PORTER FOSTER RORICK LLP

March 2024

Washington School Law Update

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

Ninth Circuit Court of Appeals

IDEA

Los Angeles Unified School District v. A.O.
No. 22-55204, 22-55226 (6/7/23)

The Ninth Circuit Court of Appeals held that the Los Angeles Unified School District denied a student with hearing impairment a Free Appropriate Public Education (FAPE) when it failed to specify the frequency and duration of proposed speech therapy services the student would receive. The Court further held that the District's proposed program would not have provided the student with a meaningful educational benefit because it did not provide for individualized speech therapy, and it would have provided the student with minimal access to her general education peers. A.O. was born with profound hearing loss, and she received cochlear implants that were activated in January 2019, when she was two years old. Shortly after receiving cochlear implants, A.O.'s family had her assessed by a speech language pathologist, who determined that she was severely delayed in all aspects of spoken language development, but with appropriate services and support she could develop age-appropriate auditory, speech, and language skills. As her third birthday approached, the District conducted an initial evaluation for special education services and began to develop an Individualized Education Program (IEP). The District's assessments found that A.O.'s language skills were still emerging and that she was not ready for a general education environment without supports and services. The District recommended placing A.O. in a special education pre-school classroom for deaf and hard-of-hearing students at one of its elementary schools. Under the proposed IEP, A.O. would be with typically hearing students for 30 minutes each day at recess, during electives for 30 minutes each week, and during occasional holiday parties, spending 85 percent of her time in the special education classroom. The proposed IEP also provided that A.O. would receive language and speech therapy one to ten times per week for a total of 30 minutes per week, and audiology services one to five times per month for a total of 20 minutes per month. The IEP did not specify whether A.O. would receive language and speech therapy individually or in a group setting. The parents rejected the District's proposed IEP and enrolled A.O. in a private school that educates deaf and hard-of-hearing students in a blended classroom together with typically hearing children. A.O.'s parents then filed a due process hearing request, challenging the proposed IEP. Following an evidentiary hearing, the Administrative Law Judge (ALJ) concluded that the District's proposed educational program violated the Individuals

with Disabilities Education Act (IDEA) because it failed to educate A.O. in the least restrictive environment (LRE) and failed to specify clearly the frequency, duration, and structure of the speech therapy and audiology services. In reaching this conclusion, the ALJ relied upon the parents' expert witnesses, who testified that children with cochlear implants needed to have significant access to typically hearing same-aged peers who can serve as language models. The ALJ ordered the District to pay the cost of the private school in which A.O. had been enrolled. The District challenged the ALJ's decision by filing a lawsuit in federal district court, and following competing motions, the district court largely affirmed the ALJ's decision. However, the district court agreed with the District that the IDEA does not require the IEP to specify whether speech therapy would be provided in an individual or group setting, and it reversed the ALJ's decision on that basis. Both parties appealed, and the Ninth Circuit Court of Appeals reinstated the holding of the ALJ in its entirety, agreeing with the parents on all claims. The Ninth Circuit first held that the speech therapy frequency ranges rendered the proposed program unclear. The Court agreed with the ALJ's conclusion that offering speech therapy once a week for 30 minutes is very different from offering A.O. ten three-minute sessions per week, and such range made it difficult for the parents to understand whether those services would be of benefit to A.O. The Court further agreed with the ALJ that the District's proposed program, which provided for 85 percent of her time in a segregated classroom with other deaf and hard-of-hearing students did not provide A.O. sufficient interaction with typically hearing peers. Finally, the Ninth Circuit reversed the portion of the district court ruling in favor of the District, and it reinstated the ALJ's determination that A.O. required individual speech therapy in order to receive a FAPE. The Court noted that the IEP identified the speech therapy as "direct service (collaborative)," and it held that this description failed to provide the family with any indication of whether this would be individualized therapy or in a group setting. Judge Collins dissented and would have held that the proposed IEP provided A.O. with FAPE. Judge Collins disagreed with the majority's conclusion that the IDEA required the District to specify whether speech therapy would be individualized, and he found that the therapy frequency ranges did not impede the parent's right to participate, as they could have asked further questions regarding how those ranges would be implemented in practice. Finally, Judge Collins criticized the ALJ and majority for (in his view) comparing the private deaf and hard of hearing program to the District's proposed setting and then concluding that the District program was "inferior" based on such comparative analysis.

Title IX

Jane Doe 1 v. Manhattan Beach Unified School District
No. 23-55233 (2/22/24) (unpublished)

In an unpublished decision, the Ninth Circuit Court of Appeals affirmed dismissal of a high school student's Title IX lawsuit against a California school district, holding that the District did not violate Title IX by failing to expel the respondent student. Jane Doe was a high school student in the Manhattan Beach Unified School District who filed a Title IX complaint against another student, T.G., accusing T.G. of raping her off-campus. The District initiated an investigation and offered Doe several supportive measures including security escort, changes to Doe's class schedule, mental health counseling, and regulation of T.G.'s movement on campus. At Doe's request, the District also researched alternative ways for Doe to complete the school year, such as a shorter school day and online courses. Doe believed that those supportive measures were insufficient, and she requested that T.G. be expelled or removed from a school athletic team, which the District denied. Doe filed a lawsuit in federal district court, alleging that the District violated Title IX by refusing to discipline T.G. and also delaying its investigation into her complaint. The district court dismissed Doe's complaint on summary judgment. The Ninth Circuit affirmed, reasoning that to prevail, Doe had to demonstrate the District acted with "deliberate indifference" in responding to her Title IX complaint, which requires a showing that the response to harassment was "clearly unreasonable" in light of the circumstances. The Court cautioned that this is a high standard and was not met here given that the

District offered a range of supportive measures. The Court held that even if additional supportive measures could have been offered, a complainant is not entitled to the precise remedy preferred. The Court further rejected Doe's claim that the District's delay in investigating the complaint constituted deliberate indifference because there was no evidence the delay prejudiced Doe or was a deliberate attempt to sabotage resolution of her complaint. As a result, the court affirmed dismissal of Doe's lawsuit.

Washington Court of Appeals

Wrongful Termination

Worland v. Kitsap County
No. 57366-1-II (2/13/24) (unpublished)

The Washington Court of Appeals affirmed dismissal of a wrongful termination lawsuit filed by a former Kitsap County maintenance and operation specialist who was terminated in 2020. Bryan Worland worked in various roles for the County between 2012 and 2020, during which time he was a member of Teamsters Local 589 (Union). The Union and County are parties to a collective bargaining agreement (CBA) that requires aggrieved employees to resolve disputes with the County through the CBA grievance procedure, and if not satisfied, the Union may submit the matter to binding arbitration. In 2019, the County received several allegations of misconduct regarding Worland, and it initiated an investigation which found seven different types of misconduct. Following a pre-termination hearing, the County discharged Worland based on the substantiated misconduct. Worland filed a grievance challenging his termination through his Union, which hired a lawyer to represent Worland through the grievance proceedings and arbitration. At hearing, the Union argued that the County lacked just cause to terminate Worland and that his termination was pretext and retaliation for Worland previously voicing concern over his owed overtime. The arbitrator concluded that five of the seven misconduct allegations were supported by substantial evidence, and based on those five types of misconduct, the County had just cause to terminate Worland. The arbitrator further determined that the County afforded Worland due process and did not treat him disparately. Worland then filed a lawsuit for wrongful termination in violation of public policy in superior court, arguing that the County had fired him for complaining about underpayment and retaliation related to overtime. The trial court dismissed Worland's lawsuit on summary judgment, finding that Worland was precluded from relitigating whether his termination was lawful based on the arbitration decision. The Court of Appeals affirmed, holding that the doctrine of collateral estoppel precluded Worland from relitigating in superior court the identical issues that were raised during the arbitration. Because the arbitrator had already examined whether the County's reasons for terminating Worland were fair, honest, and supported by evidence, the Court held that the arbitrator's decision precluded Worland from bringing a subsequent wrongful discharge claim similarly premised on Worland's public-policy linked conduct. The Court further rejected Worland's argument that application of collateral estoppel unjustly denied him the right to a jury trial and lawyer of his choice, reasoning that the Union owed Worland a duty to represent him in good faith and there was no evidence the Union's lawyer took any action that was contrary to Worland's interests during the arbitration.

PFR Announcements

Public Records Disclosure Training

March 25, 9 am to 3:30 pm
Two Union Square Conference Center, Seattle

Join Liz Robertson and Olivia Hagel for a full day of hands-on training in processing public records requests and avoiding mistakes that lead to liability. This workshop will satisfy the legally-mandated training for district officials and public records officers. The cost is $250 per person and includes lunch. Attendance is limited to 40 people to facilitate small group activities and lots of interactive questions and answers. Register by sending an e-mail with your name, school district, and any purchase order information to info@pfrwa.com.

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Update Editors

Liz Robertson
elizabeth@pfrwa.com

Jay Schulkin
jay@pfrwa.com

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PORTER FOSTER RORICK LLP
601 Union Street | Suite 800
Seattle, Washington 98101
Tel (206) 622-0203 | Fax (206) 223-2003
www.pfrwa.com

Lance Andree
Lynette Baisch
Chase Bonwell
Cliff Foster
Olivia Hagel
Josh Halladay
Parker Howell
Rachel Miller
Buzz Porter
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