

07263-1

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NO. 67263-1

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION I

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CENTER FOR JUSTICE,

Appellant,

v.

ARLINGTON SCHOOL DISTRICT,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 7 AM 11:02

**ORIGINAL**

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## I. INTRODUCTION

Is something that happens 43 out of 46 times a “regular” occurrence or a “special” occurrence? That is the main issue for the Court decide. CFJ contends that holding a study session in conjunction with its twice-monthly regular meetings on all but three occasions over a two year period is a “regular” occurrence. The District says it is merely a “special” one. In this Reply, CFJ provides a statutory construction analysis of the meaning of “regular”. The District did not in its brief.

The District mistakenly argues at length that special meeting notice under the Open Public Meetings Act, ch. 42.30 RCW (“OPMA”) provides the public more notice than the regular meeting notice CFJ believes the OPMA requires for such regularly occurring meetings. Specifically, the District argues that the 24-hour notice to school board members and any newspaper requesting such notice (even though newspapers are not required to publish the notices) provides more notice to the public than notice of a regular meeting provided by a District ordinance.<sup>1</sup>

Twenty-four hours notice—that is not required to be given to the public at large—is not as good of notice as a regular meeting schedule

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<sup>1</sup> The District claims regular meeting notice is in a District “policy.” Response at 3. This is true, but not the whole story. School districts adopt rules by “policy” instead of “ordinance.” So a regular meeting schedule for the District would not be buried in a mere policy such as a policy manual; a regular meeting schedule “policy” would be the equivalent of a regular meeting schedule ordinance. Because “policy” is a misleading term, this brief will use the term “ordinance,” which more effectively conveys the kind of notice being provided.

describing months in advance when a meeting will occur. A regular meeting notice passed as an ordinance allows the public to know that, for example, meetings will occur on the second and fourth Mondays of each month as is the case here.

Even after the District's brief, it still remains puzzling why a governmental body would go to the trouble of providing continual special meeting notices when, instead, the District could simply adopt an ordinance—once, not before every meeting—and thereby comply with the OPMA. The District never explains why it sought to provide far more onerous (but far less effective) special meeting notices when it could have just adopted one ordinance and been done with it.

Indeed, the District spends much of its briefing discussing special meeting notices—but whether meeting notices for study sessions complied with the requirements for special meetings is not an issue on appeal. The issue in this appeal is whether the study sessions were regular meetings.

The District even delves into whether CFJ “changed” its legal theory in this case from special meeting notice violations to regular meeting notice violations. The Complaint alleged that the District held “study sessions” in violation of the OPMA and never conceded, as the District implies, that the “study sessions” were in fact special meetings.

The District makes much of the fact that CFJ did not seek special meeting notices until shortly after the Complaint was filed. The District seems to be suggesting that a complaint must have all the ultimate facts in it—at the very beginning of a case. This is not required, especially in Washington, which has mere notice pleading. Discovery can, and often does, lead to changes in a case. Cases evolve. This is permissible. If it were not permissible, there would not be rules allowing discovery and the amendment of complaints.

But the District’s focus on when regular meeting notice issue was advanced first misses the point: the only substantive issue in this appeal is whether study sessions are “regular” meetings when they preceded two years of the District’s twice-monthly regular meetings on all but three occasions.<sup>2</sup>

Turning to the attorney fees issue, the District first maligns CFJ and artificially paints CFJ as a money-hungry plaintiff, rather than what it is, a non-profit organization and public-interest lawfirm. But, like with the lengthy briefing on special meeting notices, this is not the real issue either. The issue is whether the trial court’s decision to award attorney fees based on the number of “violations” CFJ proved means the trial court must count all violations upon which CFJ undisputedly prevailed, or only half of

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<sup>2</sup> A second issue is the trial court’s mathematical error in calculating attorney fees. But the “regular” meeting issue is the only OPMA issue in this appeal.

them. The District urges a new standard—not used by the trial court or the OPMA—of the number of “claims” upon which a party prevails. It is not disputed that CFJ prevailed on two violations per executive session. The trial court, looking as it did at the number of “violations” CFJ prevailed upon, calculated attorney fees based on one—not two—violations per executive session. However, in calculating the total violations alleged (144), the Court did include the two violations per session. The math is simple: CFJ prevailed on twice as many violations as the trial court took into account in calculating fees.

## **II. LEGAL AUTHORITY AND ARGUMENT**

### **A. Study Sessions Occurred With the Normal Regular Meetings on Every Occasion Except for Three**

The District greatly downplays the regularity with which it holds study sessions as the District held only three twice-monthly regular meetings that were not preceded by a study session during the two years encompassed by this action. See CP 2345 (Julie Davis, assistant to superintendant and the Board of Directors for the Arlington School District, identifying the three regular meetings not preceded by a study session). This comes out to 43 out of 46 times.

If the Board’s study sessions are not considered to be regular meetings, then the term “regular” in the OPMA has no significance. Under the District’s view, if it wanted to hold meetings every time on the

second and fourth Mondays of the month but only give 24 hours notice (to themselves and a newspaper under no obligation to print the notice) then it could as long as it called them “special meetings.” The District should not be permitted to give a mere 24 hours notice for meetings that occur on nearly the same schedule as its normal regular meetings.

**1. The closest OPMA definition of “regular” meeting is “recurring.”**

The OPMA does not define “regular” meetings for local governments such as the District. The only mention of “regular” meetings for local governments is RCW 42.30.070, which provides, “A public agency shall provide a time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of the business of that body.”<sup>3</sup> No definition of “regular meetings” is provided. That is why the issue has been presented to this Court.

A portion of the OPMA defining “regular” meetings for state agencies, however, should be considered. RCW 42.30.075, which applies to state agencies, defines a “regular” meeting as “recurring meetings held in accordance with a periodic schedule declared by statute or rule.”

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<sup>3</sup> As previously noted, supra note 1, for a school district, “whatever other rule is required for the conduct of the business of that body” would be a “policy.” Because “policy” implies an informal directive instead of the “rule ... required for the conduct of the business of” the body, the more descriptive term “ordinance” will be used in this brief to describe the proclamation the District must use to announce its regular meeting schedule.

The District argues that the RCW 42.30.075 definition of “regular meetings” does not apply here because it only applies to state agencies. The District also seems to be arguing that the RCW 42.30.075 definition of “regular” meeting also does not apply because that definition discusses meetings “held in accordance with a periodic schedule declared by statute or rule” and the District never provided the periodic schedule. Thus, the District is arguing that because it did not provide periodic notice by ordinance—which is the entire OPMA issue in this case—that it was not required to provide periodic notice by ordinance. This is circular logic.

Additionally, CFJ is not arguing that RCW 42.30.075—a statute discussing state agencies—mandatorily applies to the District, which is not a state agency. Instead, CFJ is arguing that the Court, when determining the meaning of “regular meetings” in RCW 42.30.070, which is the statute applicable to local governments such as the District, should look to the definition of “regular meetings” in RCW 42.30.075.

There is another reason for the Court to consider the definition of “regular meetings” in RCW 42.30.075. The Court, when interpreting the meaning of “regular meetings” for local governments in RCW 42.30.070, should harmonize the definition of “regular meetings” (which is “recurring” meetings) from RCW 42.30.075. **See Roy v. City of Everett**, 118 Wn.2d 352, 357, 823 P.2d 1084 (1992) (“an act must be construed as

a whole, harmonizing all provisions to ensure proper construction.”)  
(citation omitted).

The District points to AGO 1971 No. 33, which discusses the concept of an agency with such irregular meetings that it does not have regular meetings and therefore would not be required to promulgate a regular meeting schedule. Brief of Respondent (“Response”) at 24. This is premised on an agency not holding regularly recurring meetings; the District did.

The District must admit that when a local government has regularly recurring meetings that it must formally announce the regular meeting schedule. Response at 24 (“To the extent that [public agencies] do [have regularly recurring meetings], however, they must identify the date and time of those meetings as provided in RCW 42.30.070.”) (citing AGO 1971 No. 33, p. 16). Precisely. When a local government has regularly recurring meetings—such as on all but three occasions—then the local government must formally announce the regular meeting schedule. This is what the District was required to do by the OPMA. It did not.

**2. The ordinary meaning of “regular” also supports the conclusion that the study sessions are “regular.”**

As previously noted, “regular meetings” is not defined in RCW 42.30.070. “A term left undefined in a statute is given its plain and

ordinary meaning as defined in a standard dictionary.” State v. Marohl, 170 Wn.2d 691, 699, 246 P.3d 177 (2010).

WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY gives the pertinent definition of “regular” as “recurring, attending or functioning at fixed or uniform intervals.” In almost every single instance, the Board held a study session prior to the normal regular meeting. See CP 2345, ¶4, and CP 1085-1120. Given that the District deems its regular meetings to be recurring at regular enough intervals to fall within the regular meeting schedule, so should the “study sessions” which occur on nearly the identical schedule.

**3. Other canons of statutory construction support the conclusion that the study sessions are “regular.”**

Courts do not interpret statutes in a manner leading to absurd results. “[S]tatutes should be construed to effect their purpose, and strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided.” State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). The purpose of the OPMA is stated in the legislative declaration contained in RCW 42.30.010:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the

intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

To effectuate this purpose, regular meetings of a governing body must be noticed “by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” RCW 42.30.070. This allows the public to consult whatever mechanism governs the conduct of the body, and obtain notice of meetings. It allows, for example, the public to know that a study session will be held on the second and fourth Mondays at 7:00 p.m., in the District Board Room—as they almost always were. See CP 1630-1634.

The above canon of statutory construction also requires an interpretation that is not “absurd.” To claim that meetings occurring with regularity on all but three occasions are not “regular” but rather “special” would be absurd.

#### **4. The District attempts to define “regular” as 100 percent regularity.**

The District tries to set an exceedingly high standard for “regular” meetings. It implies that a “regular” meeting is one which occurs every

single time “without exception.” Response at 27 (arguing “it would make little sense for the District to amend its regular meeting schedule to incorporate study sessions that do not always happen, or occasionally happen on days other than those listed in the regular meeting schedule”). A 100 percent regularity rate is not required—this would mean that for the District to have “regular” meetings it could never cancel or reschedule a meeting. The closest thing to a standard (at least for state agencies) in the OPMA is “recurring” meetings. RCW 42.30.075. Not 100 percent of the time; merely “recurring.” When the District holds study sessions in conjunction with its regular meeting schedule on all but three occasions over a period of two years, this is “recurring.”

**B. Special Meeting Notice Is Less Effective Than Regular Meeting Notice**

The District argues at length that the special meeting notice it provided is more effective than regular meeting notice. This is not correct.

First, as previously noted, special meeting notice provides notice only 24 hours advance. Regular meeting notice provides a schedule months—even years—in advance. Knowing that meetings occur on the second and fourth Monday of the month provides long-range notice.

Second, special meeting notice only must go to the Board members and media requesting such notice. Obviously, notice to Board members is not notice to the public.

Notice to a newspaper is not automatically notice to the public for four reasons. First, notice only goes to newspapers requesting such notice. Until January 4, 2007, no newspaper had requested notice of special meeting notices. Second, newspapers are not required to publish special meeting notices. Third, some newspapers, such as the Arlington Times, publish weekly instead of daily; notice of a special meeting in 24 hours will do no good if the newspaper is published only weekly. Fourth, even when a newspaper does publish a special meeting notice, the notices are usually interspersed with other advertising and would not likely be noticed by the public unless they were specifically seeking out special meeting notices one day in advance of the meeting. See e.g. CP 1147, 1154, 1162, 1170, 1179, 1188, 1195, 1203, 1226, 1231.

**C. Additional Steps Do not Equate to “More Notice”**

The District argues that it must do more work to provide notice of a special meeting so this must mean more notice is being provided. Response at 31 (“CFJ invites this Court to adopt a theory that would relieve the District of complying with the more demanding notice requirements of the OPMA, and would leave the public less informed and

ostensibly less engaged.”). Special meetings require that notice of the place and time, and notice of the business to be transacted, must be in writing, and must be given to the Board members and members of the media that have requested notice. RCW 42.30.080. Instead, regular meeting notice need only be provided once in “ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” RCW 42.30.070. However, the District fails to explain how it doing more work equates to more or better public notice. The less onerous regular meeting notice—adopting it once in an ordinance—provides much greater notice to the public. Less work and more notice—the District should want to provide regular meeting notice.

Another flaw in the District’s argument that it gave more notice (24 hours special meeting notice) than is required for a regular meeting is that the District never addresses the fact that regular meeting notice to the public weeks or months in advance is far better notice than 24-hour notice to the Board and any newspapers requesting it.

Providing a meeting schedule allows members of the public to be aware of when all meetings occur, such as the District does with what it deems to be its normal regular meetings. They are to be held on the second and fourth Monday of each month, at 7:00 p.m., in the District Board Room. See CP 1105-06 at ¶¶35-37, CP 1384-1405 (showing Board

Policy and amendments made to it). Despite the District’s argument that it is somehow a burden to require the “public to navigate through the District’s website for the dates and times of both its regular business meetings and study sessions” (Response at 30) the public has no trouble “navigating” to locate the dates and times of the normal regular meetings. To suggest that finding the meeting schedule on the District’s website is more difficult than locating a notice in a newspaper 24 hours prior to a meeting, for which no prior notice was given to anyone, is not persuasive.

**D. The District Treats the Term “Study Session” as Synonymous with “Special Meeting”**

The term “special meeting” appears in the OPMA, and has a specific definition and notice requirement; “study session,” on the other hand, is simply a name that the District gave to some of the meetings it holds. Throughout its brief, the District uses the terms interchangeably. They are not interchangeable—that is the whole issue in the case. This is reflective of the District’s argument throughout this case: The study sessions are special meetings because the District treated them as special meetings.

**E. The Trial Court’s Fee Award is Inconsistent with Its Ruling on the District’s Violations**

The trial court's award of attorney fees under a statute or contract is a matter of discretion, which will not be disturbed absent a clear

showing of abuse of discretion. **Boeing Co. v. Sierracin Corp.**, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). As stated in the Brief of Appellant, this does not give the trial court the freedom to employ a flawed method for calculating attorney fees. The State Supreme Court “has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award.” **Brand v. Department of Labor and Industries of State of Wash.**, 139 Wn.2d 659, 665, 989 P.2d 1111 (citing **Progressive Animal Welfare Soc'y v. University of Wash.**, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990)). Here, the trial court employed a flawed method of calculating fees as it reduced fees based on a percentage not reflective of the degree of success that the trial Court found in its ruling on Summary Judgment.

**1. The District did not clearly admit to the executive session violations.**

The District claims that it lost on every claim that was contested and therefore CFJ should receive very little attorney fees for this work, but this is not the case. The District refused to admit that it had violated the OPMA even based on facts that it had admitted, forcing Plaintiff to prove those violations. **See** CP 914-915 (counsel for CFJ asking the District to admit to violations); and CP 917-918 (District refusing to agree to

violations because “it does not agree that multiple violations occurred regarding those executive sessions”). After the District refused to agree that multiple violations occurred per meeting, the trial court found that the District had violated the OPMA on two grounds for each meeting specified. CP 966-67 (finding District violated the OPMA by failing to convene in a public meeting prior to going into executive session and for failing to announce purpose of executive sessions.).

**2. The error is mathematical, and does not involve a discretionary determination by the trial court.**

The District attempts to look to the number of executive sessions upon which CFJ prevailed in order to calculate the degree of success. Response at 35-37. However, the trial court used all alleged violations as the unit of measuring the percentage of success. CFJ alleged a total of 144 violations, which were based on the number of violations. Often there were multiple violations per meeting. So violations—not meeting dates—were the standard used by the trial court to determine the fraction. See CP 54 (“the successful claims were 21 out of 144 claims, constituting a degree of success of 14.6%.”)<sup>4</sup> That is, the trial court did not use executive sessions as the unit of measure when determining the number of violations (the bottom number in the fraction). If the court is going to employ the 144 claims (the total alleged violations calculated using three violations

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<sup>4</sup> The trial court refers to 144 “claims” but these are the 144 violations CFJ presented.

per executive session) in determining the degree of success, it must also employ the total number of total alleged violations upon which CFJ prevailed—42—to determine the success rate.

The second reason why “violations” instead of claims or executive session meeting dates is the standard for assessing attorney fees is that the OPMA attorney fee statute authorizes an award of attorney fees for a “violation” of the Act. RCW 42.30.120(2). So “violation” is the correct standard. And, as explained below, CFJ prevailed on 42—not 21—“violations.”

CFJ alleged a total of 144 violations of the OPMA. This number was compiled, in part, by alleging 3 separate violations of the OPMA for 32 executive sessions: (1) for failure to begin in an open public meeting prior to convening into an executive session; (2) for failure to announce a proper purpose for convening to executive session; and (3) for failure to announce a proper ending time prior to convening in executive session. See CP 1741-1749 (Motion for Summary Judgment alleging OPMA violations pertaining to executive sessions); and CP 1614-1628 (Chart submitted with Appellant’s Motion for Summary Judgment organizing the alleged OPMA violations by meeting date).<sup>5</sup>

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<sup>5</sup> CFJ alleged only two violations (failure to announce proper purpose and failure to announce an ending time) for a 33rd executive session. See CP 1616 (October 9, 2006,

As CFJ stated in its opening Brief, it obtained summary judgment on *two* of three separate OPMA violations for 21 executive sessions—for (1) failure to begin in an open meeting prior to convening an executive session and, (2) failure to announce a proper purpose for the executive session. See CP 965-969 (Order Granting Plaintiff’s Motion for Summary Judgment in Part); and CP 54 (Order on Attorney’s Fees). CFJ prevailed on 42 of the alleged 144 violations, yet the trial court’s order awarding attorney fees states that “the successful claims were 21 out of 144 claims, constituting a degree of success of 14.6%.” CP 54 (emphasis added).

However, the three separately alleged types of violations were counted as separate violations to obtain the total of 144 claimed violations of the OPMA—namely executive sessions upon which CFJ prevailed comprised 63 alleged violations of the OPMA. Because CFJ prevailed on two of the three alleged violations for the 21 executive sessions CFJ prevailed on, CFJ prevailed on 42 out of the 144 alleged violations. When awarding attorney fees the trial court did not take into account the fact that CFJ prevailed on two of three violations for the 21 executive sessions upon which it prevailed. By only counting half the victories, the trial court therefore erroneously concluded that CFJ had a success rate of half

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Meeting). CFJ did not prevail on claims for this executive session, therefore the fact that only two violations were alleged does not factor into the below discussion.

of its actual success rate. This flawed math deprived CFJ of a significant amount of attorney fees to which it was entitled.

For reasons described above, CFJ prevailed upon 29.2% (42 out of 144) of its claims, yet was only found to have prevailed on 14.6% (21 out of 144) of its claims when the Court calculated fees. **Compare** CP 965-69 (order granting summary judgment on (1) failure to begin in an open meeting prior to convening an executive session and, (2) failure to announce a proper purpose for the executive session for 21 executive sessions) with CP 54 (order stating “the successful claims were 21 out of 144 claims.”).

While the District argues that the award should be viewed in light of what it alleges was “minimal work” the fact is that the Court reduced the fees based on a calculation of success which was flawed, not due to the amount of work expended in the matter. If the figure was based solely on a finding that the time spent was excessive, and the trial court reduced the fees based on its estimate of what time was excessive, then it may be more difficult to disturb the lower court’s ruling. However, when a court finds that a party prevailed on a specific number of claims at one point in an action, and then awards a fee amount based on a different number, the trial court should not be given deference in its improper calculation. There is no deference for mathematical errors.

Additionally, contrary to the District's suggestion otherwise, CFJ is only requesting that the award of attorney fees should be doubled in the instances where the Court employed the 14.6% factor, not across the board. While the majority of the attorney fees were multiplied by this factor, CFJ stated in its opening brief: "the trial court multiplied the hours expended by CFJ's counsel on summary judgment by 14.6 percent, as well as multiplying "other time spent on the case" by 14.6 percent. CP 55." Brief of Appellant at 10-11. The mathematical error only applies to those fees to which the factor of 14.6 percent was applied and those calculations are reflected in the trial court's order. CFJ is not seeking to have *all* attorney fees doubled, though the majority of the fees were indeed reduced due to the trial court's improper methodology.

These flawed calculations constitute an improper method for the trial court to reduce CFJ's attorney fee award, and this Court should correct the lower court's flawed calculation.

**3. The District's attempt to analogize the fee award here to Public Records Act penalties is misplaced.**

The District's analogy to the discretion allowed in awarding *penalties* in a Public Records Act ("PRA") case is misplaced because it does not take into account that the error alleged is mathematical, and

because the PRA penalties serve a different function than the fee award in a case involving a fee shifting statute.<sup>6</sup>

The purpose of an award of penalties under the PRA is deterrence; and while the fee provisions can also serve as a deterrent, the main purpose of the fee shifting provision is to make it financially feasible for Plaintiffs to bring claims. **See Yousoufian v. Office of Ron Sims** 168 Wn.2d 444, 462-63, 229 P.3d 735 (2010) (“the purpose of the PRA's penalty provision is to deter improper denials of access to public records. The penalty must be an adequate incentive to induce future compliance.”); and **American Civil Liberties Union of Washington v. Blaine School Dist. No. 503**, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) (“ACLU”) (discussing how a liberal interpretation of the fee-shifting statute under the Public Records Act “is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records”). Here, because the Court’s award deals with fees as opposed to penalties, the court was dealing with an award making it financially feasible to bring the successful claims brought by Plaintiff, not an award whereby the focus was deterrence.

In the PRA penalty context, a Court is afforded a very large range of discretion; zero to one hundred dollars per day that access to records

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<sup>6</sup> Like the OPMA, the PRA is also a fee shifting statute, however, the District’s analogy is not to the PRA’s fee provision but rather to its penalty provision.

was denied. **See** RCW 42.56.550(4). The Court may further assess the penalty on a per record basis or may group records together in the assessment of the penalty. Further, the Court has numerous factors to assess when determining the proper award of a penalty, which primarily focus on the actions of the agency.

In assessing fees, the focus is what fees were reasonable in obtaining the successful result. The focus in the fee award context is what portion of the fees was reasonably incurred in bringing the successful portions of the lawsuit, rather than on the actions of the agency. Penalties are different than an award of attorney fees, which allow Plaintiffs to bring a suit for violative conduct, rather than punish the agency for the violation. Here, based on its finding that CFJ prevailed on 42 out of 144 alleged violations that it brought, the trial court should have assessed fees based on the 42 violations upon which it prevailed.

Finally, despite their dissimilarities, discretion in penalty calculations must still be supported by the evidence. **See Yousoufian**, 168 Wn.2d 458-59 (in discussing the trial court's assessment of penalties, "A trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take.") (internal quotations omitted). Here, the trial court found 42 violations, and it then awarded fees based on

only 21 violations. This is not a ruling within the Court's discretion; it is a methodical and mathematical error which should not be upheld by this Court.

**F. This Appeal is Not Frivolous**

An appeal is only "frivolous," permitting an award of attorney fees and costs to party who prevails on appeal, if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. See Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009). Raising even one debatable issue precludes a finding that the appeal as a whole is frivolous, and will preclude appellant from being forced to pay attorney fees as sanctions. See Advocates for Responsible Development v. Western Washington Growth Management Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010). "Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant." Id., citing Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007).

Respondent has offered nothing to demonstrate that this appeal is frivolous, in fact, the trial court, while ruling against CFJ, suggested the opposite:

With respect to the study session issue, while I don't agree with the legal theories that have been advanced, I can't say that no one could advance them or could find the regular versus special aspect of it even cognizable.

October 23, 2009, RP at 75-76.

Further, Respondent faults CFJ because it “merely repeats the arguments the [trial] Court rejected” when an appellant is limited to doing just that—repeating arguments made at trial. Generally, an Appellant is precluded from making new arguments on appeal, and the entire purpose of an appeal is to argue that the lower court erred in its assessment of the arguments presented below—not to allow the parties to bring a different case on appeal. See e.g., State v. Sauve, 100 Wn.2d 84, 86-87, 666 P.2d 894 (1983) (appellate court will not consider issues not raised before trial court unless they are constitutional issues; but will not consider constitutional issues raised in second appeal that could have been raised in first appeal); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.”). By the District’s logic, it should be sanctioned as well for repeating the arguments it made at trial, and lost.

In the District’s reply for its motion for summary judgment below, the District argued it was entitled to CR 11 sanctions in part because the “study-sessions-as-regular-meetings argument” was a “barren” claim and

that “plaintiff never argued that defendant's study sessions constituted regular meetings before it filed its summary judgment motion.” See CP 2372. The Court denied the District’s plea for sanctions. See CP 973 (“Defendant’s request for CR 11 sanctions against Plaintiff is DENIED.”)

Finally, there are at the very least debatable issues pertaining to the award of fees below. Where the Court found 42 violations, but only awarded fees based on half of that amount, there is certainly a debatable issue present. While the District argues that the court employed the “pertinent legal standards” it largely ignores the application of the Court’s improper math to arrive at a reduction that is not reflective of the success obtained in this action. CFJ is not arguing that courts do not have discretion when it comes to awarding attorney fees, but trial court’s should not be permitted to rest on improper methodology for the calculation of fees as being within its “discretion.” This is precisely the type of scenario whereby appellate courts have overturned fee awards. Progressive Animal Welfare Soc’y v. University of Wash., 114 Wn.2d 677, 690, 790 P.2d 604 (1990) (“a trial court's determination regarding attorneys' fees utilizing an improper criteria or method requires correction”).

**G. Fees and Costs on Appeal**

Again, if this court finds that the Board violated the OPMA, CFJ requests attorney’s fees and costs incurred in bringing this appeal pursuant

to RAP 18.1 and RCW 42.30.120(2) (mandating the award of all costs including reasonable attorney fees to a party who prevails against an agency under the OPMA). Further, if this court finds for CFJ on any grounds, CFJ requests reasonable expenses incurred in bringing this appeal pursuant to RAP 14.3.

### III. CONCLUSION

Based on the foregoing, this Court should find that the Arlington School District's longstanding practice of holding regularly recurring meetings it terms "study sessions" nearly every time it holds its normal regular meetings were improperly noticed in violation of the OPMA. The Board treated these meetings as "special meetings" but, the OPMA does not provide for public notice of special meetings. Therefore, the Board has been able to conduct regular meetings, occurring with nearly the same regularity as its normal regular meetings with no requirement of public notice. Further, this Court should overturn the trial Court's miscalculation of attorney fees and award Appellant its additional fees.

Respectfully submitted this 30th day of November, 2011.

By: 

Greg Overstreet, WSBA #26642  
Chris Roslaniec, WSBA #40568



**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on November 30, 2011, I caused the delivery by U.S. Mail and by email pursuant to agreement of a copy of the foregoing Brief of Appellant to:

David Hokit  
Andrea Schiers  
555 W Smith St  
PO Box 140  
Kent, WA 98035-0140

Dated this 30th day of November, 2011 at Seattle, Washington.



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Chris Roslaniec