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

Title IX

A.B. v. Hawaii State Department of Education
No. 20-15570 (4/4/22)

The Ninth Circuit Court of Appeals reversed a district court order denying class certification to female student athletes who brought a claim alleging unequal treatment in the athletic programs at their public high school in Hawaii. Plaintiff A.B., along with her younger sister and other former or current female student athletes, filed a complaint in district court alleging that they and other female student athletes at their high school experienced "grossly unequal treatment, benefits, and opportunities in relation to male athletes," in violation of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs, services, and activities that receive Federal financial assistance. Plaintiffs specifically alleged that male student athletes were provided standalone athletic locker room facilities near the athletic fields while female student athletes had no standalone athletic locker room facilities, and were instead forced to carry their athletic gear with them all day and change in teachers' closets or in nearby public restrooms. The plaintiffs also alleged that their high school had retaliated against them by threatening to cancel the female water polo team program after they brought issues of Title IX compliance to the attention of administrators. Plaintiffs moved to certify a class of all present and future female student and potential student athletes at the high school. The district court denied the motion, finding that the plaintiffs failed to show that the class was "so numerous that joinder of all members is impracticable," a threshold requirement for obtaining class certification. The Ninth Circuit reversed, reasoning that the numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations on the number of class members. The Court held that the numerosity requirement had been met here given that the proposed class exceeded 300 persons, and joinder of all class members was not practicable given that the class membership would continuously change as female student athletes matriculated and graduated from high school during the pendency of the case.

First Amendment

Boquist v. Courtney
No. 20-35080 (4/21/22)

The Ninth Circuit Court of Appeals reversed dismissal of an Oregon state senator's First Amendment retaliation claim, holding that he had

pleaded a plausible claim that he was subjected to materially adverse action based on public statements he had made on the senate floor and outside to reporters. In 2019, twelve minority members of the Oregon State Senate, including Senator Brian Boquist, walked out of the Senate chamber to prevent a quorum in protest against certain senators for their role in approving a sexual harassment settlement and denying a public records request. While the senators were absent, certain majority senators stated that those who prevented the quorum could be fined, arrested, physically detained, and imprisoned. The Senate later held debate on proposed legislation, and Boquist spoke on the floor to oppose that legislation. During his speech, Boquist also acknowledged the threats from the majority members to arrest him for the walkout, and he stated, "if you send the state police to get me, Hell's coming to visit you personally." Later that afternoon, Boquist spoke with reporters and told them: "This is what I told the [state police] superintendent: Send bachelors and come heavily armed. I'm not going to be a political prisoner in the state of Oregon. It's just that simple." Based on Boquist's statements, the senate majority leadership directed him to give at least twelve hours advance notice in writing to the Secretary of the Senate before he intended to visit the State Capitol ("12-hour notice rule") so that it could increase security. Boquist filed a pro se complaint in district court challenging the 12-hour notice rule as a violation of the free speech clause of the First Amendment. The district court dismissed Boquist's complaint, finding that he failed to state a claim. The Ninth Circuit reversed, holding that Boquist's allegations were sufficient to survive a motion to dismiss. The Court held that at this stage of the proceeding, assuming the allegations in Boquist's complaint as true, he had plausibly met the three prongs of a First Amendment retaliation claim because (1) his speech was constitutionally protected; (2) he was subjected to materially adverse action through the 12-hour notice rule; and (3) there was a causal connection between his constitutionally protected activity and the adverse action. The Court noted that on remand, the defendants were still free to raise affirmative defenses, including that their actions were motivated by legitimate security concerns, but that dismissal of Boquist's claims at the pleading stage was not appropriate.

Washington Court of Appeals

Public Records Act

Washington Education Association v. Department of Retirement Systems
No. 83343-0-I (3/28/22)

The Washington State Court of Appeals reversed a preliminary injunction prohibiting the Department of Retirement Services (DRS) and the Office of Financial Management (OFM) from releasing the full names and dates of birth of public employees pursuant to a Public Records Act (PRA) request. In February 2020, the Freedom Foundation submitted public records requests to the DRS and OFM, seeking the full name and full dates of birth of union-represented public employees. The day after the Freedom Foundation submitted its requests, the legislature amended RCW 42.56.590, which governs the notification of data security breaches, to define "personal information" to include an individual's first name or first initial and last name in combination with their full date of birth. The Washington Education Association, which represents public employees whose information was subject to the Freedom Foundation's request, sought a preliminary injunction, arguing that the amendment to RCW 42.56.590 effectively amended the PRA's privacy exemption for public employees, RCW 42.56.230(3). The trial court issued a preliminary injunction, concluding that disclosure of the employees' names in conjunction with their full

dates of birth violated their right of privacy. The Court of Appeals granted interlocutory review and reversed, holding that the plain language of RCW 42.56.590 limits its applicability to the data security breach context, and that its definition of "personal information" did not apply to exemptions under the PRA. The Court held that RCW 42.56.230(3) does not prohibit DRS and OFM from disclosing public employee birthdates when linked with their names. Nonetheless, the Court held that another recent amendment to the PRA, RCW 42.56.250(8), now prohibits the disclosure of the month and year of birth of any public employee unless the Freedom Foundation can establish that it was a member of the "news media," which is entitled to access employee birth dates. Therefore, the Court remanded for the trial court to determine whether the Freedom Foundation qualifies as "news media."

Public Records Act

Washington Federation of State Employees v. State
No. 83342-1-I (3/28/22)

The Washington State Court of Appeals held that public employees who are survivors, or whose immediate family members are survivors, of domestic violence, sexual assault, stalking, or harassment have a substantive due process right to personal security and bodily integrity, and that this constitutional right precludes public agencies from disclosing their name, physical work location, and work contact information in response to a Public Records Act (PRA) request when doing so presents a substantial likelihood that the employee's physical safety or the safety of an employee's family member would be in danger. The Freedom Foundation sent several PRA requests to hundreds of State and local agencies, seeking public employees' full name, full date of birth, job title, work email address, employer, and duty station address. In December 2019, multiple labor organizations ("the Unions") filed a complaint against various public agencies, asserting that the release of personal information of survivors of domestic violence, stalking, and sexual assault would violate those employees' constitutional rights. The Unions obtained a preliminary injunction in the trial court, which enjoined the disclosure of this information for employees who had provided the Unions specific documentation evidencing their status or the status of a family member as a survivor of domestic violence, sexual assault, or stalking. Ultimately, the Unions identified approximately 1,000 protected employees whose information was exempt from disclosure under the preliminary injunction. The Unions then obtained a permanent injunction, which permanently enjoined the disclosure of this information for the 1,000 protected employees. The Court of Appeals reversed the permanent injunction, holding that public employees who are survivors, or whose immediate family members are survivors of domestic violence have a constitutional right to preclude the State from releasing their personal information, but only upon a showing of substantial likelihood that the employee's physical safety or the safety of that employee's family member would be in danger. The Court held that the Unions had failed to make this showing because they exclusively relied on generalized testimony that confidentiality was critical for the safety and well-being of employees who had experienced domestic violence, sexual assault, and stalking. Therefore, the Court reversed the permanent injunction and remanded for the trial court to make an individualized determination whether any particular public employee would be in danger of physical harm if their identity and work location were made public.

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. Consistent with their statutory obligations, 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 Office of 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.

Arbitration

City of Prosser v. Teamsters Union Local 839
No. 37889-6-III (4/19/22) (unpublished)

The Washington State Court of Appeals held that an arbitration award ordering the City of Prosser to reinstate a police officer who had sexually harassed three female citizens violated public policy, and was properly vacated. In 2017, a female citizen reported that Prosser Police Officer Shane Hellyer had touched her inappropriately while she was detained. The City of Prosser placed Hellyer on administrative leave and investigated the complaint. During the investigation, three Prosser businesswomen alleged that Hellyer would routinely visit their businesses while on duty and discuss his sex life with them, sent one a picture of lubricant, and showed them photographs of women in risqué clothing. The women all reported that this behavior made them extremely uncomfortable. After investigating the allegations, the City discharged Hellyer. Hellyer's union, Teamster's Union Local 839 (Union) grieved the termination, and the matter proceeded to a two-day arbitration hearing. The arbitrator, Kenneth Latsch, ordered that Hellyer be reinstated, finding that there was not sufficient cause for termination. The arbitrator's award focused on the sexual assault allegations that prompted the investigation, and he found that the complainant was not credible. The arbitrator's only discussion of the complaining businesswomen was a finding that the Union had presented evidence to "neutralize" their sexual harassment allegations. The City sought a writ of certiorari in superior court asking for the arbitration to be vacated as being in violation of public policy, noting that the arbitrator's award pertained almost exclusively to the sexual assault allegations, and that he failed to substantively address the allegations of misconduct involving the businesswomen. The superior court remanded to the arbitrator with instruction to clarify whether he had determined that Hellyer had sexually harassed

the businesswomen, as proscribed by Washington law. On remand, the arbitrator concluded that those interactions constituted sexual harassment, but he clarified that such harassment was "neutralized" by the evidence that Hellyer had also shown risqué photos to one of the woman's husbands and that the husband had thanked Hellyer for checking in on his wife's business. The arbitrator further held that Hellyer's interactions with the women amounted to "the type of coarse conversation that may take place in a workplace." The matter then returned to superior court, where the court concluded that the award violated the clear public policy of the Washington Law Against Discrimination (WLAD), which prohibits discrimination in places of public accommodation. The Union appealed, and the Washington Court of Appeals agreed with the superior court that the award violated public policy because sexual harassment is a form of sex discrimination under the WLAD. The Court explicitly rejected the arbitrator's notion that such conduct could be "neutralized" by Hellyer's interactions with the women's husbands, or constituted "coarse conversation" that should be tolerated in a place of public accommodation. As a result, the Court held that the arbitrator's award violated express, well-defined public policy, and it affirmed the superior court order vacating the arbitration award.

Public Records Act

Martin v. City of Lakewood
No. 38542-6-III (4/28/22) (unpublished)

The Washington State Court of Appeals held that the City of Lakewood violated the Public Records Act (PRA) when it failed to adequately search for all records related to an investigation of misconduct by a Lakewood police officer. In 2019, the Lakewood Police Department conducted two separate but related investigations into multiple police officers following allegations of dishonesty and misconduct. At the conclusion of the investigation, one of the officers who had been investigated, Russell Martin, made two separate public records requests for documents "related to" each of the investigations. Many of the documents produced in response to the requests overlapped, but the City produced an interview of one of the officers only in response to Martin's second request. Martin believed that this interview should have been produced in response to his first request, and he filed a PRA lawsuit, alleging that the City had wrongfully withheld the officer's interview in response to his first PRA request. The City filed a motion for summary judgment, arguing that the interview was not responsive to the first request because it was not contained in that specific investigation file. The superior court granted the City's motion, finding that the City had produced all records responsive to the request as a matter of law. The Court of Appeals reversed, holding that the City viewed Martin's request too narrowly when it only searched for and provided the contents of the first investigation file, reasoning that Martin's request was for all documents "related to" that investigation, which would have included the interview even though it was not maintained in that investigation file. As a result, the Court reversed summary judgment in favor of the City, held that summary judgment should have been entered in favor of Martin, and remanded to the superior court to calculate the appropriate penalty for the City failing to produce the interview in response to Martin's first PRA request. In a concurring opinion, Judge Fearing argued that the "adequate search" standard applied by the courts in PRA actions is inappropriate, and that courts should instead impose strict liability for an agency's failure to produce a responsive record.

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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

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