WASHINGTON SCHOOL LAW UPDATE

April 2017

PORTER FOSTER RORICK LLP

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 Tim Reynolds and Jay Schulkin 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

Individuals with Disabilities Education Act

Endrew F. v. Douglas County Sch. Dist.
No. 15-827 (3/22/17)

The U.S. Supreme Court revisited the standard a school district must meet to provide a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), rejecting a lower court decision that required district to provide "merely more the de minimis" educational benefit. Endrew F. was a fifth grade student with autism, who in part due to behavioral problems, was not making very significant progress from year to year. His parents withdrew him from public school and enrolled him in a private school specializing on autism, where he made significant behavioral improvements and more academic progress. His parents filed a complaint with the Colorado Department of Education requesting reimbursement for the private school tuition. The ALJ, district court, and court of appeals all rejected the parents claim, concluding the district's IEP, consistent with the IDEA, provided the student with some educational benefit (something more than "de minimis"). The Supreme Court ruled that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The Court stated that where advancing from grade level to grade level is not reasonable for a student, the IEP "must be appropriately ambitious in light of his circumstances . . . . The goals may differ, but every child should have the chance to meet challenging objectives." The Court reasoned that the "de minimis" test was not consistent with the IDEA: "It cannot be the case that the Act typically aims for grade-level advancement for children with

disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot." The court remanded the case to determine whether the standard it articulated was met.

Ninth Circuit Court of Appeals

Individuals with Disabilities Education Act

Avila v. Spokane Sch. Dist.
No. 14-35965 (3/30/17)

The Ninth Circuit held that the two-year statute of limitations for the Individuals with Disabilities Education Act (IDEA) runs from the date the plaintiffs knew or should have known of the actions forming the basis of their claims. Spokane School District Student G.A. was evaluated for autism in 2006 at age 5. The school psychologist determined he was not eligible for services. A 2007 evaluation concluded that the student was eligible for services under the category of autism. In 2010, the District reevaluated the student, and drafted another IEP. The parents did not agree with the 2010 reevaluation, requested an independent educational evaluation, and after that request was denied, filed a request for a due process hearing. The request, filed on April 26, 2010, raised eleven claims including claims relating to the district's failure to identify the student as a child with a disability in 2006, and failing to assess his disability in 2006 and 2007. At the due process hearing level, the administrative law judge dismissed the claims "regarding the District actions or inactions occurring prior to April 26, 2008" as barred by the two-year statute of limitations. On appeal, the district court affirmed. The Ninth Circuit remanded the case to the district court, concluding the appropriate trigger for the two-year statute of limitations was not when the District's actions occurred, but rather, when the parents knew or should have known of the alleged actions forming the basis of their complaint.

Washington Court of Appeals

Teacher Discipline

Greenberg v. Seattle Sch. Dist.
No. 74931-5-I (3/6/17) (unpublished)

The Court of Appeals held that a teacher could not challenge his arbitrator-approved suspension in court because he had not exhausted his remedies with the arbitrator while the arbitrator still had jurisdiction over the matter. Greenberg taught high school humanities for the Seattle School District. A student in his class complained about his methods for teaching a unit on race, and the school district suspended the race unit. Greenberg allowed students to circulate a petition to reinstate the race unit during class time, and the superintendent determined that Greenberg should be disciplined. The school district reprimanded Greenberg and transferred him to a different school. The union filed a grievance which proceeded to arbitration. The arbitrator determined that the school district did not have just cause to transfer Greenberg, but could suspend him without pay for ten days. Neither party had proposed that Greenberg be suspended. The arbitrator retained jurisdiction for two months. During those two months, the district imposed the suspension. Greenberg did not advise the arbitrator that he disputed the suspension. After the arbitrator's jurisdiction had expired, Greenberg requested an adverse effect hearing under state law to challenge the suspension. The district refused to hold a hearing. Greenberg commenced an action in superior court seeking a writ of review and declaratory relief. The trial court dismissed the suit, and Greenberg appealed. One of the elements for a writ of review is that there is "no adequate remedy at law." The Court of Appeals held that Greenberg could not satisfy this requirement because he had not availed himself of an adequate remedy at law—returning to the arbitrator while the arbitrator still had jurisdiction.

Negligence

C.B. v. Bethel Sch. Dist.
No. 48063-8-II (3/7/17)

Where a student left the custody of a private school and entered the custody of a school district by boarding a district school bus, the private school owed no duty to the student for harms that occurred after she boarded the bus. CB was a high school special education student. The Bethel School District contracted with Northwest School of Innovative Learning (NWSOIL) to provide special education services to CB. The District provided school bus transportation for CB. After school one day, CB became agitated while boarding the District's bus. Before the bus departed, CB got off the bus, walked to the public library, met a stranger, and accompanied him to his apartment, where the stranger sexually assaulted her. CB sued the District and NWSOIL for negligence. CB and the District reached a settlement, and NWSOIL moved for summary judgment dismissal on all claims. NWSOIL argued that it owed CB no duty once CB left NWSOIL's custody by getting on the District's bus. CB argued that NWSOIL owed CB a duty until the bus departed. The trial court concluded as a matter of law that the District, not NWSOIL, had custody of CB at the time she left the bus and thus owed her a duty of care. The court dismissed the claims against NWSOIL. CB appealed NWSOIL's dismissal. The Court of Appeals relied on the recent Washington Supreme Court case *N.L. v. Bethel Sch. Dist.*, which held that although a school district's duty to a student might end when the student leaves its custody, the school district's liability for a breach of duty while the student was in the district's custody is not cut off merely because the harm did not occur until after the student left the district's custody. The Court of Appeals held that when CB got on the bus, NWSOIL no longer had custody of CB and no longer owed her a duty of care. Instead, it was the District that owed CB a duty of care because under its own school board policies, the District bus driver had responsibility for the student once the student boarded the bus. As a result, the Court of Appeals affirmed the trial court, concluding that CB's claims against NWSOIL were properly dismissed.

Attorney General Opinions

Washington Law Against Discrimination

2017 Op. Att'y Gen. No. 2 (3/20/17)

The Attorney General's Office ("AGO") was asked to provide a formal opinion on the question of whether Initiative 200 ("I-200"), codified at RCW 49.60.400, prohibits public agencies from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities. For the sake of its opinion, the AGO focused only on state law and not on federal constitutional issues, and assumed that some existing disparity study does document disparities. The AGO reached three conclusions. First, I-200 prohibits only situations in which government uses race or gender to select a less qualified contractor over a more qualified contractor, and does not prohibit measures such as aspirational goals, outreach, training, or the use of race or gender as a tiebreaker between equally qualified contractors. Second, under very narrow circumstances, I-200 may allow agencies to elevate a less qualified contractor over a more qualified contractor if there is sufficient evidence of discrimination in state contracting that cannot be resolved through race- or sex-neutral means. Third, agencies may use preferences based on race or gender when necessary to avoid losing eligibility for programs providing federal funds.

Open Public Meetings Act

2017 Op. Att'y Gen. No. 4 (3/21/17)

The Attorney General's Office ("AGO") was asked to provide a formal legal opinion on the question of whether a public agency's governing body can permissibly hold regular meetings exclusively by telephone conference call. The AGO opined that it is permissible for the governing body of a public agency to hold a meeting exclusively by telephone, so long as the meeting complied with all requirements of the Open Public Meetings Act ("OPMA"), Chapter 42.30 RCW, including providing the statutorily-required notice of the meeting and its location. The physical presence of a majority of the governing body is not required to trigger the requirements of the OPMA. The AGO stated that such a meeting must still be open to the public, as the opportunity for the public to attend a meeting is a core OPMA requirement. The AGO opined that an agency could hold an OPMA-compliant telephone meeting by designating one or more specific locations as the meeting place, where a speaker phone would be provided to enable members of the public to hear all discussions and provide testimony. However, the AGO did point out that its opinion on this matter is not without risk, as a court might disagree with the notion that an all-telephonic meeting complies with the OPMA. The AGO recommended that the legislature follow the lead of other states by adopting clarifying legislation to specifically address this subject.

PERC

Duty of Fair Representation

Tacoma Sch. Dist.
Decision 12662 (3/1/17)

PERC's Unfair Labor Practice Manager dismissed two consolidated complaints alleging the District committed an unfair labor practice and the union violated its duty of fair representation because the incidents took place outside of the six-month statute of limitations. The statute of limitations may not be extended because an individual was not aware of his or her statutory rights. Further, PERC did not have jurisdiction over the allegation regarding the District because it related to contract violations which are enforceable either through the grievance process or through the courts.

Employer Interference

King County
Decision 12661 (2/28/17)

A PERC hearing examiner held that the employer committed an unfair labor practice when a supervisor sent an email to a union executive officer stating he was ready to eliminate overtime due to the amount of grievances filed related to overtime. An employer interferes with employee rights when an employee could reasonably perceive the employer's actions as a threat of reprisal or force, or a promise of benefit, associated with the union activity of that employee or other employees. Despite the fact that the supervisor apologized for the email and retracted his statement after the union expressed concerns related to it being perceived as a threat of reprisal or force, the Examiner found that the email would be perceived by a typical union employee as discouraging protected union activities, and therefore constituted interference.

Unilateral Change

City of Battle Ground
Decision 12659 (2/17/17)

A PERC hearing examiner held that the union's allegations regarding a unilateral change in wages, hours, or working conditions is untimely when the union knows of the facts underlying its complaint prior to the six-month statute of limitations. The

employer made changes to its defense attorney interview scheduling policy for officers, and the union received emails from the employer about those changes outside of the six-month statute of limitations, although the new scheduling matrix was not presented to the union until months later in a grievance regarding the scheduling changes. The six-month time frame for filing a complaint with PERC begins when the complainant knows or should know that the purported practice at issue has been broken, and may only be tolled when it has been found that the employer deceived the union or concealed facts that form the unfair labor practice complaint. The email communications between the employer and union before the six-month statute of limitations made it clear that the scheduling changes at issue were occurring and were not isolated incidents, which was also apparent based on the grievance the union filed over the matter, so the union's complaint alleging unilateral change was untimely.

Refusal to Bargain

Port of Everett
Decision 12641-A (3/6/17)

The Commission reversed the Unfair Labor Practice Manager's decision that the union failed to state a cause of action for refusal to bargain, holding that when a union alleges that an employer has changed an existing employee's work schedule in a manner that results in a reduction of overtime to bargaining unit members, it has met the initial requirement of stating a cause of action for refusal to bargain. At hearing, the union will have the burden of proving that the employees' interest in work schedules and overtime or other factors impacting wages, hours, and working conditions outweigh the employer's interests in staffing and service levels or other matters of entrepreneurial control.

Duty to Bargain in Good Faith

Snohomish County Fire District
Decision 12669 (3/20/17)

A PERC Examiner held that a union committed an unfair labor practice by not bargaining in good faith when it behaved in a manner that indicated it had authority to agree to a proposal during the course of the bargain, but then refused to sign the agreement when its executive board did not ratify it. During the bargain, the parties disagreed about some of the terms of a proposed successor agreement, and the union advanced a solution it said would allow the union to ratify the contract if the proposal was accepted by the employer's board of commissioners. After the employer's board approved the solution and agreement, the union refused to sign the agreement when the union's executive board rejected it. At no time did the union indicate that the executive board would need to ratify the solution or agreement. A party may be found to have failed to bargain in good faith when it misrepresents its authority to reach agreement during the course of negotiations. Because the union's negotiator stated that if the employer agreed to the union's proposed solution there would be no need for ratification by the union's executive board or membership, and the union's conduct gave the employer a reasonable belief that the parties had reached a final, binding agreement, the union committed a ULP by not bargaining in good faith. As a result, PERC directed the union to sign the agreement it had reached with the employer.

Unit Clarification

University of Washington
Decision 12665 (3/7/17)

In this order clarifying a bargaining unit, PERC held that it was appropriate to include a previously unfilled job classification in an existing bargaining unit because it is in the same job series as a job

classification already in the unit, performs the same work as that job classification, and work jurisdiction issues would be created if it was excluded from the bargaining unit. Although ordinarily employees are permitted a say in the selection of an exclusive bargaining representative, accretions are the exception to that rule. An accretion may be ordered by PERC when unrepresented employees logically belong in one existing bargaining unit and the positions can neither stand on their own as a separate unit or be logically accreted to any other existing unit. PERC found those conditions to be present in this situation because the bargaining unit at issue is the only appropriate placement for the position.

Direction of Cross-Check

Port of Friday Harbor
Decision 12666 (3/7/17)

PERC held that the cross-check process was the appropriate method to determine bargaining unit representation, despite the employer's preference for a mail ballot election, because the two conditions for a cross-check were satisfied. A cross-check involves a comparison of signatures on cards submitted by the union with signatures on an existing employment record submitted by the employer. In order for the cross-check method to be used, the labor organization must (1) be the only organization petitioning to represent the employees at-issue; and (2) submit a showing of interest demonstrating that at least 70 percent of employees signed valid cards in support of the labor organization. The Executive Director held that an employer preference for the question to be resolved by an election is not sufficient to disregard the statute and rule permitting a cross-check of signed cards as an alternative to an election administered by PERC.

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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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