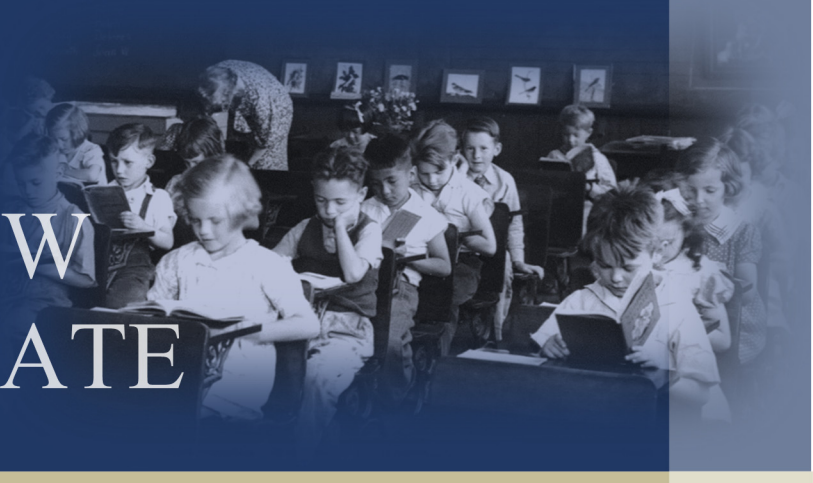
WASHINGTON SCHOOL LAW UPDATE



PORTER FOSTER RORICK LLP

April 2022

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

U.S. Supreme Court

First Amendment

Houston Community College System v. Wilson
No. 20-804 (3/24/22)

The United States Supreme Court held that a purely verbal censure of one member of an elected legislative body by other members of that same body does not violate the First Amendment. In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System (HCC), a public entity that operates community colleges. Wilson disagreed strongly with his colleagues regarding the direction of the HCC, and publicly accused the Board of violating its bylaws and ethical rules in various media outlets. Wilson also arranged robocalls to the constituents of specific trustees to publicize his views, and he hired a private investigator to surveil another trustee to prove that she was not truly a resident of the district that had elected her. Wilson also filed multiple lawsuits, alleging that the Board had violated various ethical duties, including by allowing a trustee to vote via videoconference. At a meeting held in 2018, the Board responded to Wilson's activity by adopting a public resolution "censuring" Wilson, and stating that his conduct was "not consistent with the best interests of the College," and "not only inappropriate, but reprehensible." Wilson sued, asserting that his censure violated the First Amendment. HCC moved to dismiss the claim, and the trial court granted the motion, concluding that Wilson lacked standing under Article III. Wilson appealed, and the Fifth Circuit of Appeals reversed, holding that Wilson had standing and that his complaint stated a viable First Amendment claim. The Supreme Court of the United States granted certiorari and reversed the Fifth Circuit's opinion, holding that the Board's purely verbal censure did not violate the First Amendment. The Court noted the history of elected bodies exercising their power to censure their members, dating back to colonial times. The Court further noted Congress's recent history of censuring its members. The Court further reasoned that Wilson did not have a viable First Amendment retaliation claim because there was no evidence that the censure deterred him from speaking his mind. Therefore, the Court reversed the Fifth Circuit ruling, but in doing so, cautioned that its decision was a narrow one, and that the Court did not mean to suggest that a verbal reprimand or censure could never give rise to a First Amendment retaliation claim when government officials reprimand employees, students, or other licensees.

Ninth Circuit Court of Appeals

First Amendment

Riley's American Heritage Farms v. Elsasser
No. 20-55999 (3/17/22)

The Ninth Circuit Court of Appeals held that a school district's decision to sever its business relationship with a field trip venue due to social media activity by the venue's principal shareholder may constitute unconstitutional First Amendment retaliation. The Court further held that a plaintiff seeking injunctive relief for a school district's ongoing First Amendment violation may sue individual school board members in their official capacities to correct the violation. Riley's American Heritage Farms provides historical reenactments and apple picking for students on school field trips. For approximately 16 years, at least one school within the Claremont Unified School District booked and attended a field trip to Riley's Farm. In August 2018, James Riley, one of the principal shareholders of Riley's Farm, posted a series of controversial tweets, including criticisms of gender identity issues and comments equating the Black Lives Matter movement to ISIS. These tweets appeared on Riley's personal social media accounts, and they did not reference Riley's Farm or anything related to school field trips. Parents of the District learned of the tweets, and several parents emailed teachers, principals, and specific school board members that they would not allow their children to attend any field trip at Riley's Farm. The District administration met to discuss the parents' concerns, and following that meeting, sent an email to the building principals asking that they discontinue any field trips to Riley's Farm. In response, Riley and Riley's Farm ("Riley plaintiffs") filed an action for violation of civil rights under 42 U.S.C. § 1983, alleging that the District, individual members of the school board, and certain District administrators, had violated their First Amendment rights by prohibiting school field trips at Riley's Farm in retaliation for Riley's protected speech. The district court dismissed the District from the lawsuit based on sovereign immunity and then granted the individual defendants' ("school defendants") motion for summary judgment on the ground that they were entitled to qualified immunity. The Court of Appeals affirmed in part and reversed in part, holding that the relationship between the District and Riley's Farm was analogous to that between a government and government contractor, even though Riley's Farm did not have a written contract for services with the District. The Court then applied the *Pickering* framework—a test used to determine whether a public employer violated an employee's free speech rights—to the Riley plaintiffs' First Amendment claims, reasoning that the Court had previously extended the *Pickering* framework to a range of situations where the relationship between the parties is analogous to that between an employer and employee, and where the rationale for balancing the government's interests against an employee's free speech rights applies. Applying the *Pickering* framework here, the Court held that Riley's social media posts fell within the core of protected First Amendment activity, as they discussed issues of politics and social relations, and that the Riley plaintiffs had established a prima facie case that the District had taken adverse action against them by prohibiting future field trips at Riley's Farm. The Court then held that the District fell short of demonstrating that it had sufficiently strong government interests which outweighed the Riley plaintiffs' free speech interests, because the only evidence of disruption it presented was testimony that an unspecified number of parents had voiced complaints or refused to send their children to future field trips at Riley's Farms. Finally, the Court held that the rights at issue were not clearly established, so the individual school board members and District administrators were entitled to qualified immunity on the Riley

plaintiffs' damages claims. The Court thus affirmed dismissal of the Riley plaintiffs' claim for damages. But the Court held that those individual defendants could still be held liable for the Riley plaintiffs' claims for injunctive relief because they could remedy the District's policy that violates the Riley plaintiffs' first amendment rights.

Washington Court of Appeals

Appeal of School Board Decision

Smith v. Kent School District, No. 415
No. 82613-1-I (3/7/22) (unpublished)

The Washington State Court of Appeals held that a school district's determination that an advisory committee meeting did not violate the Open Public Meetings Act (OPMA) was not an appealable "order or decision" of the school board. In 2018, the Kent School Board established a Fiscal Recovery Task Force to advise the Board on fiscal matters. Because a quorum of the Board was not present at the Task Force meetings, the District determined that those meetings did not need to be open to the public in accordance with the OPMA. Consistent with that determination, the Task Force decided to keep its meetings closed, and it denied the request of interested community members to attend. Upset with this decision, community member Kenneth Smith filed a series of complaints under the Board policy governing complaints regarding District employees. The District investigated Smith's complaints and determined that there had been no inappropriate action because the Task Force meetings did not need to be open to the public. The District further offered to provide Smith ample notice of when the Task Force was scheduled to present its findings to the Board so that he could attend that meeting. Smith filed an appeal of the District's decision in superior court under Chapter 28A.645 RCW, the statute that governs judicial review of an "order or decision" of a school official or board. The superior court determined that the challenged decision was not the kind of order that fell within the scope of the applicable statute, and it dismissed Smith's complaint. The Court of Appeals affirmed, holding that an appealable "order or decision" under the statute is limited to final decisions that a school official or board has authority to decide in the course of administering the school. The Court held that the district's determination that Task Force meetings were not subject to the OPMA did not meet this standard since a court, not a school official or board, has authority to adjudicate alleged OPMA violations. As a result, the Court affirmed dismissal of Smith's appeal.

Public Records Act

Hood v. Columbia County
No. 38187-1-III (3/8/22) (published in part)

The Washington State Court of Appeals held that Columbia County was not entitled to obtain discovery related to Eric Hood's motives for making a public records request which led to Public Records Act (PRA) litigation. In January 2019, Hood sent an email to the County asking for all records the County had received from the auditor as part of a recent state audit. The County provided Hood a copy of the completed audit reports and closed the request. Hood filed a complaint for violations of the PRA, claiming that the County failed to provide all responsive records. The County suspected that Hood was a "disingenuous" PRA litigator, and sent Hood discovery requests designed to establish that his motive for making his public records request was financial gain, rather than a genuine desire to obtain the records. The discovery requests addressed topics such as Hood's litigation history and information about settlements from his previous lawsuits. Over Hood's objection, the superior court granted the County's motion to compel its requested discovery. The Court of Appeals granted discretionary review and reversed the superior court's order, holding that the requested discovery

was not relevant because a requestor's improper motive and abuse of the PRA is not a factor the trial court may consider when setting a per diem penalty. The Court was sympathetic to the County's argument, but held that only the legislature could change the law to allow a requestor's motives to be a relevant factor in setting penalties. The Court noted in dicta that an agency nevertheless may be able to seek discovery regarding how other agencies answered a requestor's similar PRA request, as such information could be evidence that other agencies have struggled to understand the request, which would be relevant because courts may consider a public records request's lack of clarity and the reasonableness of the agency's excuse for noncompliance when setting a per diem penalty.

Employee Misclassification

Kersteter v. Concrete School District
No. 82511-9-I (3/14/22) (unpublished)

The Washington Court of Appeals affirmed summary judgment dismissal of an employee's wage claims, holding that the statute under which the employee sought relief only applied to employment-based benefits, not wages. Karl Kersteter was the transportation supervisor for the Concrete School District. Each year, he signed a new contract stating that his position was part-time. Although Kersteter's hours gradually increased from 0.5 FTE to 0.71 FTE, he maintained that he worked more than 40 hours per week and should have been classified as full-time. He retired in 2017, after which the district reclassified the position as full-time and increased the salary. Kersteter filed an initial complaint for unpaid wages in superior court under Chapter 49.46 RCW, the minimum wage statute, and Chapter 49.48 RCW, the statute governing wage payments and collections. However, he amended his complaint to remove those claims and instead alleged a cause of action under RCW 49.44.170, which makes it unlawful for an employer to misclassify a public employee to avoid providing "employment-based benefits." The superior court determined that the claims related to his salary were not within the scope of RCW 49.44.170, and dismissed. The Court of Appeals affirmed, holding that the plain language of RCW 49.44.170 applies only to employment-based "benefits," which does not include wages. The Court further held that summary judgment dismissal of Kersteter's pension claims was appropriate because any cause of action based on his loss of pension benefits was dependent on Kersteter prevailing on his wage claim, and he had abandoned his wage claim when he amended the complaint.

Public Official Surety Bonds

Stevens County ex rel. Rasmussen v. Travelers Sur. & Cas. Co. of Am.
No. 37812-8-III (3/31/22)

The Washington State Court of Appeals held that individual county commissioners could not be held personally liable on their public official surety bonds for taking legislative action that constituted an unconstitutional gift of public funds. As required by statute, three Stevens County commissioners executed a $20,000 public official bond, which obligated them to faithfully perform the duties of their offices or positions. In early 2019, the Washington State Auditor published a report on a routine accountability audit of Stevens County's financial affairs for the years 2016 and 2017, which opined that three transfers of funds under the County's homeless plan were unallowable gifts of public funds. Based on the Auditor's report, the Stevens County Prosecuting Attorney sued the commissioners in their personal capacities and each commissioner's bond surety, alleging that the commissioners were individually liable on their bonds for voting to approve the unconstitutional gifts. The trial court agreed with the prosecutor's allegations as a matter of law, and it entered judgment against the commissioners and their sureties for $130,326.25, plus interest, taxable

costs, and attorney fees. The Court of Appeals reversed, holding that the county commissioners could not be held personally liable on their bonds for official action taken collectively as a board. The Court reasoned that the statutory scheme governing public official bonds reflects a distinction between individual commissioners and the board acting as a legislative body, and Washington case law has long recognized that actions taken by a legislative body are distinct from those taken by individual legislative officials. Because the actions at issue were taken by the commissioners as a legislative body, the Court held that the commissioners were not acting in their individual capacities and that regardless of whether their votes were unconstitutional, they could not be held liable for those votes under the terms of their official bonds.

PERC

Refusal to Bargain

Othello School District
Decision 13488 (3/15/22)

A PERC Examiner concluded that the Othello School District did not commit a refusal to bargain unfair labor practice when it decided to return to in-person instruction during the 2020-21 school without first providing the Othello Education Association (OEA) with notice and an opportunity to bargain because that decision was not a mandatory subject of bargaining. However, the Examiner concluded that the District did commit a direct dealing unfair labor practice when it circumvented the union and directly approached two high-risk employees regarding modifications to their approved temporary COVID-19 accommodations following the decision to return to in-person instruction. In preparation for the 2020-21 school year, the Washington Department of Health (DOH) issued guidance for school districts to determine how and when to resume in-person instruction, which primarily directed school districts to select a learning model based upon COVID-19 community transmission rates. That summer, the District and the OEA, the union that represents a bargaining unit of certificated nonsupervisory staff, negotiated a memorandum of understanding (MOU) for the 2020-21 school year, which committed the District to rely upon the guidance of the state or county health department in determining whether schools are safe to transition to an in-person or hybrid model. Although the 2020-21 school year initially began with nearly all teachers providing instruction online, following community pressure, the District's Board of Directors decided to implement a hybrid model approximately one month into the school year. Later that fall, the Board voted on a phased schedule for resuming in-person instruction, which would result in most students being offered in-person instruction by January 2021. The parties bargained the effects of the District's decision and reached a new MOU in February 2021. Meanwhile, in response to the District's decision, certain teachers who were at higher risk of illness from COVID-19 voiced their concern about returning to in-person instruction. The District met with two teachers who self-identified as high risk, with union representatives present, to discuss potential accommodations. This culminated in the District offering—and the teachers accepting—temporary accommodations that allowed them to teach remote courses as the District implemented its phased approach. However, once nearly all students had returned to in-person learning, District administrators contacted the two high-risk teachers, without including the union, with offers to modify their accommodations. The OEA filed an unfair labor practice complaint, alleging that the District had unilaterally changed employees' working conditions by returning to in-person instruction without providing the union an opportunity for bargaining, and also that the District circumvented

the union through direct dealing with employees regarding accommodations. The examiner concluded that the District's decision to return to in-person learning was not a mandatory subject of bargaining, and therefore, the District did not commit a unfair labor practice when it required teachers to provide in-person instruction during the 2020-21 school year. The examiner acknowledged that transitioning from remote learning to in-person instruction had an impact on the employees' working conditions, but on balance with the District's managerial right to control the format of its instructional program, the examiner held that the District's interests predominated. The examiner separately concluded that the District's back-and-forth communication with the two high-risk teachers (without the OEA) regarding modifying their accommodations constituted unlawful circumvention because they involved mandatory subjects of bargaining, including circumstances under which certain types of leave are used. The examiner further rejected the District's argument that it did not have a duty to bargain with the union as the exclusive bargaining representative in the context of the reasonable accommodation process, reasoning that there is no "carve-out" permitting public employers to directly engage in negotiations with represented employees regarding issues arising under the Americans with Disabilities Act or the Washington Law Against Discrimination. As a result, the examiner dismissed the unilateral change allegations in the complaint, but ordered the District to cease and desist from dealing directly with bargaining unit members concerning mandatory subjects of bargaining.

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