

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

Public Records Act

Sullivan v. University of Washington
No. 22-35338 (2/17/23)

The Ninth Circuit Court of Appeals held that the personal identifying information of the appointees to a government committee was not exempt from disclosure under the Public Records Act (PRA). The federal Animal Welfare Act requires research facilities that use live animals to maintain an Institutional Animal Care and Use Committee (“Committee”) whose purpose is to ensure that the facility’s practices in the care of animals complies with federal law. The University of Washington is a research facility required to appoint such a committee, and its Committee members hold meetings open to the public. Some members of the University’s Committee prefer to remain anonymous due to personal safety concerns. To safeguard this interest, the Committee minutes and reports solely identify these individuals by their initials. The People for the Ethical Treatment of Animals (PETA) filed a records request with the University seeking the letters appointing Committee members, which

included their personal identifying information. After receiving third-party notice, 73 individuals filed a purported class action in federal court, seeking an order restraining the University from disclosing their identities in response to PETA’s request. The district court granted an injunction restraining release of the records, concluding that there was a serious question of whether disclosure would violate those members’ First Amendment right to expressive association. The Ninth Circuit reversed, holding that the First Amendment only protects the right of individuals to join together and associate for a shared cause in their private capacity. By contrast, the Committee members were appointed to ensure the University’s research practices comply with federal law and were therefore not akin to a private association where members can choose their own purposes and decide how to advance them. The Court held that the Committee members’ association was analogous to government volunteers or contractors in that the scope of their work was pursuant to their official duties, and as such, this activity is not afforded First Amendment protection. As a result, the Court held that disclosure of the members’ identities would not burden their First Amendment rights, and it reversed the order of the district court barring release of the records to PETA. Judge Fitzwater wrote separately to state that the Washington legislature had authority to adopt other exemptions that could curb the release

of identifying information of such committees when the individual members' safety is at risk.

Washington Court of Appeals

Discrimination

Ma v. Gagliardo

No. 83294-8-I (2/6/23) (unpublished)

The Washington Court of Appeals held that a volunteer swimming official established a prima facie case of discrimination based on evidence that he was required to complete an “unprecedented” number of mentoring sessions before being recommended for a referee role. Moses Ma was a volunteer swimming official who began the process of obtaining his local referee certification in 2015. That process required two steps: after training and test, he needed to complete several “novice” sessions in which he worked with a mentor; then after completion of the novice sessions, he could be recommended for final observation by an official authorized to issue certifications. On average, candidates are required to complete eight novice sessions before they can be recommended for observation. But Ma was required to perform 58 novice sessions. Officials who had worked with Ma described him as “a fair, highly competent, and committed official,” but noted that he needed to “work on timing.” Although Ma had many supporters, two members of the committee responsible for certifying officials—John Gagliardo and Richard Cox—found Ma difficult to work with, and Cox had made several comments that Ma should not be allowed to become a referee. When other officials learned that Ma had to complete more than 50 novice sessions, they were “shocked,” noting that the only other official required to complete such a high number was Diane Vo, who completed 38 novice sessions. Both Ma and Vo are of Asian descent. In May 2018, Ma attended a swim meet as a parent to watch his children compete. After the session, he had

conversation with another parent, Diane Zhang, during which Zhang began looking around for her daughter, and Ma told Zhang the location of her daughter. Zhang later reported that the interaction was “creepy,” and made her feel like her family was being watched. Following the incident, Gagliardo began communicating with regional and national officials about the committee's authority to suspend Ma's credentials and take disciplinary action. The committee eventually met on July 4 and voted to temporarily suspend Ma pending a hearing to discuss the committee's concerns. In September 2019, Ma sued Gagliardo and Cox for violations of the Washington Law Against Discrimination (WLAD). The trial court granted judgment for the defendants and dismissed Ma's complaint. The Court of Appeals reversed, holding that Ma had presented sufficient evidence that his experience in obtaining his referee certification and the later suspension of his credentials was discriminatory, so as to survive a motion to dismiss. The Court reasoned that Ma presented evidence that the only two officials required to complete a significant number of novice sessions were of Asian descent, raising an inference that they were treated unfavorably based on race. The Court further concluded that this heightened credential requirement, coupled with the later suspension of Ma's credentials, was a basis upon which a jury could find these actions were materially adverse. As a result, the Court reversed dismissal of Ma's discrimination complaint under the WLAD and remanded to the trial court for further proceedings.

PERC

Unit Clarification

Granite Falls School District

Decision 13628 – EDUC (2/14/23)

The Public Employment Relations Commission (PERC) dismissed a unit clarification petition filed by the Public School Employees of Washington



(PSE), which sought to add a certificated District Nurse position to its classified bargaining unit. The Granite Falls School District employs a District Nurse position to oversee the day-to-day functions of its school nurses. The District Nurse position has moved between the PSE and Granite Falls Education Association (GFEA) bargaining units multiple times beginning in 2000. The position initially did not require the employee to possess an educational staff associate (ESA) certificate from the Washington State Professional Educator Standards Board (PESB) and as a result, the District initially placed the District Nurse position in the PSE bargaining unit. However, when the position opened in June 2021, there were changes to sexual health education and HIV instruction standards, and the District decided to make an ESA certificate a requirement for the position so that the District Nurse could teach on those topics. In October 2021, the District Nurse resigned, and the District considered restructuring its delivery of nurse and health services to students. The District decided it would create a new ESA certificated Health Officer position, remove the ESA certification requirement for the District Nurse position, and then move the District Nurse position back to the PSE bargaining unit. However, the District ultimately concluded that it could not afford to create this new Health Officer position and as a result, it decided to maintain the ESA certification requirement for the District Nurse position. PSE filed a unit clarification petition with PERC in December 2021, seeking to add the District Nurse position to its bargaining unit. Following an evidentiary hearing, a PERC Examiner dismissed the PSE’s petition, holding that the District had authority to choose which credentials are required for the position based on its business needs. Because the District continued to require that the District Nurse position hold an ESA certificate, the Examiner ruled that it needed to remain in the GFEA certificated bargaining unit.

Porter Foster Rorick LLP

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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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