# WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

**July 2022**

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

## United States Supreme Court

### First Amendment

*Kennedy v. Bremerton School District*
No. 21-418 (6/27/22)

The U.S. Supreme Court held that the Bremerton School District violated the First Amendment when it prohibited a high school football coach from praying on the field immediately following football games. For several years, high school football coach Joseph Kennedy routinely prayed at the 50-yard line at the conclusion of each game. Although he initially prayed alone, eventually nearly the entire team joined Kennedy in his post-game prayers, and the practice evolved to include Kennedy incorporating prayer-like motivational speeches to his team, and the team engaging in pregame and postgame prayers in the locker room. The District first learned of this practice in 2015, and it sent Kennedy multiple letters during that season advising him that this 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 allow him to continue to pray without violating District policy or the Establishment Clause of the First Amendment. Kennedy ceased the locker-room prayers, but he refused to stop offering his "post-game personal prayer" midfield following games. According to Kennedy, he asked the District to allow him to continue his "private religious expression" alone, and that he only sought an opportunity to pray after the game was over and the players had left the field. Nonetheless, prior to the October homecoming game, Kennedy made multiple media appearances, publicizing his intent to pray at the 50-yard line. This led to widespread media coverage, and the District received a large volume of correspondence from community members. The District again advised Kennedy that he remained "on duty" immediately following the football games and was expected to continue supervising students. The District had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, but it directed him not to do so in District-issued uniform, under stadium lights, with students still on the field, and with the audience still in attendance. Kennedy disregarded this directive, and he continued to pray at the conclusion of each game on the 50-yard line with students, players, coaches from the opposing team, and the media joining. The District placed Kennedy on paid administrative leave, and the superintendent recommended that he not be rehired the following school year. Kennedy then sued the District for violating his First Amendment rights. 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. The Court of Appeals affirmed, holding that Kennedy's free speech claim failed because at the time of his prayer, he was speaking as a public employee, not as a private citizen, and even if he were speaking as a private citizen, the District's interest in avoiding an Establishment Clause claim justified restricting his post-game prayers. The U.S. Supreme Court reversed, holding that the District's actions violated the Free Speech Clause of the First Amendment because Kennedy spoke as a private citizen on a matter of public concern during his post-game prayers, and the District's interest in not endorsing religion did not outweigh Kennedy's free speech rights. In reaching the conclusion that Kennedy's speech was private speech, not government speech, the Court reasoned that such prayers were not "ordinarily within the scope" of his duties as a coach, and it noted that during postgame periods, coaches were free to briefly attend to personal matters, such as checking sports scores on their phones and greeting friends and family in the stands. In reaching this conclusion, the Court heavily weighed Kennedy's assertions that he merely sought to pray quietly alone on the field. The Court further held that the District's interest in avoiding an Establishment Clause violation did not outweigh Kennedy's protected speech, as necessary to justify a restriction of private speech about a matter of public concern. To reach this result, the Court explicitly overturned decades of precedent for analyzing Establishment Clause claims first announced in 1971 in *Lemon v. Kurtzman*, which dictated that courts examine "whether a reasonable observer" would consider the government's challenged conduct "an endorsement of religion." The Court noted that it had "abandoned" the *Lemon* test several years ago, and it announced a new test instructing courts to interpret the Establishment Clause by "reference to historical practices and understandings" going forward. Applying a "historically sensitive understanding of the Establishment Clause," the Court acknowledged that the Founding Fathers sought to prohibit coercive worship, but held that Kennedy's practices were not coercive, relying on his statements that he did not require students to pray, and disregarding assertions that students had felt compelled to join the prayers as "hearsay." As a result, the Court held that the District violated the First Amendment by suspending Kennedy for his "quiet, postgame prayers." Justice Sotomayor, joined by two other justices, wrote a dissent, criticizing the majority for characterizing Kennedy's prayers as "private" and "quiet" when the record showed that Kennedy had for years led student athletes to pray following games, and he continued to do so following the District's directives by publicly praying midfield in his District uniform with parents, community members, and the media present. Other than "misreading the record," the dissent criticized the majority for overruling *Lemon* and adopting a new "history and tradition" test that rejects longstanding concern surrounding government endorsement of religion. Finally, the dissent criticized the majority for applying its coercion analysis without recognizing the unique pressures faced by students when participating in school-sponsored activities, and instead only relying on Kennedy's assertions that he did not require the students to participate.

## Ninth Circuit Court of Appeals

### Public Records

*Inter-Cooperative Exchange v. U.S. Dep't of Comm.*
No. 20-35171 (6/7/22)

The Ninth Circuit Court of Appeals held that the National Oceanic and Atmospheric Administration (NOAA), a federal agency responsible for implementing fishery management plans, failed to

adequately search for records responsive to a request made under the Freedom of Information Act (FOIA), the federal public records law that Washington courts look to for guidance in interpreting the Washington Public Records Act (PRA). Federal law establishes regional fishery management councils to regulate coastal fisheries, and which operate under NOAA. In 2015, the regional council that manages fisheries off the coast of Alaska considered whether an increase to the state minimum wage should impact its established arbitration system used to guide the price negotiations between crab harvesters and processors. Glen Merrill, the assistant regional administrator for the council, moved to include the rising labor costs for consideration in the arbitration system, but that motion ultimately failed. A cooperation of crabbers known as the Inter-Cooperative Exchange (ICE) submitted a FOIA request seeking all correspondence to or from Merrill relating to (1) the interpretation and application of the arbitration system standards, as well as (2) all records related to the Alaska state minimum wage increase. In response, NOAA searched Merrill's emails, network, and desktop, and Merrill searched his personal devices, using only the search terms "binding arbitration," arbitration," and "crab." This response produced 146 records, which the ICE deemed inadequate. The ICE brought a FOIA claim against NOAA, claiming that the search terms used were not reasonably calculated to uncover all relevant documents. The district court granted summary judgment in favor of NOAA, finding that the agency had used reasonably calculated search terms. The Ninth Circuit reversed, citing the government's heavy burden to show "beyond material doubt" that its search was adequate. The Ninth Circuit held that NOAA had not met its burden because the search terms used were too narrow because they did not address the second half of the request related to minimum wage laws, and also that the search terms used should have accounted for shorthand terms and related variants such as "arbitrator" or "arbitrating."

## COVID-19 Restrictions

*Brach v. Newsom*
No. 20-56291 (6/15/22)

Sitting en banc, the Ninth Circuit Court of Appeals dismissed as moot an action brought by a group of parents challenging California Governor Gavin Newsom's executive order restricting in-person instruction at schools because of the COVID-19 pandemic. Like other states, in March 2020, Governor Newsom declared a state of emergency and issued an executive order requiring Californians to stay at home. As a result, public schools closed their buildings and finished the year with remote instruction. In summer 2020, the California Department of Public Health issued the "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California 2020-2021 School Year" (Reopening Framework). This framework allowed schools to reopen once the rate of COVID-19 transmission in their local areas stabilized, and they would be allowed to remain open even if transmission rates later increased. Shortly after the Reopening Framework was announced, a group of parents and a student filed suit, alleging that the State's decision to delay reopening schools until local conditions improved violated the fundamental right to a basic, minimum education in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also violated other federal civil rights statutes. As the lawsuit was pending, COVID-19 conditions improved and California issued updated guidance for the 2021-22 school year (2021-22 Guidance) which imposed no restrictions on school reopening, and which recognized in-person schooling as critical to the mental and physical health of students. Meanwhile, the district court granted summary judgment in favor of California in the parents' lawsuit in December 2020. The parents appealed, and a divided three-judge panel

of the Ninth Circuit reversed the district court's ruling, accepting the parents' argument that the Fourteenth Amendment's Due Process Clause guaranteed a fundamental right to in-person education and holding that the case was not moot. A majority of active judges on the Ninth Circuit, however, voted to vacate the panel opinion and rehear the case en banc (a procedure in which eleven Ninth Circuit judges vote upon and decide the case). The en banc court was also divided, with the majority holding that the case was moot given that the restrictions on in-person instruction had been lifted and that there had been no state-imposed barrier to reopening for in-person instruction since April 2021. Because the parents had already obtained the relief they sought in their lawsuit—a return to in-person instruction—the Court held that it could not provide effective relief, and it dismissed the parents' challenge as moot. Five judges dissented, and would have held that the case was not moot because the State of Emergency remains operative and therefore the issue fit within the "capable of repetition, yet evading review" exception to mootness. The dissenting judges briefly addressed the merits and would have affirmed the grant of summary judgment in favor of the State, reasoning that the parents had not demonstrated that distance learning failed to satisfy the basic educational standard guaranteed by the Fourteenth Amendment.

### Union Dues for Nonmembers

*Allen v. Santa Clara County*
No. 19-17217 (6/23/22)

The Ninth Circuit Court of Appeals held that public employers cannot be held liable for collecting mandatory agency fees prior to the 2018 U.S. Supreme Court holding in *Janus v. AFSCME*. In *Janus*, the U.S. Supreme Court overturned decades of precedent and held that public-sector labor unions may not collect mandatory "agency fees" from nonconsenting employees. Following *Janus*, several California public-sector employees filed a class action against the Santa Clara County Correctional Peace Officers Association (Union) and Santa Clara County (County), seeking to retroactively recover any pre-*Janus* agency fees deducted from their salaries. The district court dismissed the complaint against the Union because the Ninth Circuit had previously held that unions were entitled to a good faith defense against §1983 claims concerning pre-*Janus* agency fees, as such collection had been expressly authorized by U.S. Supreme Court precedent until *Janus*. Because the County had also relied in good faith on pre-*Janus* law in collecting the fees, the district court similarly dismissed the action against the County. The Ninth Circuit Court of Appeals affirmed, reasoning that private parties may rely on judicial interpretations of the law without facing liability for doing so, and municipalities are generally liable in the same way as private corporations in §1983 actions; and that "principles of equality and fairness" dictated such result. The Court held that the County had merely facilitated collection of agency fees for the Union, serving as a "middleman" deducting agency fees from paychecks and transferring the funds to the Union under presumptively valid state law. The Court declined to hold municipalities to a different standard than it held unions, and it held that like unions, the County was entitled to a good faith defense to a claim for refund of pre-*Janus* agency fees. The Court therefore affirmed dismissal of the employees' claims.

## Washington Court of Appeals

### Public Records Act

*Taylor v. Clark County*
No. 55797-5-II (6/22/22) (unpublished)

The Washington State Court of Appeals held that records related to an internal investigation that led to the termination of a Clark County deputy sheriff were not exempt from disclosure under the

"personal information" exemption of the Public Records Act (PRA), RCW 42.56.230(3). The County terminated Ryan Taylor following an internal investigation into his use of County equipment to surveil his ex-wife. Following his termination, Staci Patton filed a request seeking the findings and reports regarding the internal affairs investigations, which included the name of Taylor's counselor and an audio tape of an interview with his counselor, in which Taylor provided details related to his divorce. Taylor obtained a TRO prohibiting Clark County from releasing the records, and then sought an injunction barring release of the records under the "personal information" exemption of the PRA, which applies when release of information would violate an employee's right to privacy. The trial court denied Taylor's motion for an injunction, concluding that he had not established that the records are exempt. The Court of Appeals affirmed, citing caselaw holding that a police officer's name in connection with a substantiated complaint of misconduct does not violate the officer's right to privacy. Because the internal investigation of Taylor's misconduct was substantiated, the Court held that disclosure of the internal investigation documents, which included the audio interview recording and name of his counselor, did not fall into the category of "personal information" exempt from disclosure under the PRA, and it therefore affirmed the trial court's denial of an injunction prohibiting the release of this information.

## PERC

### Unit Clarification

*Mead School District*
Decision 13520 (6/21/22)

The PERC Executive Director held that two bargaining units must be clarified to remove athletic directors because the athletic directors were supervisory and because classified employees may not be in the same bargaining unit as certificated nonsupervisory employees. Mead School District employs two athletic directors. One was represented by the District's certificated nonsupervisory bargaining unit, and the other was represented by a classified bargaining unit. The District filed a unit clarification petition seeking to remove both positions from the bargaining units, and the two unions conceded that the bargaining units should be so clarified. PERC agreed. First, PERC concluded that because the athletic director position does not require professional education certification as a condition for employment, it could not be included in the same bargaining unit as certificated employees, so PERC ordered the position to be removed from the certificated nonsupervisory bargaining unit. Second, PERC concluded that the position supervised other employees within the classified bargaining unit, such that the position must be removed from the classified bargaining unit. PERC reached this conclusion because the athletic directors develop District-wide athletic programs and budgets; they evaluate, train, and supervise coaches within the classified bargaining unit, and have authority to discipline coaches; and although they lack formal hiring authority for coaches, they have de facto hiring authority, given that they recruited and interviewed 117 coaching candidates since 2017, and in each instance the candidate they recommended to be hired was ultimately hired. As a result, PERC ordered the athletic directors to be removed from the bargaining units.

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