged that no prior case had involved this precise set of facts, but it nonetheless held that prior cases involving speech in the school setting clearly establish that disagreement with a disfavored political stance or controversial viewpoint is, by itself, not a valid reason to curtail expression. Nonetheless, the Court affirmed dismissal of the lawsuit against HR Officer Gomes and the District, concluding that HR Officer Gomes had not encouraged Principal Garrett to make the specific statements at issue, and that the District's dismissal of the HIB complaint was not an endorsement of unconstitutional conduct, but was instead, merely a finding that the conduct did not violate its HIB policy.

First Amendment

Chen v. Albany School District
No. 20-16541 (12/27/22)

The Ninth Circuit Court of Appeals held that a public school district had the authority to expel two students who posted violent, racist content about their classmates in a private social media account while off-campus. Cedric Epple and Kevin Chen were students at Albany High School (AHS), a public high school in California, during the 2016-17 school year. In November 2016, Epple created a "very private" Instagram account to share content with only a select group of friends. Chen followed the account using a separate username, and he likewise viewed the account as an "exclusive" place where a small group of friends could "banter privately." Between November 2016 and March 2017, Epple used the account to post insulting posts about various AHS students, including multiple posts targeting Black classmates and invoking racist and violent themes. For example, in one post, Epple drew nooses around a picture of a Black classmate, and in another, he took an image from a Black classmate's Instagram account and re-posted it alongside a historical image of a slave being punished. Epple also posted historical images depicting Ku Klux Klan violence against Black people, including a photograph of a lynched man hanging from a tree, and a "Ku Klux starter pack," which included images of a noose, white hood, burning torch, and Black doll. Epple also posted images of identifiable Black classmates with captions comparing them to gorillas. Although Chen did not post any content to the account, he liked many of the images and commented that

certain posts were "too good," and commented on several posts using racially charged language. Despite Epple's intent to keep the account "private," one of the account followers shared the content with other students, and knowledge of the photographs and content rapidly spread among the student body. Many students were upset or afraid to go to school after seeing the posts, including the students specifically targeted by the account. And the parents of one student targeted by the account withdrew their daughter from school. The school counselors and mental health staff were inundated with students seeking help to address their feelings of anger, sadness, and frustration about the racist posts and comments. A group of parents organized a rally outside the school, which was covered by the local news. The District suspended Epple and Chen for five days, and later notified them that it would recommend expulsion because the posts constituted racial harassment and bullying. Chen filed a federal lawsuit against the District, which resulted in a temporary restraining order enjoining his expulsion hearing. Epple's expulsion hearing went forward in June 2017, and the school board voted in favor of expulsion. Epple then challenged his expulsion by filing a federal lawsuit, alleging that the District's actions violated his free speech rights. The district court determined that the cases were related, as Chen's lawsuit alleged similar free speech claims, and it dismissed both cases on summary judgment. The Ninth Circuit affirmed, rejecting the students' argument that they were insulated from discipline simply because the speech occurred off-campus or was intended to be "private." The Court held that the speech bore a sufficient nexus to the school and its students to be susceptible to regulation because it was reasonably foreseeable the content would reach and impact the school, and it had resulted in significant impact to the targeted students and school. The Court noted that the ease in which electronic communications can be copied and shared contributed to the foreseeability of the content's impact. The Court concluded that the District's regulatory interest under these facts was significant because once the posts became public, the targeted students became aware they were victims of serious or severe bullying and harassment, and the District arguably had a duty to respond to a "racially hostile environment" of which it had become aware. The Court likewise recognized a school's authority and responsibility to act *in loco parentis* when protecting students from maltreatment by other students. Judge Gould concurred, but he wrote separately to express his view that hate speech should not be tolerated or afforded the full protection of the First Amendment in the context of the school environment.

IDEA

D.R. v. Redondo Beach Unified School District
No. 21-56053 (12/20/22)

The Ninth Circuit Court of Appeals held that a California school district violated the Individuals with Disabilities Education Act (IDEA) when it proposed changing a student's placement to a more restrictive environment based on the student's lack of grade-level performance in the regular classroom. D.R. is a student with autism who was previously enrolled in the Redondo Beach Unified School District (District). Prior to the start of third grade, D.R.'s Individualized Education Program (IEP) team developed an IEP under which D.R. would spend 75 percent of his school day in the regular classroom with appropriate supplementary aids and services to support his academic progress. Those aids and services included a full-time behavioral aide who worked with D.R. one-on-one to help him follow a modified general education curriculum. Midway through D.R.'s third grade year, the IEP team reconvened, and school officials recommended a blended program in which D.R. would spend more than half of his time in a special education classroom. D.R.'s parents insisted that D.R. was making sufficient progress in his current placement and opposed increasing the time he

would spend in a special education classroom. Given the parents' objections, school officials decided not to implement their proposal, and D.R. remained in general education for 75 percent of his school day. Prior to fourth grade, school officials again proposed changing D.R.'s placement. D.R.'s parents again rejected this proposal, and D.R.'s placement remained unchanged. Before the start of fifth grade, the IEP team convened, and school officials again recommended a change in placement to a more restrictive setting, noting that D.R. was performing several grade levels below his non-disabled peers in language arts and math. However, the District acknowledged D.R. had made progress toward his IEP goals and had also developed interpersonal skills by developing close friendships with his general education peers. Upon receiving the District's latest proposal, D.R.'s parents terminated the IEP meeting, removed D.R. from school, and hired a private instructor to teach him one-on-one at home. D.R.'s parents then requested a due process hearing, arguing that the District's proposed fifth-grade IEP violated IDEA's least restrictive environment requirement by removing D.R. from the regular classroom for more than half of his school day. After an evidentiary hearing, an administrative law judge (ALJ) ruled that the District's proposed IEP did not violate the IDEA. The district court affirmed, placing great weight on the fact that D.R. was performing several grade levels below his non-disabled peers and could not keep pace with the general education curriculum without significant modifications. The Ninth Circuit Court of Appeals reversed, holding that the proper benchmark for assessing whether a child received academic benefit from placement in the regular classroom is whether the child made progress toward meeting IEP goals, not whether the child is performing at grade level. Because D.R. had made significant progress toward meeting his IEP goals, the Court held that the District violated the IDEA by proposing a more restrictive placement. Nonetheless, the Court held that D.R.'s parents were not entitled to reimbursement for the expenses incurred after removing D.R. from school because the record showed that the District had previously acquiesced to the parents' request for their son to remain in his current placement, and also because the private tutoring at home did not allow for any time in the general education classroom, and was therefore, more restrictive than the setting the District had proposed.

First Amendment

Waln v. Dysart School District
No. 21-15737 (12/9/22)

The Ninth Circuit Court of Appeals held that a high school student adequately alleged that her school district violated the First Amendment when it prohibited her from wearing an eagle feather on her cap during her high school graduation ceremony. The Dysart School District, located in Arizona, has a graduation policy that prohibits its students from decorating their graduation caps. Lisa Waln, a former District student and member of the Sisseton Wahpeton Oyate Native American tribe, asked the District to accommodate her religious practice by allowing her to wear an eagle feather on her cap during her high school graduation. Eagle feathers play a significant role in Waln's religious beliefs, as the tribe considers eagles to be connected to God, and the feathers are customarily worn in great times of honor, including graduation ceremonies. In line with this practice, Waln's grandmother gave her a blessed eagle plume to wear at her high school graduation. The District refused to make an exception to its policy and declined Waln's religious accommodation request. Waln arrived at her graduation wearing her decorated cap, and school officials forbade her from attending the ceremony. However, the District allowed other students who arrived with altered caps to attend the ceremony, including one student who wore a "breast cancer awareness" sticker on his cap. Waln filed a complaint in federal district court, alleging that the District had violated

the Free Exercise Clause and Free Speech Clause of the First Amendment when it prohibited her from attending the ceremony, but allowed other students with secular cap adornments to attend. The district court dismissed Waln's complaint and entered judgment in favor of the District. The Ninth Circuit reversed, holding that Waln had adequately established that the District applied its policy selectively, thereby burdening the free exercise of Waln's religious faith. The Court held that if the District did not enforce its policy to exclude other students' secular messages, then it could not enforce its policy to burden Waln's religious conduct. The Court similarly held that Waln had adequately pled a free speech violation because the District's selective enforcement of its policy constituted impermissible viewpoint discrimination.

Washington Supreme Court

Duty to Bargain

WSCCCE v. City of Spokane
No. 100676-4 (12/8/22)

The Washington Supreme Court held that a municipal ordinance mandating that all collective bargaining be open to the public was preempted by state law and unconstitutional. In 2019, the City of Spokane's city charter was amended to include a new section that provided the City would conduct all collective bargaining in a manner that was transparent and open to the public. This included publishing all notes, documentation, and bargaining proposals on the City's website and opening sessions to public observation. The collective bargaining agreement between the Washington State Council of County and City Employees, AFSCME Council 2 (Union) and the City expired in December 2020. Prior to its expiration, the Union notified the City's labor relations manager that it wanted to engage in traditional labor negotiations, and it proposed a ground rule that negotiation meetings be closed to the public. The City responded that it intended to conduct open bargaining negotiations consistent with the City charter. The parties met multiple times to discuss ground rules, but by March 2021, they were unable to reach agreement as to whether the sessions would be open to the public. The City consistently maintained that it could not agree to closed meetings based upon the ordinance. In May 2021, the Union filed an action in superior court, seeking a judicial determination that the City's ordinance was unconstitutional because it was preempted by chapter 41.56 RCW, the Public Employees' Collective Bargaining Act (PECBA). The trial court agreed with the Union and ruled that the PECBA governed collective bargaining between the parties, and therefore, preempted the ordinance as a matter of law. The Washington Supreme Court affirmed, reasoning that Article XI, Section 11 of the Washington Constitution allows a city to make and enforce local regulations, but only so long as they are not in conflict with general laws. Although the PECBA does not expressly prescribe the way parties must conduct their bargaining sessions, it does establish that it is an unfair labor practice for one party to unilaterally set mandatory ground rules before negotiations occur. As a result, the Court held that the City's ordinance, which set mandatory ground rules for all negotiations with the City, was preempted by the PECBA and was therefore unconstitutional.

Washington Court of Appeals

Student Discipline

M.G. v. Yakima School District No. 7
No. 38165-0-III (12/6/22) (unpublished)

The Washington Court of Appeals held that the Yakima School District violated student discipline laws when it indefinitely precluded one of its students from returning to his high school following a long-term suspension. In October 2017,

the District required one of its students, M.G., to enter into a "gang contract" based on his refusal to wear blue during gym class, which the District believed signaled gang affiliation. The contract prohibited M.G. from engaging in indicators of gang activity, including using unique hand signals, or wearing certain haircuts or colors. In September 2019, M.G. got into a verbal altercation with another student at lunch. Later that day, M.G. walked into his high school building, unzipped his sweatshirt and revealed a red shirt underneath, which the District believed signaled gang membership. M.G. then met with two students who were also under a gang contract. The District emergency expelled M.G. based on his lunchtime altercation, exposure of red clothing, and meeting with other gang members. The expulsion notice provided an end date of September 18, 2019. On September 17, the District converted M.G.'s emergency expulsion into a long-term suspension with a new end date of September 23. M.G. appealed the long-term suspension, which was upheld by the presiding hearing officer. Even though the suspension ended September 23, on September 22, the District notified M.G. by letter that he was not permitted to return to his high school due to the "serious nature" of his "threatening" behavior toward another student. M.G. attended school through Yakima Online, where he performed poorly, largely because he did not have access to a computer or Internet at his home. In January 2020, M.G. requested to enroll at a different high school within the District. The District denied this request, citing M.G.'s refusal to alter his current hairstyle, which the District alleged was associated with gang membership. M.G. challenged the denial of his transfer request by sending a letter to the president of the school board. In response, the District convened a committee, where M.G.'s mother attended and challenged the evidence against her son. On March 26, 2020, the District notified M.G. by email that it was denying his transfer request because of his gang affiliated behavior, which included his refusal to alter his hairstyle. M.G. challenged this decision by letter, arguing that the District's refusal to allow him to return to his educational placement violated Washington student discipline regulations. In response, the District's legal counsel sent a letter to M.G.'s family, insisting that he could not return to school because he continued to exhibit behavior that led to his removal, including "gang associated hairstyle among other things." In April 2020, M.G. challenged the District's decision in superior court, arguing that the District had violated student discipline laws, violated his due process rights, and deprived him of his constitutional right to an education when it excluded him from returning to school because of his hairstyle. The superior court dismissed M.G.'s complaint, noting that M.G. had not altered the behavior that resulted in his suspension, specifically citing his refusal to change his haircut. The superior court ruled that the District did not have to allow a student to re-enter school when it had evidence that would result in the student's immediate suspension upon return, such as continuing to adorn gang-affiliated symbols. The Court of Appeals reversed, holding that Washington's student discipline law, RCW 28A.600.015, prohibits the expulsion or suspension of a student for an indefinite length of time, and specifically requires the District to provide an end date. The Court noted that there were certain exceptions, such as when a student commits certain criminal offenses against their teachers or classmates, but the District conceded none of those exceptions applied. The Court further noted that the District could have petitioned for an extended expulsion based on safety concerns, but that it did not follow the procedures to do so. Instead, the District argued it had broad authority to prohibit M.G.'s return based on safety concerns, which the Court held was insufficient under Washington student discipline laws. As a result, the Court held that the District violated RCW 28A.600.015 when it extended

M.G.'s long-term suspension for an indefinite length of time and remanded his case to the superior court for further proceedings.

PFR Announcements

2023 Bargaining Skills Workshops

Porter Foster Rorick is once again partnering with the Washington School Personnel Association (WSPA) to present our popular workshops on collective bargaining skills. The workshops include a primer on the legal rules for collective bargaining, but also focus on the behavioral and strategic skills which help bargaining teams find agreements. These skills are important for all members of a management bargaining team, and particularly as we head into another challenging year for collective bargaining in 2023. The courses are taught by attorneys who regularly sit at bargaining tables with certificated and classified employee unions in Washington State and who collectively have negotiated settlements for more than 800 open labor contracts over the past 30 years.

This year we are offering our Bargaining Skills 101 curriculum on two dates: January 23 and January 30. We are also offering a Bargaining Skills 201 curriculum on three dates: January 24, January 31, and February 1. Attendees can choose to come to the 101 or 201 workshop, or attendees can choose to come to both workshops on back-to-back days. The workshops will be held at the Two Union Square Conference Center in downtown Seattle with each section limited to 40 participants to facilitate small group activities and informal dialogue. We currently have space available on January 23 and February 1, and waiting lists for January 24, January 30, and January 31. The cost is $295 per day for WSPA members and $395 per day for non-members, with a $400 daily discount for districts who send a team of four or more. Lunch and refreshments are included. If you have any questions about the workshops, please feel free to call our attorneys or staff at (206) 622-0203 or send an email to info@pfrwa.com.

Porter Foster Rorick LLP

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