PORTER FOSTER RORICK LLP

April 2025

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

First Amendment

Hartzell v. Marana Unified School District
No. 23-4310 (3/5/25)

The Ninth Circuit Court of Appeals held that an Arizona school district's policy prohibiting speech "that is offensive or inappropriate" was unconstitutional as applied to a parent who was banned from campus following an altercation with a building principal. The Court further held that the parent had established a viable First Amendment retaliation claim because a reasonable jury could conclude that the parent was banned from campus due to her "offensive or inappropriate" speech per district policy, rather than her conduct. Rebecca Hartzell is the parent of eight school-aged children in the Marana Unified School District (District), five of whom attended Dove Mountain K-CSTEM school (Dove Mountain) during the 2019-20 school year. Hartzell repeatedly expressed concerns to Dove Mountain Principal Andrea Divijak that Hartzell's children were scheduled to perform simultaneously in different locations, which meant she could not watch all her children perform. On February 7, 2020, Dove Mountain hosted an event where children presented on projects, and two of Hartzell's children were scheduled to present in different rooms simultaneously. Hartzell saw Divijak in a classroom, approached her, and "sarcastically" thanked Divijak for "making [her] choose which kid [she was] going to support again today." According to Hartzell, Divijak refused to speak with her further, turned away, at which point, Hartzell touched Divijak's arm and said, "stop, I'm talking to you." Divijak, on the other hand, claimed that Hartzell grabbed her wrist and prevented her from walking away. Marana Police Department officers approached Hartzell in the school parking lot, informed her they would be investigating an assault involving a teacher, and told her she was "trespassed from" the entire school property, meaning she could no longer drop off and pick up her children from Dove Mountain. Hartzell met with the superintendent on February 24, who informed her of the District's decision that she be banned from school grounds indefinitely. In doing so, the District relied on its policy, which prohibits in part "[u]se of speech or language that is offensive or inappropriate to the limited forum of the public school educational environment." The District did not lift the ban until June 2023. Meanwhile, the state filed misdemeanor assault charges against Hartzell, which were eventually dismissed. On February 4, 2021, Hartzell filed a lawsuit against the District and Divijak, alleging in part a First Amendment retaliation claim. The case proceeded to trial, and at the close of evidence, the

District moved for judgment as a matter of law on the retaliation claim, which the district court granted, meaning that the district court decided in favor of the District on that claim without allowing the jury to decide based on the evidence presented. Hartzell appealed, and the Ninth Circuit Court of Appeals reversed, holding that Hartzell's First Amendment retaliation claim was viable to the extent it relied on District policy because the portion of the District policy prohibiting "offensive and inappropriate" speech was unconstitutional. The Court noted that the special characteristics of the school environment allow the District to restrict speech that materially and substantially interferes with the operation of the school, but held that the District cannot constitutionally prohibit all speech that it deems offensive or inappropriate. As a result, the Court held that to the extent the District applied the portion of its policy barring speech that is "offensive or inappropriate" to Hartzell, it violated the First Amendment. The Court further noted that at trial, the parties presented conflicting evidence as to whether Hartzell was banned for her speech or whether she was banned for her conduct of grabbing Divijak's wrist. The Court held that this conflicting evidence presented a question of fact for the jury to decide, and therefore, the trial court erred by resolving the issue as a matter of law in favor of the District. As a result, the Court reversed Hartzell's First Amendment retaliation claim and remanded for further proceedings.

First Amendment

Jensen v. Brown
No. 23-2545 (3/10/25)

The Ninth Circuit Court of Appeals held that a math professor had a clearly established constitutional free speech right to criticize changes to his employer's curriculum without being disciplined. Lars Jensen is a math professor at a community college in Nevada, which is part of the state's higher education system. In June 2019, the Board of Regents adopted a new "co-requisite policy," which would place students in college level math classes even if they needed remedial math instruction. Jensen disagreed with the policy changes, and in December 2019, he emailed the entire math department faculty his concerns regarding these new coursework standards. In January 2020, the College held a "Math Summit" to discuss the policy implementation with the community, and during a question-and-answer session, Jensen attempted to criticize the policy, but a College administrator cut him off and ended the session. Afterward, Jensen created a handout discussing his concerns, including argument that the curriculum changes would lower the technical skills of graduates in the program, which he argued would impact employers in the community. During a break in the Math Summit, Jensen distributed his handout room to room. The administrator collected the copies, informed Jensen that he was being disruptive, and instructed him to not distribute the handout. Jensen defied the directive and continued to distribute the handout. Jensen was later reprimanded for defying this order, and during his 2019-20 annual performance evaluation, he received an "unsatisfactory" rating based upon his insubordination. During the next year's annual performance review, Jensen again received an "unsatisfactory" rating based upon his criticism at the Math Summit. The College then decided to terminate Jensen's employment based upon him receiving two "unsatisfactory" performances in a row. Jensen challenged his termination by filing a First Amendment retaliation complaint in federal court, naming only various administrators in their personal capacities as defendants. The district court dismissed Jensen's complaint, finding that his lawsuit against the individual administrators was barred by qualified immunity, a doctrine that shields government officials from personal liability unless they violated a "clearly established" constitutional right. The Ninth Circuit reversed and held that the administrators violated clearly established law when they disciplined Jensen for his speech. The Court first held that Jensen's criticism of the way the College operated its math department, and the resulting lower standards among graduates, was a matter of public concern, and therefore implicated free speech protection. The Court next cited its precedent in which it previously held that speech "related to scholarship or teaching," including curriculum, is entitled to free speech protection, even

if the speech is made pursuant to the employee's official duties. Because the speech was entitled to First Amendment protection, the College needed to show its interest in promoting efficiency in the services it performs outweighed Jensen's free speech rights. The Court held that the College could not meet that burden here because there was no evidence of actual, material and substantial disruption or reasonable prediction of disruption to the workplace. In reaching this conclusion, the Court held that the disobedience of a directive is not sufficient to show disruptive impact, and that the College needed to provide some indication that Jensen's speech would have impaired the College's functioning, which it failed to do. Finally, the Court held that the individual administrators were not barred from personal liability in this case because Ninth Circuit case law clearly established that a professor has the right to speak about a school's curriculum without facing discipline. As a result, the Court reversed dismissal of Jensen's First Amendment retaliation lawsuit and remanded for further proceedings.

Washington Court of Appeals

Public Records Act

Hood v. City of Vancouver
No. 59242-8-II (3/4/25)

The Washington Court of Appeals reversed dismissal of a Public Records Act (PRA) lawsuit filed by Eric Hood, holding that there remained a disputed issue of material fact as to whether the agency had conducted an adequate search for responsive emails. In May 2022, Hood submitted a records request to the City of Vancouver seeking "all records" related to a recent audit of its "organization," including "all records of its response to the audit or to the audit report, including changes to policy or practices." The City interpreted the request as seeking records related to the recent audit of the City, not the recent audit of the Downtown Redevelopment Authority (DRA), a local entity created by the City to manage construction and maintenance projects. The City provided Hood a link to the audit report on the state auditor's website. The City's public records system then sent Hood an automated email repeating his initial request, to which Hood responded that he "made a request to the Downtown Redevelopment Authority on 5/27." The City responded to this communication by providing Hood a link to the auditor's website and instructing him to type "Downtown Redevelopment Authority" in the search box to locate the DRA audit report. The City also requested clarification as to what documents other than the report Hood sought, to which Hood repeated his request almost verbatim. Internal emails showed that City staff believed Hood's request encompassed all "records sent/received; to/from; state auditor's office" regarding the DRA's recent audit. On June 21, 2022, the City disclosed 46 pages of responsive records, which did not include any emails, and it closed the request. Almost a year later, Hood filed a PRA lawsuit, claiming that the City had failed to search for and produce responsive records. Hood also submitted a records request to the state auditor, seeking the same documents he had requested from the City, and in response, the state auditor provided more than 100 emails, many of which were exchanged between its office and City employees mentioning the DRA. The trial court dismissed Hood's lawsuit on summary judgment, finding that the City's response was sufficient as a matter of law. The Court of Appeals reversed, holding that there remained a genuine issue of material fact as to whether the City performed an adequate search because it was not clear whether the City had searched for email records. The Court noted that the emails would have been responsive to Hood's request, and the City employees' declarations did not address whether the email databases were searched, and if not, why they were not searched. As a result, the Court reversed dismissal of Hood's lawsuit and remanded to the trial court for further proceedings.

Wrongful Termination

Contreras v. City of Yakima
No. 39868-4-III (3/20/25) (unpublished)

The Washington Court of Appeals affirmed dismissal of a bus driver's wrongful discharge in violation of public policy lawsuit, holding that she failed to allege sufficient evidence for a jury to conclude that her employer terminated her based upon her union

activity. Isabel Contreras was terminated as a bus operator with Yakima Transit following a series of unsafe bus driving incidents. The first incident occurred when a citizen reported that she had almost been hit by a city bus that ran a stop sign, which was later confirmed to be true based on the bus camera recordings. Yakima Transit imposed a written reprimand on Contreras for this incident. Three years later, a passenger reported that Contreras had charged her full bus fare despite being a senior citizen. Contreras's direct supervisor, Jeff Beaver, reviewed the video footage and confirmed that Contreras had charged the passenger full fare because she had failed to present her reduced fare identification card. The video also showed Contreras failing to stop at five stop signs. Beaver did not have authority to discipline Contreras for misconduct and instead filed an incident report regarding the fare incident. Beaver then started a separate investigation into the conduct of failing to stop at the stop signs. Beaver asked Contreras to meet regarding the fare incident, and he did not intend any discipline to arise from the meeting. Instead, he planned only to tell Contreras that he had informed the passenger that she needed to present her identification card to ride the bus with reduced fare. Nevertheless, Contreras requested that a union representative be present at the meeting, which Beaver did not appreciate. Following that meeting, Beaver continued to investigate Contreras's failure to stop at stop signs, which was substantiated, and led to the City of Yakima suspending Contreras. Four days after Contreras returned to work, a different passenger filed a complaint with Yakima Transit, alleging that Contreras had rudely spoken to her and drove the bus forward before she had time to sit and remove her baby from a stroller. These allegations were substantiated by video, and the city manager decided to terminate Contreras based upon this incident. Contreras filed a wrongful termination lawsuit against the City, arguing that the City had terminated her in violation of public policy based upon her union activity. The superior court dismissed the wrongful termination claim on summary judgment, and the Court of Appeals affirmed. The Court held that Contreras failed to allege sufficient facts for a jury to conclude that the city manager decided to terminate her based upon her requesting a union representative because there was no evidence the city manager knew of this request. The Court held that there was no evidence Beaver either directly or indirectly communicated about the union representation request to the city manager, or that the request influenced the city manager's decision to terminate. As a result, the Court affirmed dismissal of Contreras's wrongful termination claim.

Tort Claim Requirements

Flaherty v. Seattle Public School District
No. 86778-4-I (3/31/25) (unpublished)

The Washington Court of Appeals reversed dismissal of a former teacher's tort claims against Seattle Public Schools ("District") even though she did not follow statutory pre-litigation notice requirements under chapter 4.96 RCW, holding that she had "substantially complied" with the notice requirements. Jacquelyn Flaherty is a former elementary school teacher who alleged that the District had retaliated against her for reporting abusive treatment and for advocating on behalf of disadvantaged students of color, and had discriminated against her based upon her racial identity and disability. In July 2022, Flaherty through her attorney submitted to the District a completed "Seattle Public Schools Discrimination Complaint Form" and a supplement she entitled, "Seattle Public School Tort Claim." She sent these materials to the District's Human Resources Department even though the District's general counsel was the agent appointed to receive notice of tort claims and even though the District had designated its "Personal Injury Claim" form for tort claim notice purposes. Flaherty filed a lawsuit against the District in October 2022, making similar allegations as in her notice. The District moved to dismiss the lawsuit based on Flaherty's failure to comply with RCW 4.96.020, the state statute that governs the presentation of claims for damages to local government entities, including school districts. The superior court granted the District's motion, ruling that Flaherty had failed to comply with the statute by providing the wrong form to the wrong person and by not including a monetary amount of claimed damages, all of which were required by statute. The Court of Appeals reversed, reasoning that strict compliance

with the notice requirements is not required under existing precedent, and that a claim can move forward so long as the claimant made "a bona fide attempt" to comply with the claim filing statute. The Court held that Flaherty had substantially complied with the statute because the cover letter for her materials requested that Human Resources notify the District's attorney of her claim, and the form she used was very similar to the one that the District had designated under the notice statute. Finally, the Court held that failure to provide a dollar amount of claimed damages was not required under RCW 4.96.020 so long as the notice provides a description of the damages claimed so as to allow the government an opportunity to investigate, negotiate, and possibly settle claims, which Flaherty's notice provided. As a result, the Court reversed dismissal of Flaherty's lawsuit and remanded for further proceedings.

Washington School Law Update

The **Washington School Law Update** is published by Porter Foster Rorick LLP on or about the 5th of each month. To be added to or removed from our distribution list, simply send a request with your name, organization, and e-mail address to info@pfrwa.com.

Update Editors

Liz Robertson
elizabeth@pfrwa.com

Jay Schulkin
jay@pfrwa.com

April Masthead Photo Credit

Music class at Parkland School, Seattle, 1939. Seattle Post-Intelligencer Collection, Museum of History & Industry, Seattle. All rights reserved.

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