# WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

**October 2017**

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

## Ninth Circuit Court of Appeals

### IDEA

*R.E.B. v. State of Haw. Dep't of Educ.*
No. 14-15895 (9/13/17)

The Ninth Circuit Court of Appeals held that where transition services are necessary for a disabled child to be educated and participate in new academic environments, transition services must be included in the child's IEP. J.B., a kindergartner with autism, attended a private special education school. The Hawaii Department of Education (DOE) staff convened a meeting to develop an IEP for J.B.'s transition from the private school to public kindergarten. J.B. objected to the proposed IEP, arguing that DOE violated the IDEA by refusing to address the father's concerns about the transition to public school. A hearing officer and the district court found in favor of the DOE. J.B. appealed to the Ninth Circuit, which reversed. The Court held that, while the IDEA mentions transition services only in the context of postsecondary planning, services that ease the transition between institutions or programs—whether public or private—serve the IDEA's requirement that IEPs must include supplementary aids and services that will allow children to be educated and participate with other children with disabilities and nondisabled children. As a result, the Court held that where transition services are necessary for a disabled child to be educated and participate in a new academic environment, transition services must be included in the IEP.

### Due Process

*Roybal v. Toppenish Sch. Dist.*
No. 15-35541 (9/20/17)

The Ninth Circuit held that the Toppenish School District satisfied its federal due process obligations when it provided a former principal with notice and an opportunity for a hearing before he was reassigned to be a teacher, accompanied by a decrease in salary.

The District employed Roybal as a principal. Prior to the 2012-13 school year, the District reassigned Roybal to work as an assistant principal and raised his salary. Roybal received a poor performance review in August 2013, and requested that the District correct it. Roybal retained counsel to assist with that effort, and his attorney sent the Superintendent a letter stating that he was reviewing the evaluation. On May 15, 2014, the District served Roybal with a notice of reassignment to a teacher position and an

accompanying reduction in salary, pursuant to RCW 28A.405.230. The notice listed reasons for the reassignment, and explained that the Board would hold an executive session to allow Roybal to request reconsideration of his reassignment. Roybal and his attorney met with the Board to contest the reassignment, and the Board upheld the District's decision to reassign.

Roybal sued the District and the Superintendent in state court, bringing two claims under 42 U.S.C. § 1983—that the District (1) reduced his salary without due process and (2) retaliated against him in violation of the First Amendment for speaking to an attorney—as well as various state law claims. The District removed the case to federal court where both parties moved for summary judgment. The District argued that it did not violate due process or retaliate against Roybal. The Superintendent argued that he was entitled to qualified immunity in his individual capacity. The trial court denied the District's motion, concluding that it violated due process as a matter of law, that genuine issues of material fact existed whether the District violated Roybal's First Amendment rights, and that the Superintendent was not entitled to qualified immunity. The district court granted summary judgment to Roybal on his due process claim.

The District brought an interlocutory appeal before the Ninth Circuit as to the qualified immunity denial and on the merits of the constitutional claims. The Ninth Circuit reversed the summary judgment granted to Roybal and directed the trial court to enter judgment in favor of the District, including a finding that the Superintendent had qualified immunity as to the due process claim. The Court also concluded that it lacked jurisdiction to review Roybal's First Amendment retaliation claim because the trial court had found that genuine issues of material fact existed regarding the claim, and ordered that the claim proceed to trial.

The Court acknowledged that RCW 28A.405.230 created a constitutionally protected property interest in the salary Roybal received as a principal, and stated that the District could not deprive Roybal of his property interest without providing due process. The Court held that RCW 28A.405.310, however, provides employees with greater due process protections than does the U.S. Constitution, which only requires a *Loudermill* hearing, and that the District satisfied *Loudermill*'s requirements by granting Roybal notice and an opportunity for a hearing before he was deprived of his property interest in his salary.

## Federal Guidance

### Sexual Misconduct

U.S. Dep't of Education
Questions & Answers on Campus Sexual Misconduct (9/22/17)

The U.S. Department of Education issued guidance in advance of rulemaking regarding campus sexual misconduct under Title IX. The Department also rescinded the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014. The new guidance reflects several notable changes: the Department has withdrawn its expectation that in order to be "prompt," investigations must be completed within 60 days; the Department retracted its position that only a "preponderance of evidence" standard may be used in sexual harassment cases, instead directing schools to use the same standard that the school uses in other student misconduct cases, which may be "preponderance of the evidence" or "clear and convincing evidence;" in withdrawing the April 2014 Q&A, the Department retracted its previous list of topics on which investigators and adjudicators must be trained, and cautioned against training and investigative approaches that apply sex stereotypes; the

Department retracted its prohibition on mediation in sexual violence cases; the Department discouraged restrictions on imposing gag orders on the parties; the Department announced new guidelines for investigative reports; the Department prohibited the use of fixed rules that favor one party over another in the imposition of "interim measures" while still recognizing the legal need for such interim measures; and the Department now allows schools to restrict appeal rights to respondents only.

## PERC

### Unfair Labor Practice; Order of Dismissal

*Kent School District*
Decision 12771 (8/30/17)

PERC dismissed four allegations by an employee that the District committed unfair labor practices, including multiple actions in reprisal for union activities that may have constituted either discrimination or interference, because the complaint did not state dates or participants for any of the occurrences. PERC rules for contents of an unfair labor practice complaint require the complainant to submit a "clear statement of the facts constituting the alleged unfair labor practices, including times, dates, places and participants in occurrences." The date of occurrence and names of participants are necessary to determine whether the allegations are timely in light of the six-month statute of limitations for unfair labor practice complaints.

## Washington Legislature

### Paraeducators

ESHB 1115

The Washington legislature passed new legislation this summer regulating the employment of paraeducator staff. A state paraeducator board was created and charged with adopting minimum employment requirements for paraeducators, establishing requirements and policies for general and advanced paraeducator certificates and developing the paraeducator certification process. While the majority of the new law is set to take effect September 1, 2019, new minimum employment standards for paraeducators take effect September 1, 2018. As of that date, paraeducators "who work under the supervision of a certificated or licensed staff member to assist in providing instructional services to students and families" must be at least eighteen years of age; hold a high school diploma or equivalent; and meet one of the following: (1) have received a passing grade on the Education Testing Service's Paraeducator Assessment; (2) hold an AA degree; (3) have earned 72 quarter credits or 48 semester credits at an institution of high learning; or (4) have completed a registered apprentice program

Districts should anticipate working with local bargaining units to address implementation of these requirements. These new state requirements closely match the previous federal requirements for paraeducators assigned to work in Title I programs.

### School Siting

HB 2243; RCW 36.70A.new
ESHB 1017; RCW 36.70A.new

In the 2017 session, the Washington State legislature passed two bills that enable new and expanded school buildings to be located in areas designated as rural in county comprehensive plans. The 28 Washington counties planning under the Growth Management Act, Chapter 36.70A RCW, may now revise their plans and policies to allow schools to locate new and expanded buildings outside of urban growth areas, where they traditionally have been welcomed. To take

advantage of the new opportunity, school districts must have updated policies addressing facility needs, and must make a finding—in concurrence with the county legislative body—that the new school cannot feasibly be located within the urban growth boundary. It may be several months before counties implement changes, but it is not too soon for school districts to start updating their policies and contacting county officials.

## Public Records

EHB 1595; Chapter 42.56 RCW

In the 2017 session, the Washington State legislature made several significant changes to the Public Records Act, Chapter 42.56 RCW. These changes give public agencies a greater ability to charge for producing electronic records, and establish new standards for responding to overbroad or unclear requests.

Agencies may now charge requestors the actual costs for producing electronic records, including the actual costs of cloud storage, electronic production/file transfer, and electronic transmission of records. Actual costs may be imposed only after the agency adopts a statement of costs and conducts a public hearing. If an agency determines it would be too burdensome to calculate actual costs, the agency may charge the following flat fees: (1) $.15/page for printing electronic records or photocopies; plus (2) $.10/page for scanning; plus (3) $.05 for every four records transmitted via email or cloud-based storage; plus (4) $.10/gigabyte for records delivered electronically; plus (5) actual cost of delivery devices such as thumb drives, envelopes, postage, etc. Upon request, agencies must disclose anticipated charges to the requestor and give the requestor the opportunity to revise the request.

Public agencies can also now charge actual costs for "data compilations [or] customized electronic access services." Fees for customized access cannot be charged unless the agency notifies the requestor of the charges in advance and explains why customized access services are necessary. Agencies can charge a 10% deposit up front for customized access.

Finally, a request for "all or substantially all" agency records is not a proper public records request, and now may be denied. Agencies may also deny "bot" or automatically-generated requests if responding to them would interfere with agency functions. If an agency receives a request that is unclear in part, the agency is obligated to answer the clear part of the request while seeking clarification of the unclear part.

## Pregnancy Accommodation

SSB 5835; RCW 43.10.005

As of July 2017, all Washington employers including public school districts must comply with Washington's new pregnancy accommodation law. Although this law overlaps some of existing requirements under the federal Pregnancy Discrimination Act and Americans with Disabilities Act, the law also creates new legal standards of which all districts should be aware. Specifically, the law identifies specific mandatory accommodations for which districts may not request a medical certification, and which cannot be denied on the basis of undue hardship. For more information, a detailed overview of the new law is available under "Resources" at pfrwa.com.

## Paid Sick Leave

Initiative 1433; Chapter 49.46 RCW

As of January 1, 2018, the paid sick leave provisions of Initiative 1433 (codified in Chapter 49.46 RCW) will go into effect. This law requires all Washington employers to provide paid sick leave to employees, and establishes minimum standards for accrual, carryover, and use of paid sick leave. The minimum accrual is one hour for every forty hours worked.

Covered employees must be allowed to carry over 40 hours of leave to the following year. Employees must be eligible to use leave after 90 calendar days of employment. And, if an employee leaves employment and commences employment with the district again within a one-year period, any prior leave balance must be reinstated. The new law adopts the same definition of "employee" as the Minimum Wage Act, which applies to anyone the employer "permits to work," but exempts professional, administrative, and executive employees as defined further in L&I rules.

The biggest anticipated impacts on school districts could arise from the lack of clarity in the law around how it applies to extra-curricular employees and day-to-day casual substitute employees, especially certificated substitutes, who are generally considered exempt from wage and hour laws. For regular employees, existing bargaining agreements and state law generally provide for more generous sick leave accrual rights than required by the new law. The state Department of Labor & Industries (L&I) is in the process of developing rules to explain and enforce these new requirements, but the current draft rules do not clarify how the new law should be applied to substitute employees. Information on the draft rules and the opportunity for employers to make comments can be found on the L&I website.

## Paid Family and Medical Leave

SSB 5975

Beginning January 1, 2019, school districts must withhold a percentage of employee wages to fund a new paid family medical leave insurance program. The program is funded by premiums paid by employers and employees and administered by the Employment Security Department, similar to state programs for workers' compensation and unemployment insurance. Under the program, the state will pay a portion of employees' regular wages during the paid leave period, based on a formula developed by the state.

The types of leave covered by the paid leave program track closely the categories of unpaid leave under existing federal and state family medical leave laws. These include time for bonding with a new child, caring for a family member with a serious health condition, or responding to a military exigency. Paid medical leave benefits are also provided for an employee's own serious health condition. Serious health condition is defined the same as in the FMLA and its regulations.

Employees are eligible for paid family and medical leave benefits after working for at least 820 hours during the qualifying period. Employees may take up to 12 weeks of leave for either family or medical leave, or, if the employee has a need for both family and medical leave, the employee could take up to sixteen weeks of leave. An additional two weeks of leave may be used if the employee has a serious health condition with a pregnancy that results in incapacity, for a combined total of eighteen weeks.

SSB 5975 also creates legal penalties for both employees who make false claims for benefits and for employers who fail to pay benefits under any voluntary plan established, or who retaliate against or discharge employees for seeking or taking leave. The state Employment Security Department has authority to investigate allegations of retaliation.

We have already seen proposals at the collective bargaining table asking employers to subsidize the program with local funds. The statute allows, but does not require, locally negotiated supplements or benefits that go beyond the state program. The statute also states there is no duty to reopen existing contracts to negotiate regarding the program.

## Welcome

The attorneys and staff of Porter Foster Rorick are pleased to welcome four new attorneys to our team providing responsive and practical legal advice to public schools and other local governments.

### Jon Collins

Jon graduated in 2009 from Willamette University in Salem, Oregon, and received his law degree from the University of Washington School of Law in 2014. After law school, Jon clerked at Division I of the Washington Court of Appeals for the Honorable Linda Lau and at the Washington State Supreme Court for Chief Justice Mary Fairhurst. Prior to law school, Jon taught high school English in the Chicago Public Schools.

### Leilani Fisher

Leilani graduated from Brigham Young University in 2009 with degrees in economics and philosophy, and received her law degree *cum laude* from Brigham Young University's J. Reuben Clark School of Law in 2014. During law school, Leilani served as Managing Editor of Production for the BYU International Law & Management Review and authored a comment published in the BYU Law Review. Prior to joining Porter Foster Rorick, Leilani was an Assistant Attorney General in the Consumer Protection Division of the Washington State Attorney General's Office.

### Lauren McElroy

Lauren is a 2008 cum laude graduate of Whitman College and a 2013 honors graduate of the University of Washington School of Law. Prior to joining Porter Foster Rorick in 2017, Lauren served as an attorney advisor at the United States Department of Justice through the Attorney General Honors Program and clerked for the Honorable Mary Kay Becker at the Washington Court of Appeals, Division I. Prior to law school, Lauren taught middle school special education in New Orleans, Louisiana.

### Valerie Walker

Valerie graduated summa cum laude from Occidental College in 2013 and with high honors from the University of Washington School of Law

in 2017. During law school, Valerie served as the Executive Online Editor of the Washington Law Review and won membership in Order of the Coif, a legal academic honors society. Valerie clerked with PFR during the summer of 2016.

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This information is intended for educational purposes only and not as legal advice regarding any specific set of facts. Feel free to contact any of the attorneys at Porter Foster Rorick with questions about these or other legal developments relevant to Washington public schools.

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