WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

July 2021

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

U.S. Supreme Court

First Amendment

Mahanoy Area School District v. B.L.
No. 20-255 (6/23/21)

The United States Supreme Court held that a Pennsylvania public school district violated the First Amendment when it suspended a student from the school's junior varsity cheerleading team after she posted vulgar language and gestures on a social media platform outside of school hours. High school sophomore B.L. tried out for a position on her school's varsity cheerleading squad, but was instead offered a spot on the junior varsity squad. Upset by her coach's decision, while off campus the subsequent weekend, B.L. used her smartphone to upload two photos on the social media application Snapchat. The first image depicted B.L. with her middle finger raised and bore a caption with several expletives directed toward her school and cheerleading. The next image was blank, but it contained a caption complaining that freshmen had made the varsity cheerleading team. Other members of the cheerleading squad were upset by the images, and students discussed the posts for approximately five to ten minutes during class. The coaches determined that B.L.'s posts violated school rules and suspended her from cheerleading for the upcoming year. B.L. challenged her discipline in federal district court, arguing that the school's discipline violated the First Amendment. The federal district court agreed, and it ordered the school to reinstate B.L. On appeal, the Third Circuit Court of Appeals affirmed, concluding that the school district could not regulate student speech that occurs off campus. The United States Supreme Court affirmed the judgment of the Third Circuit, but it disagreed with the circuit court's reasoning. The Supreme Court held that the special characteristics of the school environment give schools additional license to regulate student speech, and this additional license does not always disappear when student speech occurs off campus. The Court identified several instances in which the school's regulatory interests regarding off-campus speech remain significant, including serious bullying, harassment, or threats aimed at teachers or students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices. However, the Court declined to set forth "a broad, highly general First Amendment rule" for identifying off-campus speech or a school's special need to regulate such speech. Instead, the Court identified three "features" of off-campus speech that may diminish a school's regulatory leeway: (1)

in relation to off-campus speech, schools rarely stand in loco parentis (in place of student's parents); (2) regulation of off-campus speech would necessarily encompass all speech a student utters in a day, which compels a heavy burden to justify intervention; and (3) the school has an interest in protecting unpopular expression, even when it takes place off campus. Mindful of these three features, the Court held that the school's interest in punishing vulgar language, preventing disruption, and promoting cheerleading team morale was insufficient to overcome B.L.'s right to freedom of expression, and as a result, the school district had violated the First Amendment when it disciplined B.L. for her social media posts.

Washington Court of Appeals

Open Public Meetings Act

Zink v. City of Mesa
No. 36994-3-III (6/1/21)

The Washington State Court of Appeals held that the City of Mesa violated the Open Public Meetings Act (OPMA) when it conditioned a citizen's right to attend a city council meeting on her agreement not to make a video recording. Local resident Donna Zink appeared for a city council meeting in 2003. Shortly before the meeting was scheduled to begin, Zink began video recording. Because one of the city council members felt uncomfortable being recorded, the mayor instructed Zink to not record the proceedings. Zink refused to turn off her camera and the mayor called the police. Zink was handcuffed, transported to the county jail, cited, and then released. Following her arrest, Zink brought multiple claims against the City, including violation of the OPMA. The trial court found the City had violated the OPMA by prohibiting Zink from recording the meeting. However, the trial court refused to enter judgment against the mayor and city council members in their individual capacities, finding insufficient proof that they had knowledge their actions violated the OPMA. The Court of Appeals affirmed in part, holding that the OPMA recognizes very few avenues for restricting attendance at governmental meetings. The Court held that government bodies cannot set conditions on the right to attend public meetings unless reasonably necessary to preserve order. Because Zink had not recorded in a disruptive manner, the Court held that the City's decision to remove her from the meeting was not reasonable and thus violated the OPMA. The Court also held that Zink failed to establish individual liability against the elected officials because they lacked knowledge that their actions violated the OPMA, noting that although the councilmembers had not received OPMA training, it was not until 2014 that the legislature adopted an OPMA training requirement for public officials.

Public Records Act

Banks v. City of Tacoma
No. 52072-9-II (unpublished) (6/2/21)

The Washington State Court of Appeals held that the City of Tacoma violated the Public Records Act (PRA) by failing to adequately search for and disclose certain records related to the police department's use of cell site simulators, which allow law enforcement, with a warrant, to precisely pinpoint the location of a cell phone. The City purchased cell site simulator technology in 2013. At that time, the City also entered into a nondisclosure agreement with the Federal Bureau of Investigation (FBI), which required the City to consult with the FBI before disclosing information about the simulators to the public. Four Tacoma residents jointly requested under the PRA: (1) all records related to the City's acquisition, use, or lease of cell site simulators; (2) all communications regarding cell site simulators, including communications with local, state, or federal agencies; and (3) all applications submitted to courts for warrants, orders, or use of cell site simulators in criminal investigations. The City

produced 560 pages of responsive documents. However, it generally withheld records that revealed the make, model, and pricing of the cell site simulators, as well as operational details of the City's devices, under the specific intelligence PRA exemption, RCW 42.56.240(1). The requesters then filed a complaint alleging violations of the PRA. During discovery, the City provided additional documents that it had failed to previously disclose, including: a billing log spreadsheet tracking payments to phone companies; e-mails between the police department and FBI; a blank warrant application template; and the meeting minutes from a citizen review panel that the City had established to provide community oversight of policing. Although the City had not previously disclosed the citizen review panel meeting minutes, the minutes were posted on the City's website and accessible to the public. Because the City had initially listed an operator's manual in its privilege log, the plaintiffs also alleged that the City had improperly withheld the operator's manual for the cell site simulators. The trial court partially granted the plaintiffs' motion for summary judgment, ruling that only the make and model information related to cell site simulators was exempt. The trial court awarded a total of $182,340 in statutory penalties against the City, and it awarded $109,885 in attorney fees. On appeal, the Court of Appeals held that the City properly withheld information regarding the make, model, and price of its cell site simulator under the specific intelligence information exemption to the PRA, as the FBI had submitted affidavits sufficient to establish that disclosure of this information could threaten national security. However, the Court held that the City had failed to adequately search for the e-mails and invoice because it did not search for responsive materials among copies of prior PRA responses involving similar requests, and did not search the city manager's office. The Court also held that the City had improperly withheld the blank warrant template by interpreting the request more narrowly than its actual wording. The Court remanded to the trial court for an evidentiary hearing to determine whether the phone company billing spreadsheet contained all responsive entries related to the use of a cell site simulator, and to determine whether the City used any operating manual at the time of the request. Finally, the Court reversed the trial court's penalties associated with the citizen review panel meeting minutes and billing spreadsheet, and it remanded for reconsideration following further resolution of the factual issues on remand.

Public Records Act

Strand v. Spokane County and Spokane County Assessor
No. 37669-9-III (6/15/21) (unpublished)

The Washington State Court of Appeals held that the Spokane County Assessor conducted an adequate search for public records in response to a homeowner's request for all records showing the basis for its assessed value of her residential property. Patricia Strand disagreed with the 2018 assessed value of her residential property, and she requested all records showing the basis for its valuation. The Assessor disclosed a property report card for the parcel number, which included information on ownership transfers, historical valuation information, ownership and transfer of ownership information, a site description, land data and calculations, and improvement data for the parcel. Strand later informed the Assessor that she was seeking the code sheets, appraisal theory, and "arithmetic" used in arriving at the property value. Through later installments, the Assessor provided Strand property record cards for other homes, neighborhood final reports, and links to photos for comparable sales and property sold information. The Assessor also informed Strand that it did not have the specific types of records she had requested because the Assessor's annual valuations are generated by a computer assisted mass appraisal process. Citing unauthenticated

documents Strand had obtained from various sources, including a different county, Strand claimed that the Assessor had not disclosed certain "valuation factors" it used to appraise her property. On appeal, the Court held that the Assessor had met its burden of showing it conducted an adequate search for records, as there was no reason to believe the records Strand was looking for existed or ever would exist. Strand's speculative claim that other records existed showing a different valuation process was insufficient to demonstrate a genuine issue of material fact, and the Court affirmed summary judgment dismissal of Strand's PRA claim.

Employment Discrimination

Carroll v. Renton School District
No. 81411-7-I (6/28/21) (unpublished)

The Washington State Court of Appeals held that the Renton School District did not unlawfully discriminate against a former employee on the basis of race and gender. The District hired Samiha Carroll, an African-American woman, as an elementary school assistant principal. Unbeknownst to the District, Carroll was six months pregnant at the time she was hired. Carroll went on maternity leave approximately two months after she was hired, and upon her return, believed that other administrators had scrutinized her about pumping breastmilk at work. Carroll also had difficulty finding childcare for her eight-year-old son. One morning, Carroll left her son in her car in the school parking lot while she attended a staff training session. This prompted a District administrator to submit a written CPS report of suspected child abuse or neglect. A few days later, Carroll resigned due to the "toxic" work environment. Carroll then brought several claims against the District including discrimination and hostile work environment under the Washington Law Against Discrimination (WLAD). Carroll's discrimination claim was premised in part on the hostile work environment constituting an adverse employment action. The Washington Court of Appeals held that Carroll had failed to establish there was a hostile work environment because she failed to support her allegations with factual details, including the identity of staff members involved, the content of alleged statements, the nature of the actions, or dates, times, and places of the incidents. The Court further held that filing the CPS report could not support a hostile work environment claim because as a mandatory reporter, the District administrator was legally required to report instances of suspected child neglect, which included inadequate supervision. Because Carroll failed to establish a hostile work environment, she also failed to establish an adverse employment action under the WLAD, and the Court affirmed summary judgment dismissal of Carroll's claims.

PERC

Interference

University of Washington
Decision 13352 (5/27/21)

A PERC examiner concluded that the University of Washington did not commit an interference unfair labor practice by misrepresenting its plan to repost a vacant security position during grievance settlement discussions. In 2017, the University created a new security sergeant position for its health and sciences facility. This new position entailed a higher level of responsibility and a higher rate of pay than that for other security officers. One of the University's security officers applied for the position and received a telephone interview, but did not advance to the next stage of the hiring process. The position ultimately went to a less senior internal candidate. The union filed a step one grievance on behalf of the more senior employee. While the grievance was pending, the employee chosen for the security sergeant position resigned. During the grievance settlement discussions, the University incorrectly informed

the union that it had decided to eliminate the security sergeant position. After the grievance settled, the University reposted the position, and ultimately hired an external candidate. The examiner ruled that the University's inaccurate statements did not rise to the level of unlawful interference because they could not reasonably be perceived as a "threat," and because they were not tied to any protected union activity. The examiner concluded that absent a direct impact on an employee's statutory collective bargaining rights, it was not PERC's role to police the truth or veracity of statements made during settlement discussions.

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