PORTER FOSTER RORICK LLP

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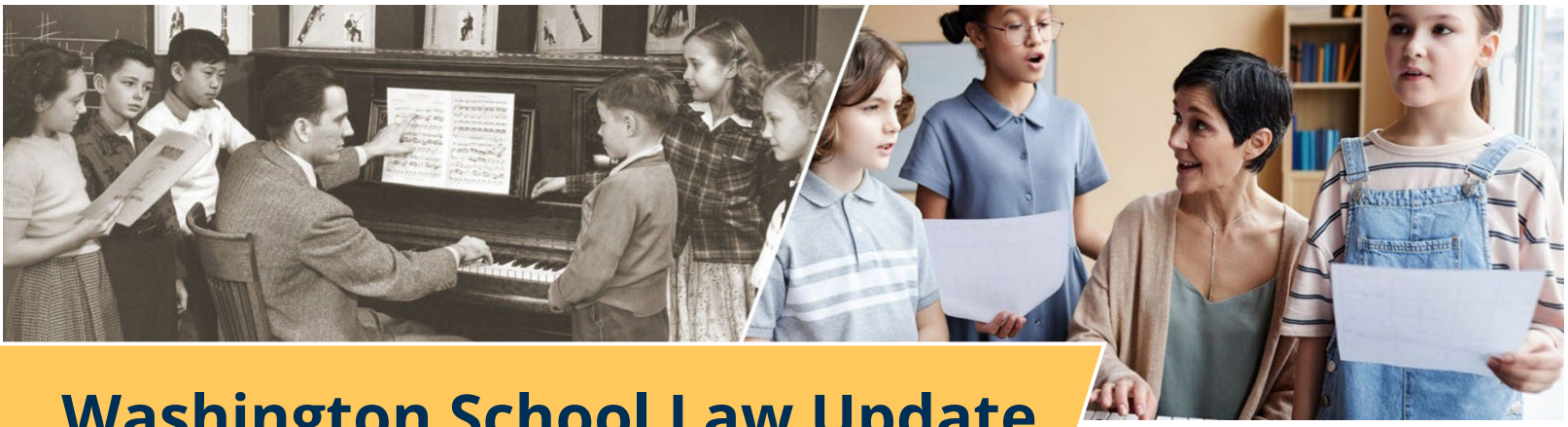

Washington School Law Update

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

Ninth Circuit Court of Appeals

IDEA

Hawai'i Disability Rights Center v. Kishimoto
Nos. 20-17521, 22-16524 (11/26/24)

The Ninth Circuit Court of Appeals held that an advocacy organization representing children with disabilities was not required to exhaust the administrative procedures of the Individuals with Disabilities Education Act (IDEA) prior to pursuing its claims arising under the American with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), or the Medicaid Act. Hawai'i Disability Rights Center (HDRC) is a federally-funded advocacy organization that represents children with developmental disabilities, including autism. The Hawai'i Department of Education (DOE) is the state agency responsible for providing children with disabilities a Free Appropriate Public Education (FAPE), and the Department of Human Services (DHS) is responsible for administering the state's Medicaid program. The DOE has a longstanding policy of providing school-based Applied Behavioral Analysis (ABA) to students with autism only if those services are "educationally relevant." Pursuant to that policy, except when ABA is educationally relevant, the DOE will not allow children with autism to access ABA during the school day even if those services are determined to be medically necessary, and it will not allow private providers onto school campuses to provide ABA services, regardless of whether those services are covered by Medicaid. In 2015, DHS issued memoranda stating that providers must provide a full range of treatment modalities, including ABA, for children under the age of 21 based on individualized determinations of medical necessity. However, DHS also issued guidance explaining that this requirement did not apply to the DOE, and that DOE may provide ABA or ABA-like services to a child when it relates to that child's educational needs. HDRC filed a complaint challenging this policy, alleging that it violated the IDEA, ADA, Section 504, and the Medicaid Act. DOE and DHS moved to dismiss the claims on summary judgment, arguing that the relief HDRC sought was available under the IDEA, and therefore, the organization was required to exhaust the IDEA's administrative procedures before filing a civil lawsuit. The district court agreed, and it dismissed HDRC's lawsuit in its entirety. The Ninth Circuit reversed in part and affirmed in part, holding that only HDRC's IDEA claims were barred by the exhaustion requirement. As to the non-IDEA claims, applying the test articulated by the U.S. Supreme Court in *Fry v. Napoleon Community Schools*, the Court analyzed whether: (1) the plaintiff could have brought the non-

IDEA claims if the conduct had occurred in a public facility that was not a school; and (2) an adult at the school, such as an employee or visitor, could have pursued essentially the same claim. The Court held that the answer to both questions was yes, reasoning that the ADA, Section 504, and Medicaid Act claims did not concern the provision of educational services and could have been filed against a public hospital that refused to allow ABA therapists to provide onsite services to children with autism. As a result, exhaustion was not required, and the Court reversed and remanded for further proceedings on the plaintiff's ADA, Section 504 and Medicaid Act claims.

Washington Court of Appeals

Discrimination

Bittner v. Symetra National Life Insurance Company
No. 85708-8-1 (10/28/24)

The Washington Court of Appeals reversed dismissal of a senior executive's retaliation claim against Symetra National Life Insurance Company ("Symetra"), holding that his advising subordinate employees to seek legal advice was protected by the Washington Law Against Discrimination (WLAD). Thomas Bittner was hired as a Regional Vice President of Sales for Symetra in 2010. In October 2014, one of Bittner's sales representatives disclosed to him that the company's Vice President of Underwriting had sexually harassed and verbally abused her. Bittner reported the allegations to Symetra's Human Resources (HR) department, which did not initiate an investigation, and instead told the employee to "work it out herself." After hearing how Symetra responded to the employee's complaint, Bittner advised the employee to seek legal advice. Also in 2014, a different employee confided in Bittner that her manager was sexually harassing her. Again, Bittner reported the allegation to HR and encouraged the employee to do the same. Symetra did not investigate the complaint, and directed Bittner to "take [his] nose out of other managers' business." Bittner later advised the second employee to seek legal advice after Symetra did not investigate her complaint. In 2018, Symetra issued Bittner a written directive to stop advising employees to seek legal advice and to "[k]now when to listen and keep quiet." Symetra also informed Bittner if he disobeyed the directives, he would be terminated. The day after the directive was sent, Bittner's supervisor began documenting performance issues with Bittner, and in February 2019, Symetra placed Bittner on a 60-day performance plan. Around this time, Bittner's supervisors were pressuring him to terminate the oldest member of his sales team, so that it could get "younger members" on the team who would be more productive. Bittner voiced his objection that this was age discrimination, and he encouraged the older employee to seek legal advice. Symetra decided in October 2019 to terminate Bittner's employment, but before it could, Bittner requested and was approved for family medical leave. Shortly before Bittner's leave expired, Symetra informed Bittner that it was filling his position and "restructuring" the role. In February 2020, Bittner accepted a position with another company, and Symetra considered Bittner to have resigned. Bittner filed a lawsuit against Symetra alleging in part retaliation in violation of the WLAD. The trial court dismissed Bittner's WLAD claim on summary judgment. Bittner's remaining claims proceeded to a jury trial, with the jury finding Symetra not liable. Bittner appealed dismissal of his WLAD claim, and the Court of Appeals reversed. The Court held that the superior court erred in finding that encouraging an employee to consult with a lawyer about workplace discrimination was not protected by the WLAD as a matter of law. The Court reasoned that the WLAD extends broad protections from retaliation to employees who oppose practices forbidden from the WLAD, which prohibits discrimination on the basis of sex and age. The Court held that Bittner's conduct of encouraging employees to seek legal advice could be viewed as having assisted in a WLAD proceeding, which would be protected by the WLAD. The Court held that interpreting the WLAD in a way that would not allow a high-level employee to oppose discriminatory practices would oppose the public policy of the WLAD to eradicate discrimination. The Court further rejected Symetra's claim that Bittner did not suffer adverse action because he voluntarily resigned, holding that the written directives, threats of termination, and placement on a performance plan also

constituted adverse actions. As a result, the Court reversed the dismissal of Bittner's WLAD retaliation claim and remanded the case for further proceedings.

Public Records Act

Thornewell v. Seattle School District No. 1
No. 85998-6-I (11/25/24) (unpublished)

The Washington Court of Appeals affirmed dismissal of a Public Records Act (PRA) lawsuit filed by parent Amanda Thornewell against the Seattle School District ("District"), holding that the District diligently responded to the request and produced all responsive records. In early 2020, Thornewell filed a complaint on behalf of her son with the District's Office of Student Civil Rights. Thornewell's attorney then emailed a public records request to the District seeking five categories of records including a wide range of emails, text messages, and records relating to the investigation into Thornewell's pending complaint. The District produced a total of 1,801 pages of responsive records in seven separate installments beginning in May 2020 and ending February 2021, and each installment was released by its estimated deadline. While responding to the public records request, the District was also investigating Thornewell's civil rights complaint. Internal emails showed that the District postponed releasing some records related to the ongoing investigation until the last two installments, due to a need to determine what documents were exempt while the investigation was ongoing. The District's legal counsel and public records officer conferred, and at one point determined that because the investigation was ongoing those records related to the investigation would be exempt under RCW 42.56.250, which exempts investigative records compiled by an employing agency in connection with a possible unfair labor practice. The civil rights investigation concluded in January 2021. After determining that RCW 42.56.250 did not apply, the District then released the responsive records related to the investigation without redaction in the sixth and seventh installments. Thornewell then filed a lawsuit against the District, alleging that it had violated the PRA by erroneously relying on the investigatory records exemption during the processing of its records request. The trial court dismissed the lawsuit, reasoning that the District had released all responsive records and had not exempted records under RCW 42.56.250. The Court of Appeals affirmed, holding that the installments were timely and that no record was withheld from production. The Court rejected the plaintiff's argument that the District violated the PRA by erroneously relying on the investigatory records exemption during its internal processing of the request. The Court reasoned that the District did not ultimately use the inapplicable exemption and that the PRA explicitly allows an agency time to determine whether an exemption applies, which is exactly what the District did. As a result, the Court affirmed dismissal of the complaint in its entirety.

PERC

Discrimination

Seattle School District
Decision 13982 (EDUC, 2024), 13983 (PECB, 2024) (11/4/24)

A PERC Examiner held that Seattle School District ("District") discriminated against three different union members by issuing a letter of counseling and including negative comments in their annual performance evaluations in reprisal for their protected union activity. The Seattle Education Association ("Association") represents three separate bargaining units, including employees who worked at Rainier View Elementary School (RVE) during the 2022-23 school year. Consistent with the collective bargaining agreements between the District and Association, staff at RVE convened a building leadership team (BLT) during the 2022-23 school year. The BLT is a committee of school administration and union-represented staff who meet periodically to facilitate collaborative, site-based decision making. Three Association members who worked at RVE, Laura Jensen, Julia Diaz, and Elizabeth Ward-Robertson, were members of the BLT. In November 2022, Jensen emailed the principal regarding the Association's concerns about substitute reimbursement, and she included other teachers she believed were impacted by substitute reimbursement pay, as well as the

Association president. In response, the principal issued Jensen a letter of counseling for unprofessional communication and directed Jensen to contact the principal "directly" to address concerns. In spring 2023, BLT meetings about the school budget became contentious, and the principal refused to allow Association members to discuss their proposed budget votes without her. Later, in Ward-Robertson's annual performance evaluation, the principal gave her an overall rating of excellent, but noted in the comments that Ward-Robertson's contributions to team meetings had been negative, self-serving, and not collaborative, and that she had engaged in "unprofessional conduct." The principal made similar comments in Diaz's and Jensen's annual evaluations, specifically regarding BLT meetings and the building budget for Diaz. The principal also determined that Diaz would be moved from a focused evaluation to a comprehensive evaluation during the next school year. On May 16, 2023, the Association filed three unfair labor practice (ULP) complaints against the District concerning the RVE principal's actions during the 2022-23 school year. The cases were consolidated for hearing before the Public Employment Relations Commission (PERC). Examiner Jessica Bradley determined that the District's actions toward Jensen, Diaz, and Ward-Robertson through their annual performance evaluations constituted unlawful discrimination in reprisal for protected union activity. The Examiner further held that the November 2022 letter of counseling issued to Jensen also constituted a discrimination ULP. The Examiner first held that the employees' roles in the BLT constituted protected union activity, as did Jensen's November email seeking clarification regarding substitute reimbursement. The Examiner held that the letter of counseling was a "textbook" example of interference with union activity, as it restricted Jensen's ability to include union representatives on emails to the principal. The Examiner further held that the negative comments in each employee's evaluation were heavily based on the principal's personal disagreements with their union advocacy through the BLT meetings. Finally, the Examiner held that the principal discriminated against Diaz in reprisal for protected union activity by placing her on a comprehensive evaluation cycle given that the principal's overall view of Diaz's job performance appeared to have been tainted by the principal's frustration with Diaz's union activity, as evidenced by the comments in the evaluation and the principal's testimony at hearing. As a result, the Examiner ordered the District to withdraw the letter of counseling issued to Jensen in November 2022, withdraw the 2022-23 written evaluations of the three employees, and conduct new evaluations for those employees.

Refusal to Bargain

King County
Decision 13984 (PECB, 2024)

A PERC Examiner held that King County ("County") committed a refusal to bargain unfair labor practice (ULP) by unilaterally contracting with a correctional facility to house adult in-custody inmates who were clients of attorneys working for the King County Department of Public Defense (DPD). Service Employees International Union, Local 925 ("Union") represents a bargaining unit of public employees working for the DPD, including attorneys who provide legal representation to individuals charged with a crime who cannot otherwise afford legal counsel. The County historically housed adult inmates in one of two correctional centers—the King County Correctional Facility located in Seattle and the Maleng Regional Justice Center located in Kent. Both facilities are close to DPD offices and courthouses, which allows the attorneys to efficiently meet with clients, attend court hearings, and work in their offices throughout the day. In October 2022, the County gave public notice that it intended to contract with the South Correctional Entity (SCORE) located in Kent to house some of the adult inmates. This change would require DPD attorneys to drive up to 60 minutes from their office to meet with clients housed at SCORE. The County did not notify the Union that it intended to contract with SCORE, but after learning about the decision, the Union demanded the County to maintain the status quo and bargain over the decision. The County agreed to bargain solely over the impact of its decision, meeting with the Union multiple times beginning in December 2022. The County launched its contract with SCORE as a pilot program in June 2023, and it

transferred 31 inmates to that facility. The Union filed a ULP complaint in September 2023, alleging in part that the County's decision to contract with SCORE was a mandatory subject of bargaining, and that the County had failed to meet its bargaining obligation by unilaterally implementing that contract without the Union's agreement. The case proceeded to a hearing before the Public Employment Relations Commission (PERC), and Examiner Christopher Casillas ruled that the County's decision to house inmates at SCORE was a mandatory subject of bargaining given the significant impact to the attorneys' working conditions. The Examiner acknowledged that the County had a significant managerial interest in contracting with outside entities to house inmates and ensure the viability of its operations, but applying the balancing test articulated in the *City of Richland* case, held that the impact to the employees' working conditions outweighed the management interest. The Examiner was particularly persuaded by the evidence that each attorney manages 70 cases at a time, and driving up to an hour to meet with one client significantly impacted their ability to efficiently complete their job duties. The Examiner ordered the County to cease and desist from contracting with outside entities to house inmates and to restore the status quo that existed prior to the implementation of the SCORE contract.

Representation Petition

Sound Transit
Decision 13992 (PECB, 2024) (11/20/24)

The Public Employment Relations Commission (PERC) granted a representation petition filed by the Amalgamated Transit Union Local 758 ("Union"), holding that the petitioned-for maintenance employees of Sound Transit shared a community of interest with its existing unit of transportation employees. Sound Transit's Tacoma Link Light Rail Division has two operational "sides" comprised of employees working in the Maintenance and Transportation Departments. The Union represents a bargaining unit comprised of vehicle operators from the Transportation side who are paid hourly, are eligible for overtime, submit timecards through Sound Transit's software system, and who receive the same benefits package as the maintenance employees. In February 2024, the Union filed a representation petition seeking to add a group of unrepresented maintenance employees, including "Maintenance Supervisors," to its existing bargaining unit. Sound Transit objected, arguing that the petitioned-for maintenance employees did not share a community of interest with the existing unit, and that the Maintenance Supervisors should be excluded under WAC 391-35-340, which presumptively excludes supervisory employees from bargaining units containing their rank-and-file subordinates. Following an evidentiary hearing, PERC's Executive Director ruled that the proposed bargaining unit was appropriate. The Executive Director first determined that the Maintenance Supervisors were not supervisors within the meaning of WAC 391-35-340 because they do not spend a preponderance of their time performing supervisory duties such as hiring, firing, and disciplining rank-and-file employees. Instead, the evidence at hearing showed that the Maintenance Supervisors merely participated in hiring committees and could make hiring recommendations, but they were unable to make the final hiring decisions. The Maintenance Supervisors had also never disciplined or effectively recommended discipline to rank-and-file employees, and their supervisory tasks largely included planning and directing work through verbal assignments or approving timecards, which was not sufficient to confer supervisory status. The Executive Director further rejected Sound Transit's argument that the maintenance employees lacked a community of interest with the transportation employees in the Union, relying on evidence that the employees received the same benefits package, worked alongside each other onsite, utilized the same software to track their time, and were subject to similar certification and pre-employment criteria. As a result, PERC ruled that the petitioned-for employees should be included in the proposed bargaining unit.

Refusal to Bargain

Arlington School District
Decision 13995 (PECB, 2024) (11/26/24)

A PERC Examiner held that the Arlington School District ("District") committed a refusal to bargain

unfair labor practice (ULP) when it refused to bargain with the Arlington Non-Rep Group (NRG), rejecting the District's argument that the NRG was not a union to which it owed a bargaining relationship. NRG consists of nonsupervisory office personnel who are excluded from the District's certificated bargaining unit and the existing Public School Employees (PSE) unit. The District has entered into collective bargaining agreements (CBAs) with the NRG since 1985, with the recognition clause of the 1985-88 agreement recognizing "the Exempt Classified Supervisors and District Office Personnel as a legal bargaining unit in the District." Subsequent agreements with the NRG contained the same recognition clause up until the 1998-2001 contract, when the title of the group changed to exclude supervisors, and the language of the agreement changed to refer to the NRG as "Classified Non-Represented" throughout. In 2014, the District created a new job position entitled Secretary to the Executive Director of Operations ("Secretary position"), which was included in the NRG unit, but ultimately filled by a current PSE member. The NRG had not negotiated over its CBA since 2009, and in August 2019, it demanded to bargain with the District primarily to negotiate employee pay. The District agreed to meet, but referred to the meeting as "Non-Rep Discussions" in its economic proposals and responsive documents. The following year, the superintendent signed a document entitled "Arlington School District Non-Represented Classified Employees Benefit Provision Schedule Effective September 1, 2020," which outlined NRG compensation and benefits, but contained no signature line for the NRG. In 2023, the employee occupying the Secretary position provided notice she intended to retire, and the District posted a position containing those job duties combined with those of another PSE unit position, and advertising it as being within the PSE bargaining unit. The NRG demanded to bargain over the transfer of those duties to the PSE bargaining unit. The District declined to bargain over this decision, informing the NRG that it did not believe it was a union. In August 2023, the NRG filed a complaint with the Public Employment Relations Commission (PERC), arguing in part that the District had a duty to bargain over its decision to transfer bargaining unit work performed by the Secretary position to the PSE. The District's primary argument at hearing was that it had no bargaining obligation with the NRG because the NRG did not participate in any union activities, such as collection of dues, labor management meetings, or new employee orientation, and it was therefore, not a labor union to which a bargaining obligation attached. Examiner Jessica Bradley rejected this argument, holding that although NRG lacked formal structure, the District had voluntarily recognized it as the exclusive bargaining representative for non-supervisory office professional employees back to 1985. Because there was no evidence that NRG stopped representing those employees or disclaimed its interest in doing so, the Examiner held that the District had an ongoing obligation to bargain over mandatory subjects, including the contracting out of the Secretary position. The Examiner ordered the District to return the duties of the Secretary position back to the NRG and to fulfill its bargaining obligations.

OSPI Regulations

Shared Leave; Sick Leave Cashout

Chapters 392-136 and 392-136A WAC; WSR 24-22-050

OSPI issued new regulations amending shared leave and sick leave cashout provisions effective November 27, 2024. The primary purpose of the new regulations is to align the provisions with comparable provisions covering state employees. Regarding shared leave, OSPI eliminated the requirement that to be eligible, an employee suffering from a job-related illness or injury must have diligently pursued and have been found ineligible for workers' compensation benefits. OSPI further capped shared leave at 25% of an employee's base salary while receiving workers' compensation wage replacement benefits. OSPI also allowed school districts to authorize shared leave beyond the default 522-day cap in extraordinary circumstances, and addressed the interplay between shared leave, parental leave, and a pregnancy disability. Regarding sick leave cashout, OSPI changed the rate of conversion from 25% of an employee's "full-time daily rate of

compensation" to 25% of an employee's "daily rate of pay at the employee's current hourly rate of compensation based on a 1.0 full-time equivalent staff."

PFR Announcements

2025 Bargaining Skills Workshops

January 27-28 and February 3-4

Porter Foster Rorick is once again partnering with the Washington School Personnel Association (WSPA) to present our popular workshops on collective bargaining skills. The workshops focus on the negotiating skills which help bargaining teams find agreements with public school unions. These skills are important for all members of a management bargaining team, particularly as we head into another challenging year for collective bargaining in 2025. The courses are taught by nine PFR attorneys who regularly represent school districts at bargaining tables with certificated and classified employee unions in Washington State and collectively have negotiated settlements for more than 800 open labor contracts over the past 30 years.

The Bargaining Skills 101 curriculum will be offered on Monday, January 27, and Monday, February 3. The Bargaining Skills 201 curriculum will be offered on Tuesday, January 28, and Tuesday, February 4. Attendees can choose to come to either or both Bargaining Skills 101 and Bargaining Skills 201. The workshops will be held at the Two Union Square Conference Center in downtown Seattle with each section limited to 40 participants to facilitate small group activities and personal interaction with the instructors.

Register to attend by sending an email to info@pfrwa.com with the name and email address for each attendee, the date(s) you wish to attend, and a purchase order number for invoicing your school district. The cost is $295 per day for WSPA members and $395 per day for non-members, with a $400 daily discount for districts who send a team of four or more. More information is available on our website or by contacting us at (206) 622-0203 or info@pfrwa.com.

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