WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

April 2023

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

United States Supreme Court

Individuals with Disabilities Education Act

Perez v. Sturgis Public Schools
No. 21-887 (3/21/23)

The United States Supreme Court held that students may bring claims for damages under other federal antidiscrimination laws, including the Americans with Disabilities Act (ADA), even if they have not exhausted their available remedies under the Individuals with Disabilities Education Act (IDEA). Miguel Luna Perez attended school in Michigan's Sturgis Public School District from the ages of 9 through 20. Mr. Perez is deaf, and he qualified for special education services under the IDEA. His accommodations included a classroom aide to translate instruction into sign language. Mr. Perez and his parents believed that the classroom aides the District provided were either unqualified or absent from the classroom for several hours at a time. Additionally, the family believed that the District had misrepresented Mr. Perez's educational progress, awarding him inflated grades and advancing him to the next grade regardless of his progress. Mr. Perez and his parents believed he was on track to graduate until months before graduation, when the District notified the family that he would not be awarded a diploma. In response, the family filed a complaint with the Michigan Department of Education, alleging that the District had violated the IDEA by failing to provide a qualified aide and misrepresenting his educational progress. The parties reached a settlement on the IDEA claim in which the District agreed to provide Mr. Perez additional schooling at the Michigan School for the Deaf. After settling the IDEA administrative complaint, the family filed a lawsuit in federal court, alleging violations of the ADA based on the District's same conduct, and seeking relief in the form of compensatory damages. The District moved to dismiss the ADA lawsuit, arguing that a provision of the IDEA required the family to exhaust the IDEA's administrative dispute resolution procedures before seeking relief in federal court, and because the IDEA administrative complaint was settled prior to a final disposition, exhaustion had not occurred. The district court agreed with the District, and it dismissed the family's ADA lawsuit. The Sixth Circuit Court of Appeals affirmed, citing prior circuit precedent establishing that the IDEA requires exhaustion when the plaintiff seeks relief for the same underlying harm the IDEA seeks to address. The U.S. Supreme Court granted review and reversed, holding that the IDEA's exhaustion requirement does not apply to all lawsuits seeking relief that other federal antidiscrimination laws may provide. Instead, the

Court interpreted the IDEA's use of the term "relief" in its exhaustion provision as only requiring a plaintiff to exhaust the administrative process to the extent the plaintiff seeks remedies under another statute that the IDEA can also provide. The Court held that exhaustion is not required when the student seeks damages under federal antidiscrimination laws that are not available as relief under the IDEA. The Court declined to address whether the specific compensatory damages Mr. Perez sought in this case were also available under the IDEA because the lower court had precluded the ADA lawsuit altogether. Therefore, the Court reversed dismissal of Mr. Perez's ADA lawsuit and remanded to the lower courts for further proceedings.

Ninth Circuit Court of Appeals

Individuals with Disabilities Education Act

C.M.E. v. Shoreline School District
No. 21-355538 (3/14/23) (unpublished)

The Ninth Circuit Court of Appeals held that the Shoreline School District appropriately included an age-appropriate transition assessment in its proposed initial evaluation of an adult student for special education services. W.P.B. received special education services from the District throughout elementary school, middle school, and four years of high school. His most recent Individualized Education Program (IEP) was developed in January 2019, and it provided that in fall 2019, he would receive services through placement in the District's community-based transition program. Through that placement, W.P.B. would attend special education classes at a community college and also participate in vocational internships. W.P.B.'s parent disagreed with placement in the transition program, and instead, wanted W.P.B. to continue his education in a high school academic setting. The District rejected the parent's placement request, and she then revoked her consent for W.P.B. to receive special education services. Three weeks later, the parent notified the District that she wished to have W.P.B. evaluated to receive special education services. In response, the District proposed a new initial evaluation for special education services, which included an age appropriate transition assessment. This included an interview of W.P.B. to understand his postsecondary goals and interests. Parent strongly objected to inclusion of the transition assessment, believing that the interview would "traumatize" her student. The District offered to pay for an outside provider to conduct the transition assessment, but the parent refused this offer and continued to withhold her consent to any evaluation that included a transition assessment. The District filed a due process hearing request, seeking an order to override the parent's refusal to consent to its proposed evaluation. Both parties moved for summary judgment, and the ALJ ruled that the District was required by the special education regulations to conduct an age appropriate transition assessment as part of its initial evaluation because the student was over the age of 16. The ALJ therefore granted the District's motion and held that it could proceed with its proposed initial evaluation. The parent unsuccessfully appealed the ALJ's ruling to federal district court, which again held that the District was required to include an age appropriate transition assessment as part of the initial evaluation. The parent appealed to the Ninth Circuit, which held that the District reasonably included the age appropriate transition assessment and interview in its proposed initial evaluation because after a student turns 16, the Individuals with Disabilities Education Act requires that the student's IEP include "appropriate measurable postsecondary goals based upon age appropriate transition assessments." As a result, the Court held the District was legally required to include the transition assessment in its proposed initial

evaluation, and it affirmed the ALJ's grant of summary judgment in favor of the District. Judge Vandyke wrote separately, concurring in the judgement, but noting that he would have decided the case solely on mootness grounds because the student had since aged out of eligibility for special education services and therefore, the District could no longer conduct its proposed evaluation regardless of the outcome this case.

Washington Supreme Court

Notice of Claim

Hanson v. Carmona
No. 99823-0 (3/23/23)

The Washington Supreme Court held that RCW 4.96.020—a statute that requires plaintiffs to provide 60 days' notice prior to filing a tort action against a government agency, including school districts—applies when a plaintiff sues a government employee acting within the scope of their employment, even when the employee is sued in their individual capacity. Miriam Gonzalez Carmona worked for the Southeast Washington Office of Aging and Long-Term Care Advisory Council (Advisory Council), a local agency. In 2016, Carmona was returning home from a work training when she ran a red light and collided into a vehicle driven by Kylie Hanson, injuring Hanson. In 2019, Hanson filed a complaint for damages in superior court against Carmona in her individual capacity, and against the Advisory Council as Carmona's employer. The complaint alleged that at the time of the accident, Carmona was acting within the scope of her employment. Carmona and the Advisory Council moved for the complaint to be dismissed on summary judgment, arguing that Hanson had failed to comply with the statutorily required presuit claims notice prior to filing. In response, Hanson amended her complaint to remove all references to the Advisory Council and removed the allegations that Carmona was acting within the scope of her employment at the time of the accident. The trial court dismissed the Advisory Council from the case, but it ruled that the case could proceed against Carmona in her individual capacity given the amended complaint. The Court of Appeals reversed, holding that the presuit notice requirement still applies when a plaintiff sues an employee without suing the employer. Hanson appealed, and the Washington Supreme Court affirmed dismissal of her case, but on separate grounds. The Court held that the plain language of RCW 4.96.020 applies to actions "against any local government entity's officers, employees, or volunteers . . . acting in such capacity." The Court held that the language "capacity" applied when an employee was acting within the scope of employment, and therefore, under such circumstances, presuit notice was required. The Court rejected Hanson's argument that her case could proceed because she had amended it to remove the Advisory Council as a party, reasoning that the notice requirement applies to all acts taken by government employees acting within the scope of employment, even when the government agency is not sued. In reaching this conclusion, the Court relied on its precedent holding that the government will ultimately be bound by any judgment against an employee acting within the scope of employment because that conduct is an act of the government entity. Therefore, the Court held that Hanson was required to provide the 60 days' presuit notice required by statute, and it remanded the case to the trial court to dismiss Hanson's lawsuit for failure to provide statutory notice. Justice Stephens dissented and would have reversed dismissal of the lawsuit, writing that RCW 4.96.020 should apply when a government employee is acting in their "official capacity," not the scope of employment. Because the amended complaint only sued Carmona in her individual capacity, not her official capacity, Justice Stephens would have held that

Hanson was not bound by the presuit notice requirement.

Washington Court of Appeals

Discrimination

Hancock v. Tae Yang, LLC
No. 38525-6-III (3/14/23) (unpublished)

The Washington State Court of Appeals held that reassignment to a desk position was a reasonable accommodation for an employee with multiple sclerosis who could not stand for long periods of time or lift weight above 20 pounds, and who required frequent rest breaks. Elizabeth Hancock worked as an event coordinator for a hotel management and event planning business. Ms. Hancock was responsible for overseeing events such as weddings, including ensuring everything was set up for events, and for managing employees. Ms. Hancock admitted this was a physically demanding job, and it often required her to be on her feet for upwards of 10 hours and to move tables, equipment and chairs when setting up for an event like a wedding. In March 2018, Ms. Hancock worked an 18-hour shift, after which she became numb from the waist down. She began seeing doctors and was eventually diagnosed with multiple sclerosis in June 2018. Prior to her diagnosis, Ms. Hancock notified her employer of her health concerns, and she met with her supervisor to discuss her condition, limitations, and available accommodations. Ms. Hancock brought a note from her doctor stating that she had been released to work with the following restrictions: light duty, limited weightlifting (less than 20 pounds), standing limited to one to two hours at a time, and rest breaks. As an accommodation, Ms. Hancock asked that two other staff members perform the physical aspects of her job, such as moving tables and carrying equipment for events. The employer declined this request, but instead offered to reassign her to an available reservations position as an accommodation, which did not require lifting or long periods of standing, and which paid less than the event coordinator position. Ms. Hancock responded by abandoning her position, and she failed to respond to any emails from the employer asking her if she was still interested in working in reservations. Around that time, Ms. Hancock applied for and began a new job at a different event venue. In May 2019, Ms. Hancock filed a lawsuit against her former employer, alleging disparate treatment and failure to accommodate her disability in violation of the Washington Law Against Discrimination (WLAD). The trial court dismissed the case, finding that Ms. Hancock had not presented sufficient evidence to support a prima facie case for either claim. The Court of Appeals affirmed, reasoning that Ms. Hancock's request that two different employees perform aspects of her job would have required the employer to modify the essential functions of the event coordinator position, which was not a reasonable accommodation. The Court further held that reassignment was a reasonable accommodation and would have been consistent with her doctor's restrictions that Ms. Hancock spend more time off her feet. Finally, the Court rejected Ms. Hancock's argument that her employer did not engage in an interactive process given that it was Ms. Hancock who cut off communication by failing to respond to her employer's offer to reassign her to the reservations position.

Discrimination

Sim v. Washington Department of Labor & Industries
No. 39013-6-III (3/14/23) (unpublished)

The Washington Court of Appeals held that a former office assistant for the Washington State Department of Labor and Industries (L&I) failed to establish a prima facie case of discriminatory discharge given the overwhelming evidence of her unsatisfactory work performance which was the

basis for her termination. Siya Sim, a United States citizen of Cambodian heritage, began working for L&I in the 1990s. In 2014, she was in her 40s and held a position as an Office Assistant 3 in the pension support unit, which entailed answering incoming calls, assisting callers, and entering data into pension records. Ms. Sim had a strained relationship with her new supervisor, Michelle Schiller, and Ms. Sim believed that Ms. Schiller "played favorites," and was generally nicer and more friendly to her colleagues. In February 2014, Ms. Schiller sent Ms. Sim a written memorandum expressing concern over Ms. Sim's customer service skills and her high rate of errors. The two signed a performance plan, which set expectations and goals for Ms. Sim to achieve, and which included additional training and counseling. Following implementation of the plan, Ms. Schiller continued receiving complaints about Ms. Sim's customer service skills and inadequate performance, specifically citing Ms. Sim's inability to answer basic customer questions. In April 2015, L&I issued a written reprimand to Ms. Sim for failing to meet performance expectations. Ms. Sim grieved the reprimand through her union, arguing in part that her supervisor had discriminated against her based on race. In response, L&I paused the disciplinary process and assigned an investigator to investigate Ms. Sim's allegations of discrimination and harassment. The investigator found the allegations unfounded, and the report summarizing the findings concluded that Ms. Sim had a high incidence of errors and had made repeated mistakes despite being in her position for five years. Following the investigation, L&I denied the grievance and upheld the discipline. In June 2015, L&I received two additional complaints, one from a pensioner whose documents Ms. Sim had mistakenly mailed to the wrong address, and the other from a confused pensioner who Ms. Sim had erroneously told he had filled out the wrong form. In lieu of being disciplined for these incidents, Ms. Sim agreed to a voluntary demotion as an Office Assistant 2, and she began a six-month trial period as required by the collective bargaining agreement (CBA). The trial period went poorly, as Ms. Sim consistently failed to meet the numerical thresholds for the number of bills processed and the accuracy with which she processed them, despite additional coaching and training. When the trial period ended in August 2017, Ms. Sim's only option under the terms of the CBA was to revert to an open Office Assistant 3 position, provided she was qualified for the job. The open position required applicants to type at least 45 words per minute and pass an imaging assessment. Ms. Sim failed both tests. Because she had failed the trial period for the Office Assistant 2 position and was not qualified for the open Office Assistant 3 position, she was terminated. Ms. Sim filed a lawsuit in superior court alleging race and age discrimination in violation of the Washington Law Against Discrimination (WLAD). The trial court dismissed the lawsuit as a matter of law. The Court of Appeals affirmed, holding that Ms. Sim failed to establish a prima facie case of discriminatory discharge because she presented insufficient evidence that she was performing satisfactory work—a necessary element to sustain a discriminatory discharge claim under the WLAD. The court held that Ms. Sim could not establish this element through "conclusory self-characterization" of her work performance as satisfactory, especially given the documented deficiencies in Ms. Sim's customer service skills and reporting accuracy. The Court further rejected Ms. Sim's disparate treatment claim—which was premised on her supervisor being more friendly toward her coworkers—holding that it was not discriminatory for an employer to show preference for employees who are largely meeting job expectations over an employee who has numerous documented performance deficiencies.

PERC

Unit Clarification

City of Kirkland
Decision 13642 (3/9/23)

The PERC Executive Director held that a newly created technology position for the City of Kirkland was a "confidential employee" that should be excluded from an existing bargaining unit. In response to changing technology needs during the COVID-19 pandemic, the City created a new Resilience and Technology Officer (RTO) position in July 2021. The person hired for this position helped the City bargain policy initiatives for teleworking and reopening the City offices to the public, including a revised telework policy that had not been updated since 2000. The RTO also helped create the City's reopening plan and helped develop a business continuity plan to prepare for future pandemics and emergencies. Through that process, the RTO worked with the City management team to review and answer union questions, formulate bargaining proposals and counterproposals, and participate in negotiations with the labor unions regarding impact to working conditions. The City also intends for the RTO to assist with upcoming initiatives which will necessitate bargaining over changes to certain employees' working conditions. In September 2021, the Washington State Council of County and City Employees—an existing labor union that represents the City's office clerical, financial, and professional employees—filed a unit clarification petition seeking to include the RTO position in its bargaining unit. The Union argued that the RTO position should be included because although the person occupying that position participated in management meetings, they did not make "impactful contributions." Following an evidentiary hearing, the PERC Executive Director dismissed the Union's petition, holding that the RTO position required expertise in policies that guided management in making decisions impacting employees' working conditions, and that the RTO actively participated on behalf of management in back and forth conversations with the Union regarding bargaining proposals, formulating counterproposals, and bargaining over the impact to the employees' working conditions. As a result, the Examiner held that the RTO exercised independent judgment and directly participated in the formulation of labor relations policy, collective bargaining, and administration of the collective bargaining agreements, which created a confidential status exempting the RTO from the bargaining unit. The Examiner further rejected the Union's argument that the City was inappropriately "spreading" confidential duties to multiple employees in an effort to exclude them from the bargaining unit, reasoning that in this case, the City was only seeking to exclude one position and noting that employers are allowed some reasonable number of personnel who are exempt from collective bargaining rights.

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 your name, organization and e-mail address to info@pfrwa.com.

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.

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	Josh Halladay	Liz Robertson
Lynette Baisch	Parker Howell	Mike Rorick
Chase Bonwell	Megan Knottingham	Jay Schulkin
Macaulay Dukes	Rachel Miller	Greg Swanson
Cliff Foster	Nick Morton	Christina Weidner
Olivia Hagel	Buzz Porter	Lorraine Wilson