WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

October 2023

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

Ninth Circuit Court of Appeals

First Amendment

Fellowship of Christian Athletes v. San Jose Unified School District
No. 22-15827 (9/13/23)

The Ninth Circuit Court of Appeals held that the San Jose Unified School District (District) likely violated the Establishment Clause of the First Amendment when it revoked the status of the Fellowship of Christian Athletes (FCA) as an Associated Student Body (ASB)-approved student club. The FCA is an international Christian religious ministry organization whose mission is to foster spiritual growth in student athletes across middle school, high school, and colleges in the United States. To further this goal, FCA clubs regularly host religious discussions, prayer times, worship, and bible studies. Although all students are welcome to participate in these events, FCA requires that its student leaders affirm certain core religious beliefs, including affirming a belief that marriage should be between one man and one woman. Since the early 2000s, FCA chapters were ASB-recognized student clubs in three District high schools, including Pioneer High School (Pioneer). In April 2019, a teacher at Pioneer, Peter Glasser, obtained a copy of FCA's leadership criteria, and Glasser believed these viewpoints were objectionable moral stances on marriage and sexuality. Glasser posted the FCA statements on his classroom whiteboard with a note expressing his sadness that this club existed on Pioneer's campus. Two FCA officers were present in Glasser's class and later stated that they felt insulted and deeply hurt by Glasser's remarks. Glasser contacted the Pioneer principal, expressing concern that the FCA's membership criteria violated the District's nondiscrimination policies. The next day, a school leadership committee composed of several school department chairs met to discuss the controversy surrounding FCA. Following the committee meeting, the principal informed Pioneer FCA that the District had decided to strip the club of its ASB approval. Because they were no longer an ASB-recognized club, the FCA was no longer included in the District's official club list or the student yearbook, and it did not have access to ASB-sanctioned fundraisers, an official campus faculty advisor, or priority access to campus meeting spaces. In April 2020, two FCA student leaders filed suit against the District and certain school officials, alleging in part that the District had violated their right to free exercise of religion under the First Amendment to the U.S. Constitution. In response to the litigation, the District adopted a new non-discrimination policy that imposed a new requirement that ASB-

recognized student groups permit any student to become a member or a leader regardless of the student's status or beliefs. The District then asserted that the FCA's statement of faith violated its new policy by excluding LGBTQ students and students of other faiths. The FCA sought a preliminary injunction to prohibit the District from enforcing its new policy and to restore its ASB status. The district court denied the injunction, finding that the new policy was unlikely to violate the FCA's religious freedom because the District's policy was content and viewpoint neutral and only incidentally violated the club's religious beliefs. The FCA appealed, and a divided Ninth Circuit panel reversed, ordering the District to again recognize the FCA as an ASB-affiliated student group. The District petitioned for rehearing en banc (reheard by the full Ninth Circuit court), which affirmed the grant of a preliminary injunction in favor of the FCA. The en banc Ninth Circuit held that the District's new policy was neither neutral nor generally applicable because the District had granted certain exceptions to other student clubs that had discriminatory membership criteria, such as the Senior Women Club or Girls Who Code Club, which expressly limited membership to students who were female-identifying. The Court further held that Glasser's remarks, which included publicly expressing dismay at the FCA's statement of faith, evidenced hostility toward religion, and as a result, the District's non-discrimination student club policy was subject to strict scrutiny. Under this heightened standard, the District would need to show that its policy served a compelling interest and was narrowly tailored to serve that interest. Because the District conceded it could not satisfy this heightened standard, the Court held that the FCA was entitled to a preliminary injunction restoring the FCA's status as an ASB-recognized student club. Judge Forrest concurred, writing separately that she would have resolved this case as a free speech issue rather than a religious-freedom issue. Three judges concurred in part and dissented in part, agreeing that the FCA was entitled to a preliminary injunction because the District had treated the FCA less favorably than secular clubs, but wrote that the majority opinion swept well beyond what was necessary to resolve the specific facts of this case.

Americans with Disabilities Act

Garcia v. Gateway Hotel L.P.
No. 21-55926 (9/15/23)

The Ninth Circuit Court of Appeals held that a prevailing defendant in an Americans with Disabilities Act (ADA) case could be awarded its costs in defending the lawsuit without a finding that the plaintiff's action was frivolous, unreasonable, or without foundation. Orlando Garcia filed a lawsuit challenging Gateway Hotel L.P. (Gateway)'s reservation policies and practices, arguing that the hotel's failure to include certain accommodation information on its website violated the ADA. The district court dismissed Garcia's lawsuit. Gateway then sought an award of costs, which the district court granted. Garcia filed multiple motions challenging the imposed costs, arguing that Gateway was not entitled to costs because under prior Ninth Circuit precedent, the ADA only allows a prevailing defendant to receive its costs upon a showing that the lawsuit was frivolous, unreasonable, or without foundation. The district court denied Garcia's motions, citing a recent decision of the U.S. Supreme Court which held that costs could be awarded to a prevailing party at the district court's discretion. The Ninth Circuit affirmed, reasoning that under the Federal Rules of Civil Procedure, costs should be allowed to the prevailing party in a lawsuit unless a federal statute provides otherwise. The Court held that the fee and cost-shifting provision of the ADA did not provide otherwise and instead, explicitly allowed the trial court in its discretion to award the prevailing party litigation expenses and costs. Relying on recent U.S. Supreme Court precedent,

the Court held that the ADA fee and cost-shifting provision did not limit the trial court's discretion to award costs to a prevailing ADA defendant, and its prior caselaw indicating that costs could only be awarded upon a showing that the action was frivolous, unreasonable, or without foundation was effectively overruled by intervening U.S. Supreme Court precedent.

First Amendment

Krishna Lunch of Southern California, Inc. v. Beck
No. 23-55072 (9/21/23) (unpublished)

In an unpublished decision, the Ninth Circuit Court of Appeals held that a religious nonprofit group did not have a constitutional right to unrestricted access to the University of California, Los Angeles (UCLA)'s central courtyard, Bruin Plaza. UCLA restricts public access to its central courtyard by prohibiting non-university affiliated persons from entering after midnight, requiring outside groups to pay a daily $500 fee for use of the courtyard, and limiting outside groups' use of the courtyard to four days per quarter. These restrictions are intended to prioritize the courtyard's use by student groups and the campus community. Krishna Lunch is a nonprofit religious organization that sought—and was denied—an exemption to UCLA's four-day-per quarter restriction and daily fee associated with the use of Bruin Plaza. Krishna Lunch filed a lawsuit in federal court, arguing that Bruin Plaza was a traditional public forum and, therefore, UCLA's restrictions on its access violated Krishna Lunch's free speech rights under the First Amendment to the U.S. Constitution. Krishna Lunch asked the district court to grant an injunction requiring UCLA to provide it with unrestricted access to speak with students in Bruin Plaza. The district court denied Krishna Lunch's request for an injunction. The Ninth Circuit affirmed, holding that Bruin Plaza was not a traditional public forum even though it may superficially resemble traditionally recognized public fora like town squares. Instead, the Court held that the plaza was a limited public forum given that the university had historically restricted access by non-university groups, and there was no evidence the space was ever open to indiscriminate use by the public. The Court further held that UCLA's reservation notice and fee requirements were reasonable in light of the purpose of the forum, which was designed for use by student groups and the campus community. Finally, the Court noted that there was no evidence that the university had applied its policies inconsistently or otherwise discriminated against Krishna Lunch based on its viewpoint. As a result, the Court held UCLA's speech restrictions were constitutional, and it affirmed denial of Krishna Lunch's request for a preliminary injunction.

Title IX

Brown v. State of Arizona
No. 20-15568 (9/25/23)

The Ninth Circuit Court of Appeals held that the University of Arizona had substantial control over the context in which a student athlete abused another student off-campus and as a result, could be liable for damages under Title IX of the Education Amendments of 1972 (Title IX). Orlando Bradford attended the University on a football scholarship beginning in fall 2015. During his freshman year, Bradford assaulted two female students multiple times. The first student was a member of the University softball team with whom Bradford was romantically involved. Multiple witnesses saw the two physically fighting in a dormitory study room, prompting the resident advisor (RA) to contact the University community director, who instructed the RA to not call the police. The student's parents later reported Bradford's abuse to the softball coach, who then contacted the University's Title IX liaison within the Athletics Department. Neither the Title IX liaison nor the softball coach notified the athletic director or anyone on the football coaching staff regarding the allegations against Bradford.

Students on the softball team continued to report seeing their teammate arrive to study hall with a black eye and finger marks on the side of her neck, which was again reported to the Title IX liaison. Despite the additional reports, the University again did not notify the athletic director or anyone on the football coaching staff about Bradford's reported assaults, but instead issued a no-contact order prohibiting Bradford from contacting the softball student. Later that year, Bradford began dating another student, Lida DeGroote, whose mother reported to the Associate Dean that her daughter was in a "concerning relationship" with another student and had bruises on her body. The Associate Dean did not respond to this report. Bradford began dating Mackenzie Brown during the spring of his freshman year, and he started to physically abuse her during the summer of 2016. At that time, with permission of his coaches, Bradford had moved into an off-campus house that he shared with other members of the football team. Bradford continued to live off-campus during his sophomore year, and he physically abused Brown between four and ten times during their relationship. On one occasion, Bradford locked Brown in his home, hit, kicked, and slapped her, dragged her by the hair, and strangled her. Brown later sought medical care, and the report showed she had burst blood vessels in her eyes, bruising on her neck, a concussion, and injury to her upper back, legs, and abdomen. Bradford was arrested in September 2016, expelled in October 2016, and eventually pleaded guilty to felony aggravated assault and sentenced to five years in prison. Bradford's coaches later testified that if they had known about Bradford's reported abuse of the first two students, then Bradford would have been removed from the football team, lost his scholarship, and would likely have been expelled by the end of his freshman year. Brown sued the University under Title IX, alleging that the University's failure to respond to the reported assaults on the first two female students deprived her of the full benefits of her education because an appropriate response would have prevented Bradford's subsequent assaults on her. The district court dismissed the case as a matter of law, holding that the University did not exercise control over the context in which Bradford's abuse occurred because it was off campus, and the University therefore could not be held liable under Title IX. A divided three-judge panel of the Ninth Circuit affirmed dismissal of the case. The Ninth Circuit granted Brown's request to rehear the case by the full court en banc, and the en banc court reversed the district court's dismissal of Brown's case. The en banc court held that Brown presented sufficient evidence that the University exercised substantial control over the context in which her abuse occurred given that athletes could only live off-campus with express permission of their coaches, which suggested a heightened level of supervisory control over their off-campus housing. The Court further held that there was evidence that the University acted with deliberate indifference, as necessary to allow for damages under Title IX, because multiple officials had knowledge of Bradford's violent assaults on the first two students, and those officials failed to report the abuse to the athletic director or Bradford's coaches. The Court held that based on this evidence, a reasonable factfinder could conclude that the University violated Title IX in failing to appropriately respond to reports of Bradford's abuse, and it remanded the case for further proceedings. Judge Rawlinson, joined by another judge, dissented, writing that the facts did not show the University exercised control over the off-campus context in which the abuse occurred. Judge Nelson, joined by two other judges, also dissented, writing that Brown had disclaimed her position that the University controlled the context of the off-campus house in the earlier proceedings, and therefore, the en banc court should not have considered that argument. Finally, Judge Lee wrote a separate dissent, arguing that criminal acts by

students off-campus do not implicate an education program or activity under Title IX.

Washington Court of Appeals

Agency Rulemaking

City of Tacoma v. Department of Ecology
No. 39494-8-III

The Washington Court of Appeals held that an agency's internal directive could constitute a "rule" subject to the rulemaking procedures of the Administrative Procedures Act (APA). The Washington State Department of Ecology (Ecology) is responsible for adopting and implementing mitigation strategies to address human-caused pollution in the Puget Sound. In partnership with the Pacific Northwest National Laboratory, Ecology spent years developing a predictive computer model to isolate and test water quality to determine the extent to which public sewer systems and wastewater treatment plants contributed to excess levels of nitrogen in the Puget Sound. In 2019, Ecology published a report analyzing levels of pollution and projecting the extent to which pollution could be reduced if nitrogen and carbon discharges were reduced at water treatment plants. The report concluded that reducing nitrogen and carbon discharges from the water treatment plants would significantly improve the water quality standards of the Puget Sound. Following the report, the Northwest Environmental Advocates filed a rulemaking petition with Ecology, proposing that the agency adopt a rule establishing technology-based discharge limits from municipal wastewater treatment facilities that discharge to the Puget Sound. Ecology denied the rulemaking petition, but in its denial, it committed to setting nutrient loading limits for all permitted dischargers in Puget Sound and requiring the permittees to evaluate nutrient reduction targets. Ecology also committed to exploring development of a general permit to regulate nitrogen discharges into Puget Sound. To fulfill those promises, Ecology directed its staff to add new terms to individual wastewater treatment plant permits that were due for renewal, imposing nitrogen discharge limits and nitrogen reduction planning requirements. Ecology also developed a new general permit that limited how many pounds of nitrogen each large and midsize wastewater treatment facility could discharge per year. The City of Tacoma and other special purpose districts that operated wastewater treatment plants filed a joint petition for review in superior court, arguing in part that Ecology's commitments in its denial letter constituted rules adopted outside of the APA rulemaking process. The trial court agreed with the City, granted the petition, and remanded for Ecology to engage in the rulemaking process. Ecology appealed and the Court of Appeals affirmed, holding that Ecology's commitments, coupled with its internal directives to alter the permitting requirements to limit nitrogen discharge, constituted rulemaking under the APA. The Court held that Ecology's new permitting standards were regulations of general applicability that altered the existing permitting benefits enjoyed by the wastewater treatment plants, and therefore were rules with the definition of the APA. As a result, the Court held that the new requirements in the individual permits and the general permit were unlawful and that Ecology was required to utilize the APA rulemaking procedures, including providing public notice and opportunity for comment, in order to impose the new permitting standards.

Note: The Washington Office of Superintendent of Public Instruction is also a state administrative agency subject to the rulemaking requirements of the APA, chapter 34.05 RCW.

PERC

Discrimination

Benton County
Decision 13710 (PECB, 2023) (9/4/2023)

A PERC Examiner held that a Benton County corrections officer was not engaged in protected union activity when he sought an accommodation for his shoulder injury, as necessary to establish a discrimination claim under Washington State collective bargaining statutes. Hubert Gilmore worked as a corrections officer for Benton County since 2004. In February 2022, Gilmore notified his supervisor that he had sustained a rotator cuff tear, which limited his ability to physically respond to or interact with inmates. The County granted Gilmore's request for a light duty assignment to a master control position, in which he would answer phone calls and monitor video camera feeds, but he would not be required to physically interact with inmates. In June, Gilmore submitted a Job Analysis document, expressing concern with his office assignment due to "dependence on others," and he asked to be reassigned to a rover position, which the County granted. In November, Gilmore's doctor completed a Fitness for Duty form, which stated that Gilmore could never work above his shoulders, forcefully grasp, or perform a high impact task on his left side. Upon receipt of this information, the County reassigned Gilmore back to the light-duty master control position because the rover position could require Gilmore to forcefully grasp his lefthand in the event of an altercation with an inmate. In response, Gilmore filed an unfair labor practice (ULP) complaint, arguing that the County had assigned him to the master control position in reprisal for his exercise of statutorily protected collective bargaining rights. Following an evidentiary hearing in which Gilmore testified that his injuries could affect his ability to employ self-defense tactics in the rover position, the PERC Examiner dismissed Gilmore's complaint. The Examiner held that Gilmore had not presented any evidence he was engaged in protected collective bargaining activity, reasoning that an employee's individual request for a reasonable accommodation was by itself insufficient to constitute protected bargaining activity which could give rise to a discrimination unfair labor practice. The Examiner further held that even if the request was protected union activity, the County had presented a legitimate, nondiscriminatory reason for placing Gilmore on a light duty assignment given that keeping Gilmore in the rover position was inconsistent with the limitations imposed by his physician and could create a safety risk for Gilmore and others. The Examiner noted that there was no evidence that union animus played any part in the light duty assignment, and therefore, held that the County had not discriminated against Gilmore for engaging in protected activity under the collective bargaining statutes.

Welcome New PFR Attorneys

The attorneys and staff of Porter Foster Rorick are pleased to announce two new additions to our team of attorneys providing responsive and practical legal advice to Washington public schools.

Kimberly Shely

Kimberly Shely represents public schools in all areas of school law.

Kimberly graduated magna cum laude from Arizona State University in 2015 and from the University of Washington School of Law in 2023. While in law school, Kimberly earned CALI Excellence for the Future Awards for the top grade in four courses including Employment Discrimination and Employment Law. She also served as the Internal Associate Editor in Chief on the *Washington Journal of Law, Technology & Arts* and Co-President of the Law and Business Association. During law school Kimberly interned with the Washington State Bar Association - Office of Disciplinary Counsel, the Seattle City Attorney's Office - Employment and Labor Section, and as a summer associate with Porter Foster Rorick LLP. Before law school, Kimberly was selected for a management development program and worked as a claims trainer for an insurance company in the Seattle area for five years.

Sharan P. Singh

Sharan Singh represents public school districts in all areas of school law.

Sharan is a 2019 graduate of the Pennsylvania State University and a 2023 graduate of the University of Washington School of Law. During law school, Sharan served as the Chief of Diversity and Inclusion of the Washington International Law Journal, the President of the Middle Eastern and South Asian Law Association, and as a clinical law student for the Immigration Law Clinic. She also interned with the U.S. Department of Education, Office of Civil Rights, and externed with the Seattle City Attorney's Office and the United States Attorneys' Office for the Western District of Washington. Prior to attending law school, Sharan served as an AmeriCorps Service Member working for City Year San Jose.

Porter Foster Rorick LLP

Washington School Law Update is published on or about the 5th of each month. To be added to or removed from our distribution list, simply send a request with a name, organization, and e-mail address to info@pfrwa.com.

Update Editors

Liz Robertson
elizabeth@pfrwa.com

Jay Schulkin
jay@pfrwa.com

PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Chase Bonwell
Cliff Foster
Olivia Hagel
Josh Halladay

Parker Howell
Megan Knottingham
Rachel Miller
Nick Morton
Buzz Porter
Liz Robertson
Mike Rorick

Kimberly Shely
Sharan Singh
Jay Schulkin
Greg Swanson
Christina Weidner
Lorraine Wilson