WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

March 2017

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

PFR Announcements

Public Records Disclosure Training

May 8, 9 am to 3 pm
Two Union Square Conference Center, Seattle

Join Andrea Bradford and Tim Reynolds of Porter Foster Rorick for a full day of hands-on training in processing public records requests and avoiding mistakes that lead to legal liability. This workshop will satisfy the legally-mandated training for district officials and public records officers. Registration is only $150 per person and includes lunch. Reserve a space by sending an e-mail with the names of attendees to info@pfrwa.com.

United States Supreme Court

Disability Discrimination

Fry v. Napoleon Community Schools
No. 15-497 (2/22/17)

The U.S. Supreme Court concluded that the Individuals with Disabilities Education Act (IDEA) did not require exhaustion of administrative remedies when the "gravamen" of the claim is something other than denial of a free appropriate public education (FAPE). E.F., a student with cerebral palsy, sought to bring a service dog to school. Because the student was already assigned a one-on-one aide under her existing IEP, the district denied the request, concluding that the service animal was unnecessary. The parents brought suit in federal court, claiming the district violated Title II of the ADA and Section 504 by discriminating against E.F. on the basis of disability, failing to accommodate E.F., and denying E.F. equal access to the school and its programs. The trial court dismissed the claims, concluding that the Frys failed to exhaust the IDEA's administrative procedures. The Supreme Court held that exhausting the IDEA's administrative procedures is required only when the "gravamen" of the plaintiff's claim is that the child was denied FAPE, an inquiry which requires the court to look beyond the labels a plaintiff uses in pleadings. The Court remanded the case to the trial court to apply this new rule, and stated that two questions should guide the inquiry: First, could the plaintiff have brought the same claim if the alleged conduct occurred at some public facility other than a school? Second, could an adult employee or visitor at the school bring the same claim? If the answer to either question is yes, the crux or gravamen of the claim is likely not a denial of FAPE, and exhaustion

of the IDEA's administrative procedures is not required.

Federal Guidance

Transgender Discrimination

U.S. Dep't of Education and U.S. Dep't of Justice
Dear Colleague Letter (2/22/17)

The U.S. Departments of Justice and Education withdrew guidance issued during the Obama administration which stated that to comply with Title IX schools must provide access to sex-segregated facilities like restrooms and locker rooms to transgender students consistent with their gender identity. To support withdrawal of the prior guidance, the Dear Colleague Letter cites the role of states and local school districts in developing policy and the "significant litigation" resulting from the prior guidance. Despite this change in federal enforcement of Title IX, a separate Washington law specifically prohibits discrimination in public schools based on gender identity, and OSPI has issued guidance based on Washington law that no student should be required to use a locker room conflicting with his or her gender identity.

Washington Court of Appeals

Wrongful Discharge

Burke v. City of Montesano
No. 48497-II (2/22/17)

The Court of Appeals held that summary judgment against Burke, a former employee of the City of Montesano, was proper because he failed to establish a genuine issue of material fact that his political activity was a substantial factor or pretext in the City's decision to terminate his employment. Burke was a longtime City public works employee. In 2011, Burke hosted a party to support a mayoral candidate who ended up losing the election. After the election, the victorious mayoral candidate asked Burke about the party, and offered Burke a pin to show Burke's support for the victorious mayoral candidate. Burke rejected the pin because he had voted for the other candidate. The two did not discuss the mayoral election again. Later, the City became aware that Burke had ordered significantly more paint for City painting projects than in the past, which coincided with Burke opening a personal painting business. The City placed Burke on administrative leave while investigating the allegations against him. Burke refused to appear for interviews with the investigator. Burke also refused to attend a *Loudermill* hearing. The City suspended Burke for insubordination. Burke again refused to attend an investigatory interview, and again refused to attend a *Loudermill* hearing. The City terminated him. Burke brought a lawsuit for wrongful discharge in violation of public policy. The trial court granted the City's motion for summary judgment and dismissed Burke's claim. On appeal, Burke argued that he was discharged for exercising his First Amendment right to engage in political activities. The Court applied the *McDonnell Douglas* three-step burden shifting test. The first step is for the plaintiff to make a prima facie case for wrongful discharge; the second step shifts the burden to the employer to articulate a legitimate nonpretextual nonretaliatory reason for discharge; and the third step requires the plaintiff to provide evidence that the employer's alleged nonretaliatory reason was pretextual. The Court held that the City successfully articulated a legitimate nonretaliatory reason for Burke's termination, and that Burke did not establish pretext. The Court accepted the City's argument that Burke was terminated for insubordination by virtue of refusing to appear at investigatory interviews, and rejected Burke's argument that the insubordination allegations were pretextual. The Court affirmed dismissal.

Open Public Meetings Act

West v. Pierce County Council
No. 48482-1-II (2/22/17) (Published in Part)

In the published portion of its decision, the Court of Appeals held that any person has standing to bring an action for sanctions or an injunction under RCW 42.30.120 and .130 of the Open Public Meetings Act (OPMA). In the unpublished portion of the decision, the Court held that the County Council members' series of emails did not violate the OPMA. The County Executive emailed the Council members to inform them that the Prosecuting Attorney's Office believed that a recently filed referendum was outside the scope of the County's referendum process. The Council members responded, requesting more information about the basis for the prosecutor's opinion and the costs of litigation, and pointing out that they believed litigation decisions rested with the Executive, not the Council. Arthur West filed a complaint against the Council, alleging violations of the OPMA. The Council members stated in declarations that they did not believe the Council had any role in whether to pursue a lawsuit against the referendum, and that they did not believe they were participating in a meeting through their emails. On the Council's motion for summary judgment, the trial court concluded that West lacked standing, and that he had failed to establish a genuine issue of material fact on the alleged OPMA violation. In the published portion of the decision, the Court of Appeals reversed the trial court's determination that West lacked standing. The Court held that under the plain language of the OPMA, "any person" has standing to bring an action for sanctions or an injunction for OPMA violations. In the unpublished portion of the decision, the Court ruled that summary judgment was appropriate because West failed to establish an OPMA violation. The Court held that there was no evidence that the Council members intended to transact official business—a required element for an OPMA violation—and that they were simply gathering information from and communicating with the prosecuting attorney rather than with each other. As a result, the Court affirmed dismissal.

PERC

Duty of Fair Representation

State-Corrections
Decision 12657 (2/6/17)

PERC's Unfair Labor Practice Manager dismissed an employee's duty of fair representation complaint against the union at the preliminary review stage because CBA ratification procedures are outside of PERC's jurisdiction. The complaint alleged that the union failed to conduct a ratification vote on a collective bargaining agreement. PERC held that ratification procedure are exclusively a matter of internal union affairs.

Duty to Bargain

Central Washington University
Decision 12588-C (2/7/17)

PERC held that the union waived its right to bargain the contracting out of bargaining unit work because the employer provided the union with notice of its intent to do so and the union did not timely request to bargain the issue. Central Washington University purchased a set of bleachers and notified the union that it intended to contract out construction of the bleachers. After the employer provided notice, the parties discussed the issue during a union-management meeting but did not agree who would perform one aspect of the work. The CBA contained a 21-day deadline for requesting to bargain changes in mandatory subjects of bargaining, and prohibited bargaining at union-management meetings. The union's practice had been to formally demand to bargain in writing, or if it was informally discussed during a union-management meeting, to follow up

in writing. PERC held that the union waived its right to bargain because it took neither of these actions before the 21-day deadline contained in the CBA.

Duty of Fair Representation

City of Seattle
Decision 12600-A (2/14/17)

A PERC hearing examiner granted summary judgment for the union on the duty of fair representation claims of four employees who voluntarily left the bargaining unit before the alleged harm occurred. The employees complained that they had not been consulted by the union when it settled an unfair labor practice complaint and decided how to distribute the settlement funds even though the alleged ULP occurred while they were employees. Because unions do not owe a duty of fair representation to individuals outside of the bargaining unit, and the four employees left the bargaining unit before the settlement was reached, the union owed no duty to consult them regarding the settlement.

Upcoming Professional Development

Enforcing School District Safety Programs
Jay Schulkin
WASBO Legal Perspective Series, Renton
March 23, 2017

Public Records Disclosure Training
Andrea Bradford and Tim Reynolds
Two Union Square Conference Center, Seattle
May 8, 2017

Porter Foster Rorick LLP

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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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