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

Kennedy v. Bremerton School District
No. 20-35222 (3/18/21)

The Ninth Circuit Court of Appeals held that the Bremerton School District did not violate the First Amendment or Title VII of the Civil Rights Act of 1964 by prohibiting a football coach from praying on the field immediately after football games. High school football coach Joseph Kennedy's practice of kneeling for a prayer at the 50-yard line of the football field immediately after each game evolved into delivering prayer-like motivational speeches to students, coaches, and attendees of both teams. The school district sent Kennedy multiple communications during the 2015 football season advising him that his conduct violated District policy, instructing him to keep his motivational speeches secular to avoid alienating any team member, and inviting him to engage in a collaborative process to reach accommodations that would still allow him to pray without violating District policy or the Establishment Clause of the First Amendment. Kennedy did not engage in discussions with the District to reach an accommodation. He instead publicized his intention to resume his post-game prayers through appearances and announcements in various media and insisted that the only acceptable outcome would be to pray at the 50-yard line immediately after games. Kennedy then prayed with coaches and players from both teams, attendees, and media immediately after subsequent football games. The District placed Kennedy on administrative leave, and he did not apply for a coaching position after the superintendent recommended that he not be rehired for the following school year. He then sued the District for violating his rights under the First Amendment and Title VII. The trial court granted summary judgment in favor of the District, holding that the District's actions were justified due to the risk of an Establishment Clause violation if Kennedy continued with his prior prayer practices. The Ninth Circuit Court of Appeals affirmed the trial court. The Court held that Kennedy's free speech claim failed because he was acting as a public employee, that the District's interest in avoiding an Establishment Clause claim justified restricting his post-game prayer since an objective observer could view Kennedy's actions as District endorsement of a particular faith, and that the District's content-based directive that Kennedy discontinue the post-game prayer withstood strict scrutiny due to the District's compelling interest in avoiding an Establishment Clause violation. The Court then held that Kennedy's Title VII claims failed because the District's desire to avoid an

Establishment Clause claim constituted a legitimate, nondiscriminatory reason for not rehiring Kennedy, and because the District demonstrated Kennedy's insistence on continuing his prior on-field prayer practices and refusal to collaborate with the District to reach an accommodation.

Washington Supreme Court

Negligence

Meyers v. Ferndale School District
No. 98280-5 (3/4/21)

The Washington State Supreme Court held that a school district can be held liable for harm that a student suffered off-campus through the acts of a third party if the district was the legal cause of the student's harm based on a proper legal causation analysis. A high school teacher for the Ferndale School District took his class for an off-campus walk without first obtaining parental permission and without securing additional adult supervision. While the class was walking back to campus, a driver fell asleep at the wheel and drove onto the sidewalk, killing two students. The parents of one of the deceased students sued the District for negligence. The trial court granted summary judgment in favor of the District, finding that the specific collision was not foreseeable as a matter of law and that the District therefore had no duty to take steps to prevent it. The Court of Appeals reversed, finding issues of fact for a jury concerning the foreseeability of the student's injuries and proximate causation, while also rejecting the District's argument that it was not the legal cause of the student's injuries. The Supreme Court held that the Court of Appeals erroneously conflated the duty inquiry and the legal cause inquiry by concluding that establishing duty satisfied legal causation. Although the Supreme Court acknowledged that the duty and legal causation issues can involve the same relevant underlying policy considerations, the Court held that legal causation must be determined through an independent analysis of whether legal liability should attach as a policy of law based on the record. However, the Court ultimately affirmed and remanded the case to the trial court based on a determination that a proper independent analysis of legal causation would have led to the same result reached by the Court of Appeals: that summary judgment for the District was improper because material issues of fact existed concerning proximate causation.

Washington Court of Appeals

Grievance Exhaustion

Lundquist v. Seattle School District (Unpublished)
No. 80211-9-I (3/1/21)

The Washington State Court of Appeals held that collective bargaining agreement (CBA) grievance procedures apply to a teacher's claim regarding the calculation of long-term disability benefits under an insurance policy procured by a school district. Seattle School District teacher Timothy Lundquist took paid medical leave for the last three months of the 2016-17 school year. After Lundquist informed the District that his leave would continue into the next year and signed his 2017-18 base employment contract and time, responsibility, and incentive (TRI) contract, he was placed on "displaced" status to enable him to return to employment if he chose. Lundquist resigned for medical reasons during that school year and began receiving long-term disability compensation of 60% of his pre-disability monthly base pay and TRI pay under an insurance policy provided to District employees through Standard Insurance Company. Standard subsequently determined that Lundquist's TRI pay constituted "extra compensation" and excluded it from the calculation of his disability benefits. Lundquist then sued the District, claiming that the District was contractually liable

for his disability compensation under the insurance policy and that his TRI pay should have been included in his benefits calculation. The District asserted as an affirmative defense that Lundquist had failed to exhaust his remedies under the CBA's grievance procedures, but the trial court determined that this affirmative defense did not apply to the contract claim because Lundquist was not an "employee" of the District while he was receiving his long-term disability benefits. The Court of Appeals reversed, holding that Lundquist was an "employee" since his contract claim accrued while he was on leave and still entitled to union representation and that his claim fit within the CBA's broad definition of a "grievance." The Court also held that the claim was not independent of the CBA since the CBA's provisions regarding duties associated with annual base pay and TRI pay must be interpreted to determine whether Lundquist's annual earnings include his TRI pay.

Public Records Act

West v. Office of the Governor (Unpublished)
No. 82057-5-I (3/15/21)

The Washington State Court of Appeals held that the Office of the Governor violated the Public Records Act (PRA) by its initial failure to provide requested records that it possessed, but that it did not violate the PRA by not providing records that were solely in the possession of the Attorney General's Office. Arthur West requested certain records from the Office of the Governor. The Office searched its email archive and consulted staff who were likely to have such records, then provided West with responsive emails. West then filed a PRA suit, alleging that the Office had failed to provide all responsive documents. The Office then performed a broader search of its email archive and the emails of additional staff members who could potentially have responsive records. This second search yielded additional responsive records which the Office provided in a second installment to West 14 days after the first installment. This second installment included several pages of redacted emails between the Office and its counsel at the Attorney General's Office (AGO), but it did not include emails between AGO staff and the solicitor general that West only learned of through a separate request for records from the AGO. The trial court determined that the Office violated the PRA by initially overlooking the records that ultimately constituted the second installment, but that the Office did not violate the PRA by not providing the solicitor general's emails since the Office did not possess those emails at the time of the request and was not required by the PRA to search for or request records from other agencies. The trial court awarded West costs and attorney fees, as well as $14 in penalties based on the factors articulated in *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010). The Court of Appeals affirmed, holding that the Office properly demonstrated that its searches were reasonably calculated to uncover all relevant documents and that the Office was not required to produce the solicitor general's emails that were not in its possession. The Court also held that the trial court did not abuse its discretion by ordering the nominal $14 penalty because the violation was the result of a mere oversight, the Office otherwise responded reasonably and promptly to the request, and the Office acted promptly to cure the oversight when it was caught.

Public Records Act

Yakima School District v. Magee (Unpublished)
No. 37505-6-III (3/18/21)

The Washington State Court of Appeals held that the Yakima School District properly asserted that records of employee drug screenings were exempt under the Public Records Act (PRA). Andrew Magee requested District records related to drug testing of current or prospective employees. The District provided the requested documents in installments over several months while asserting multiple times that the records were exempt under

RCW 42.56.250(2) because they were prepared by applicants in the process of seeking employment with the District. Although Magee did not respond to the District's correspondence regarding the exemption, the District continued to release the records and Magee continued to inspect them. The District then sought a declaratory judgment that the requested records were exempt under RCW 42.56.250(2), and Magee challenged the District's standing and claimed that the District waived its right to seek relief by releasing some of the records. The trial court granted summary judgment in favor of the District, ruling that the District could withhold the records because they were part of an application for public employment and were therefore exempt under RCW 42.56.250(2). The Court of Appeals affirmed the trial court, holding that the District had standing to pursue its declaratory judgment action and that the District had not waived its right to claim a PRA exemption because it released the first few installment of records while expressly preserving its intent to assert the exemption. The Court also imposed sanctions of $1,000 against Magee for his appellate brief, which improperly included a preamble in its introduction and failed to either introduce the actual issues for appeal or sufficiently cite to the record in its statement of the case.

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