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

First Amendment

Hernandez v. City of Phoenix
No. 21-16007 (8/5/22)

The Ninth Circuit Court of Appeals held that a police officer's social media posts denigrating Muslims and Islam addressed a matter of public concern, as required to warrant First Amendment protection. In 2013, the City of Phoenix's Police Department adopted a social media policy prohibiting officers from engaging in speech on social media platforms that would be "detrimental to the mission and functions of the Department," "undermine respect of public confidence in the Department," "impair working relationships," or "embarrass or discredit" the Department. The Department's social media policy further prohibited officers from divulging any information gained while in the performance of their official duties. After the Department adopted the policy, one of its officers, Sergeant Juan Hernandez, posted four memes to his personal Facebook account mocking Muslims and Islam, including a post equating Muslims with gang rapists. Although Hernandez intended for the posts to generate discussion amongst his friends and family, his Facebook page was not private, and any member of the public could view it. In June 2019, the posts drew widespread public criticism, largely due to their publication by Plain View Project, an organization that maintains a database of Facebook posts from law enforcement officers across the country. After the posts garnered considerable negative media attention, the Department conducted an internal investigation and ultimately concluded that the posts violated its social media policy because they were inflammatory toward certain groups and contributed to the erosion of public trust in the Department. Based on this finding, Hernandez faced discipline up to termination. Before the Department decided what discipline to impose, Hernandez filed a lawsuit in district court, seeking an order restraining the Department from imposing discipline, arguing that such discipline would violate Hernandez's First Amendment free speech rights. Hernandez also argued that the Department's social media policy was unconstitutional and facially invalid. The Department moved to dismiss the action, arguing that Hernandez's First Amendment retaliation claim failed because his posts did not warrant constitutional protection. The district court agreed that the posts did not address a matter of public concern, which meant they were not entitled to constitutional protection. The district court further rejected Hernandez's challenge to the Department's social media policy, reasoning that

the policy only prohibited posts that could reasonably be expected to disrupt the Department's mission and operations—prohibitions the U.S. Supreme Court has held are constitutionally permissible. The Ninth Circuit reversed in part, holding that in weighing the form and context, Hernandez's social media posts addressed matters of social or political concern, as they at least tangentially touched on matters of cultural assimilation and intolerance of religious differences, which would be of interest to others outside of the Department. The Court acknowledged that the posts expressed hostility toward—and sought to denigrate or mock—a major religious faith, but it held that the inappropriate or controversial character of a statement was irrelevant to whether the speech deals with a matter of public concern. The Court nonetheless held that the Department could still restrict such speech if it could show that the posts impeded Hernandez's performance of his job duties or interfered with the Department's ability to effectively carry out its mission, and it therefore remanded the case to the district court for further development of the factual record on that issue. The Court also largely agreed with the district court's rejection of Hernandez's facial overbreadth challenge to the Department's social media policy, reasoning that police departments have a strong interest in maintaining trust and confidence with the communities they serve. However, the Court held that the portions of the social media policy prohibiting speech that "embarrassed" or "discredited" the Department and which prohibited officers from divulging any information gained while in the performance of their duties could be facially overbroad, and it remanded to the district court for the Department to have an opportunity to further develop the record and show that these portions of its policy were appropriately tailored.

Individuals with Disabilities Education Act

Martinez v. Newsom
No. 20-56404 (8/24/22)

The Ninth Circuit Court of Appeals affirmed the dismissal of a lawsuit brought by a group of students and their parents, which alleged that every school district in the State of California had failed to adequately accommodate students with disabilities when public schools transitioned to remote instruction in March 2020 in response to the COVID-19 pandemic. Four students enrolled in California's Etiwanda and Chaffey Joint Union High School Districts, and their parents, filed a putative class action lawsuit on behalf of "all special needs students and their parents in California," alleging that public schools failed to adequately accommodate them during remote learning beginning in March 2020, and that they were denied a Free Appropriate Public Education (FAPE) under the Individuals with Disabilities Education Act (IDEA). The plaintiffs named hundreds of defendants, including every public school district in California, the California Department of Education (CDOE), and the California Superintendent of Public Instruction (CSPI). The plaintiffs requested: (1) an order finding that the defendants violated the IDEA; (2) an injunction requiring school districts to "immediately reassess" their needs and ability to engage in distance learning, or return them to in-person instruction; (3) an order requiring school districts to provide various educational services to students with special needs, or else return to in-person instruction; and (4) compensatory education. The district court dismissed all claims against all defendants based upon the plaintiffs' failure to exhaust their administrative remedies under the IDEA, which includes pursuing a due process hearing before an administrative law judge. The Court of Appeals affirmed, but it held that the plaintiffs' claims against the school districts in which they were not enrolled should have been

dismissed for lack of jurisdiction because the plaintiffs did not have standing to sue school districts that had not injured them personally. The Court further held that the plaintiffs' claims against the CDOE and CSPI were moot, meaning that no actual controversy against the defendants existed given that California had since returned to in-person learning and therefore, had already provided the plaintiffs the relief they sought. Finally, the Court held that the plaintiffs' claims for compensatory education against the school districts in which they were enrolled should have been dismissed because they failed to exhaust administrative remedies under the IDEA before filing a lawsuit in federal court. Therefore, the Court vacated the district court's ruling and remanded with instruction to dismiss plaintiff's claims for lack of jurisdiction, mootness, and failure to exhaust administrative remedies.

First Amendment

Fellowship of Christian Athletes v. San Jose Unified School District
No. 22-15827 (8/29/22)

The Ninth Circuit Court of Appeals held that the San Jose Unified School District violated the Establishment Clause of the First Amendment when it revoked the status of a Christian student club because its membership policies discriminated against LGBTQ+ students. The Fellowship of Christian Athletes (FCA) is a Christian religious organization with more than 7,000 student chapters across the country, and whose mission is "to lead every coach and athlete into a growing relationship with Jesus Christ and His church." The FCA regularly hosts religious discussions, service projects, prayer and worship, and Bible studies for students. Its membership is open to all students, regardless of their religion, but members who want to serve as leaders of the FCA must personally affirm to its "Sexual Purity Statement," which provides that sexual intimacy should only be within the confines of marriage and between a man and a woman. The FCA was an Associated Student Body (ASB)-recognized club within the District for nearly two decades, until it drew controversy in April 2019 after FCA members provided their social studies teacher, Peter Glasser, a copy of the club's Statement of Faith and Sexual Purity Statement. Glasser found the FCA's views on LGBTQ+ identities deeply harmful, including FCA's stance that "God assigns our gender identities at birth based on the physical parts He gives us," and Glasser reported his concerns to District administration. The District ultimately concluded that the FCA's views violated the District's non-discrimination policy because it barred students from being officers of the club if they were homosexual, and it decided to derecognize the FCA as an ASB club in May 2019. The FCA was again denied ASB recognition for the 2019-20 school year due to its policies on homosexuality and gender identity. In April 2020, the FCA national organization and its District student leaders filed a lawsuit against the District and its officials, including Glasser, alleging that the defendants violated their right to Free Exercise of Religion under the First Amendment. The students then sought a preliminary injunction requiring the District to restore the FCA's recognition as an ASB-recognized student club. Meanwhile, the District adopted new ASB guidelines which included an "All-Comers Policy" that required all ASB-recognized clubs to allow any currently enrolled students to participate in, become members of, and seek or hold leadership positions in the organizations, regardless of their status or beliefs. The District conceded that the FCA's policies violated the "All-Comers Policy," and therefore the FCA could not attain ASB recognition in the future. In June 2022, the district court denied the FCA's petition for preliminary injunction, holding that the District's All-Comers Policy was content neutral because it did not preclude religious speech, but instead only prohibited

discrimination. The Ninth Circuit reversed, and it held that a preliminary injunction should have been granted because the plaintiffs were likely to prevail in their Establishment Clause claim because the District had selectively enforced its All-Comers Policy amongst its student clubs. Specifically, the Court noted that the District had allowed its Senior Women's Club to retain its ASB recognition despite its membership being limited to students with female gender identity. Because the District had selectively enforced its club policies, the Court held that it could only burden the FCA's exercise of religion if it met strict scrutiny, meaning the District would need to show its restrictions were justified by a "compelling interest" that was "narrowly tailored" to meet that interest. The District conceded that it could not meet the "high bar" of strict scrutiny, and as a result, the Court directed the district court to enter an order reinstating the FCA's ASB recognition.

Washington Court of Appeals

Public Records Act

Hood v. Centralia College
No. 56213-8-II (8/2/22) (unpublished)

The Washington Court of Appeals held that Centralia College did not violate the PRA by withholding records since the College conducted an adequate search after requesting clarification as to the scope of the request. Eric Hood emailed the College requesting "all records it got from the auditor and all records of any response to the audit or to the audit report." The College's public records officer, Julia Huss, responded via email that same day, acknowledging the request and asking for clarification as to which audit Hood referred to. Hood identified which audit he meant, but Huss still found the request ambiguous. College employees assisted Huss in identifying responsive records. Huss later asked Hood to confirm if the records they found were what he was requesting or whether he sought something different, as she found his request ambiguous. Hood responded that he did not believe his request was ambiguous, and he repeated his original request without further clarification. After Huss provided the documents, the College did not hear from Hood until he filed a complaint nearly a year later. During discovery, the College conducted a search of its servers, and it located one responsive email that it had failed to provide earlier. The College sent Hood interrogatories about other PRA requests Hood had made to other agencies, on the basis that Hood intentionally made the request ambiguous to ensure the agencies would fail to disclose all the records he requested. The Court held that the trial court erred in ordering Hood to answer the interrogatories about other PRA requests because they did not pertain to the issue at hand—whether the College conducted an adequate search for records. The Court of Appeals held that Huss reasonably concluded she had provided all of the requested records based on her clarifying conversation with Hood, and that the search was adequate. The Court further held that even though the College failed to produce one email, that failure did not violate the PRA because the search was adequate.

Public Records Act

Cantu v. Yakima School District
No. 37996-5-III (8/2/22)

The Washington Court of Appeals held that an agency's failure to respond to a public records request for an extended period is a constructive denial of the records. The Court also held that Yakima School District's narrow interpretation of Andréa Cantu's request was an unreasonable assumption and resulted in an inadequate search for records. Cantu submitted a request to the District on October 27, 2016. The District's public records officer, Kirsten Fitterer, responded but did not send a 5-day letter. Fitterer obtained some

records from District employees but did not initially send them to Cantu. In January 2017, Cantu emailed Fitterer asking for an update. The District's technology director ran some additional searches of the District's email archive system, which resulted in 85 emails that were potentially responsive. Fitterer was unable to read the content of the emails in the format the technology director provided them, but she could see sender information, dates, and the subject lines. Fitterer forwarded this to Cantu under the assumption that Cantu would inform her if she wanted any of the emails based on the subject lines. Cantu denied there was such an agreement but did not communicate with the District for ten months, so Fitterer assumed Cantu had received all the records she had requested. Cantu submitted two new requests on August 5, 2018, requesting all HIB forms from December 2017 regarding her child and all emails regarding her child from April 2016 to the present date. The District did not send a 5-day letter in response. The District provided 9 HIB reports that were redacted and estimated that the District would be able to provide the emails by July 16, 2018, in installments. Fitterer requested help from supervisors 10 times due to an increase in PRA requests, but the District declined to provide additional assistance. On July 2, the technology department located 3,200 potentially responsive emails, which Fitterer did not finish reviewing until October 6. The District did not communicate with Cantu that it would be unable to meet the estimated July 16, 2018, deadline. Fitterer told Cantu in August 2018 that the public records office had been closed over the summer, which the Court described as "false information." Cantu filed a lawsuit on September 24, 2018. The District then provided installments of records to Cantu, although some of the searches were for the wrong time frame, records were redacted without exemption logs, and the searches were performed using a narrow set of keywords. The Court acknowledged that a search can be adequate even if it fails to identify responsive records. However, the Court held that the District did not do an adequate search because it was too narrow. Next, the Court held that the District's inaction and failure to diligently work on Cantu's requests constituted a constructive denial of records, even though the District had not formally closed the requests. The Court reviewed the totality of the circumstances to determine whether a constructive denial had occurred, holding that such a review should be performed under an "objective standard from the viewpoint of the requestor." That standard includes consideration of the plaintiff's prior requests and the communications between the parties. The Court held that the District was not diligently working on Cantu's request, which amounted to a denial of the request. The Court cited the failure to respond within five days, failure to communicate about being unable to meet its July 16 deadline, providing false information about the status of the public records office's open hours, and then failing to communicate or provide records for another five months. The Court stated that administrative inconvenience or slowness caused by a lack of allocation of resources will not excuse an agency. The Court also held that disclosing records after a constructive denial does not cure the violation. Finally, the Court held that the trial court committed a manifest abuse of discretion by awarding Cantu only $10 in per diem penalties, given that the Court found the District's actions to be "gross negligence" and "grave misconduct." The Court of Appeals remanded to the trial court to recalculate the per diem penalty and attorney fees for the wrongfully withheld records.

Rulemaking

Wilkes v. Washington State Board of Education
No. 83337-5-I (8/8/22) (unpublished)

The Washington Court of Appeals held that families' challenge to the April 2020 emergency rule promulgated by the Office of Superintendent

of Public Instruction (OSPI) is moot. In March 2020, Governor Jay Inslee closed public schools in response to COVID-19. Then on April 29, 2020, OSPI filed a new emergency rule to address the emergency school closures for the 2019-2020 school year. The rule allowed local education agencies to receive basic education apportionment allocations when the agencies could not offer the minimum number of school days due to the emergency closures. OSPI's rule was temporary and set to expire on August 7, 2020. Before the rule expired, four parents sued OSPI and the Washington State Board of Education (Board), challenging the emergency rule. The parents claimed that the rule exceeded OSPI's rulemaking authority and violated their children's constitutional and statutory right to a basic education. The rule expired in August 2020, and OSPI and the Board then moved to dismiss the case as moot. The Court held that the parents' requested remedy of a declaration that the rule was invalid was no longer an option because the rule was no longer in effect. As a result, any further order from the courts "would have been an inappropriate advisory opinion on OSPI's future action." Finally, the Court noted that the parents could have sought to stay the implementation of the rule, but did not do so. As a result, the Court affirmed dismissal of the families' challenge.

Emergency Powers

Sehmel v. Shah
No. 55970-6-II (8/9/22)

The Washington Court of Appeals held that the State mask mandate does not implicate speech, the legislature properly delegated the authority to address emergencies to the secretary of health, and Governor Jay Inslee's Emergency Proclamation was not in excess of his authority. In February 2020 Governor Inslee declared a state of emergency in Proclamation 20-05 in response to COVID-19. The Secretary of Health implemented a mask mandate in June 2020. The plaintiffs filed a claim for declaratory and injunctive relief against Governor Inslee and Secretary of Health Umair Shah to prevent the mask mandate being enforced. They argued they had a right to not wear a mask as a political message under the First Amendment. In determining whether conduct constitutes speech, the Court applied a two-part test examining whether "(1) the person intended to convey a message, and (2) whether it was likely that a person who viewed the conduct would understand the message." The intended expression must be "overwhelmingly apparent." The Court held that not wearing a mask, or wearing a mask, could mean a variety of things, so it was not overwhelmingly apparent that refusing to wear a mask communicates a political message constituting speech under the First Amendment. The Court also held that the secretary's mask mandate and the governor's emergency proclamation were within their delegated authority.

Teacher Discharge

Cronin v. Central Valley School District
No. 37939-6-III (8/25/22) (unpublished)

The Washington Court of Appeals held that sufficient cause existed to discharge and nonrenew a teacher's contract based on the teacher's conduct on and off campus, which included five separate arrests for alcohol-related offenses, inappropriately touching students, harassing staff members, and being banned from a local bakery for harassing its staff. Michael Cronin was a teacher with the Central Valley School District from 2005 to 2012. During that time, he was charged four times with DUI and physical control of a vehicle while under the influence of alcohol and/or drugs. Cronin was also charged with obstructing an officer and resisting arrest with allegations that he was under the influence at the time of his arrest. Additionally in 2008, Cronin inappropriately

touched a student by rubbing her stomach and came to school under the influence of alcohol. During the investigation into this incident, the District learned that Cronin had inappropriately touched a secretary who worked at one of its high schools by putting his head on her shoulder and placing his hand on her upper inner thigh. The owner of a local bakery (and parent of a former District student) also informed the District that she had banned Cronin from her store after he repeatedly showed up after he had been drinking and insisted that staff pour alcohol into his Coke cup so that he could conceal his drinking from students and parents. The District issued a letter of reprimand in 2009, which directed Cronin to refrain from any physical contact with students at all times and to communicate in a professional and respectful manner with all students at all times. Following the letter of reprimand, a local newspaper published multiple articles about Cronin's behavior, and the District received complaints from community members about his return to the classroom. In fall 2010, a female student reported that Cronin made her feel uncomfortable by rubbing her arm and back on two separate occasions, stroking her feet with his feet, and standing inches behind her. In January 2012, the District issued a notice of probable cause for discharge and nonrenewal of Cronin's employment based on six identified causes of action: (1) conducting himself in a manner unbecoming of a teacher; (2) engaging in a pattern of misconduct that includes alcohol or substance abuse related incidents and boundary invasion incidents (at least one of which resulted in incarceration); (3) engaging in a pattern of behavior that reflected negatively on Cronin's ability to perform his job and which negatively impacted his ability to perform his job; (4) not being available for work; (5) continuing to be unavailable for work; and (6) not being forthcoming with the District regarding behavior that impacted Cronin's ability to do his job. Following a 12-day statutory hearing, a hearing officer found that the District proved four of the identified causes by a preponderance of the evidence and that sufficient cause existed to support Cronin's discharge and nonrenewal. Cronin challenged the hearing officer's decision in superior court, which affirmed his discharge. Cronin appealed, raising several challenges, including that the notice of probable cause was legally insufficient because it was vague, and also that the hearing officer erred in allowing the District to rely on specific instances of misconduct that were not identified in the notice of probable cause as a basis for termination. The Court of Appeals affirmed the hearing officer's conclusion that sufficient cause existed to discharge Cronin and not renew his contract. The Court rejected Cronin's challenge to the sufficiency of the notice, holding that a notice of discharge does not need to include detailed reasons for the discharge so long as the reasons are made known to the teacher upon his request and the teacher is given an opportunity to present evidence and dispute the determination, which Cronin was afforded. The Court further held that it was permissible for the District to present evidence that it did not have when it issued the notice so long as it related the specified cause or causes of action in the notice. The Court held that the plain language of the statute governing adverse change in contract status of certificated employees (RCW 28A.405.300) does not limit the District to evidence identified in the probable cause notice, nor does it require the District to set forth all evidence supporting the probable cause or causes in the notice. Finally, the Court held that sufficient cause existed to terminate Cronin's teaching contract and that the hearing officer appropriately found Cronin's behavior to be irremediable, particularly given his inappropriate touching of a female student despite prior direction in the letter of reprimand

to refrain from physical contact with students at all times.

PERC

Refusal to Bargain

Ben Franklin Transit (Teamsters Local 839)
Decision 13409-A (7/25/22)

PERC determined that Teamsters Local 839 (union) did not commit a refusal to bargain unfair labor practice (ULP) when its lead negotiator used profanity and argued aggressively with the employer during negotiations. PERC further determined that the employer did not commit a refusal to bargain ULP when its human resources (HR) director sought an order of protection against the union's lead negotiator in superior court. The union represents three bargaining units of employees for Ben Franklin Transit (employer). In June 2019, the employer and union met to negotiate the successor collective bargaining agreements covering two of its bargaining units. Before the negotiations began, the union's lead negotiator, who was not an employee of Ben Franklin Transit, launched into a profanity-laced tirade, expressing frustration regarding the employer's conduct in a grievance meeting and anger that the room was not properly set up for negotiations. The employer team caucused, and upon return, stated that they would not negotiate that day, but would contact the union with future bargaining dates. The union's lead negotiator responded with further profanity and accused the employer of refusing to bargain. In subsequent negotiations, tension developed between the union's lead negotiator and the employer's HR director, and at some point, the union's lead negotiator directed someone to "put a leash" on the human resources director. According to the employer's HR director, the union's lead negotiator also threatened, shook his fists, and pointed his finger at her. The HR director filed an ex parte petition for an order of protection in superior court, alleging that the union's lead negotiator had harassed her during negotiations. Although she initially sought the order of protection on her own, later, the employer paid for the HR director's attorney fees. Both the employer and union filed multiple ULP complaints against one another. Following an evidentiary hearing, a PERC Examiner concluded that the union breached its good faith bargaining obligation because its lead negotiator's behavior was hostile, abusive, and not reasonable. The Examiner further concluded that the employer did not breach its good faith bargaining obligation when it supported its HR director in obtaining an order of protection. Both parties appealed, and the PERC Commission reversed in part and affirmed in part. PERC acknowledged that the union representative's vulgar language during negotiations was uncivil, but it concluded that such remarks were nonetheless free speech protected by the First Amendment. In viewing the totality of the circumstances, PERC concluded that the union representative's behavior did not evidence an absence of sincere desire to reach an agreement, and therefore did not constitute a refusal to bargain ULP, reversing the Examiner's decision on this basis. However, PERC affirmed the Examiner's conclusion that the employer did not breach its good faith bargaining obligations when its HR director sought an order of protection in superior court. Again, PERC acknowledged that the HR director had a First Amendment right to seek an order of protection, and it also found that her petition was not objectively baseless given her reasonable belief that she was being harassed. Commissioner Busto dissented in part, and would have concluded that the HR director's application for an order of protection was baseless and pursued for the retaliatory purposes of removing the union's lead negotiator.

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