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EDUCATION LAW REPORT

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In This Issue

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SCHOOL DISTRICT EFFORT TO PROHIBIT STUDENTS' POLITICAL ATTIRE ENJOINED

Morgan v. Mifflin County School District, Case No. 1:2--CV-01930 (M.D. Pa. 2020). The United States District Court for the Middle District of Pennsylvania issued a restraining order enjoining a school district policy prohibiting students from wearing attire expressing support for a political candidate.

BACKGROUND

From the start of the 2020-21 academic school year, Morgan Earnest, a 15-year old high school student, wore a mask supporting then President Donald Trump's campaign every day that she attended school. Earnest's mask depicted the words "Women for Trump." On two occasions, Earnest also wore a t-shirt supporting Trump's reelection campaign to school. The front of this shirt bore the words "Trump 2020 Keep America Great," and the back of the shirt contained the words "Trump 2020 The Sequel Make Liberals Cry Again."

In October, Mifflin County School District emailed a message to families of students in the district that stated complaints had been received indicating there was a disruption to the education of the students because of masks, articles of clothing and other items that were worn at school, and stated, in part:

> Starting on Monday October 5, 2020, no masks, articles of clothing or other items may be worn or otherwise brought onto Mifflin County School District property, which contain political speech or symbolize a particular political viewpoint, including but not limited to confederate flags and swastikas, as well as BLM logos or phrases associated with that movement…

Subsequently, Earnest attended school wearing her mask and t-shirt supporting the Trump campaign. That morning, at around 9:00 a.m., Earnest was sent to the administrator's office and asked to either turn her mask and shirt inside-out or go home for the remainder of the school day because her articles of clothing were in violation of the District's new policy. Earnest declined to turn her mask or t-shirt inside-out, and was therefore sent home for the remainder of the school day. She also was warned that she would be sent home again if she wore a mask or t-shirt expressing a political viewpoint in the future.

On October 20, 2020, Earnest filed a lawsuit in federal court alleging violations of her First and 14th Amendment rights and requesting a temporary restraining order and preliminary injunction against Mifflin County. The court determined that Earnest was likely to prevail on the merits of her challenge to the constitutionality of Mifflin County's policy and granted a temporary restraining order enjoining Mifflin County from enforcing its policy against Earnest for wearing clothing indicating support for a political candidate.

continued

DISCUSSION

The court acknowledged that, while school districts have more latitude to regulate the conduct of their students in school than the state is typically allowed under the First Amendment, a school's authority to regulate the conduct of its students is not unlimited. Citing the seminal U.S. Supreme Court case in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), in which that court cautioned that students do not "shed their constitutional rights to freedom of speech and expression at the schoolhouse gate," the federal court recognized that a school's interest in avoiding material and substantial disruptions in learning must be balanced against the students' rights which such regulation may seek to abridge.

In reviewing prior free speech cases from the school context, the court noted that a school district's ability to demonstrate substantial disruption is often determinative in cases challenging a restriction on students' right to free speech. Here, the court found no evidence that Earnest's attire resulted in any disruption that would cause Mifflin County to have a "well-founded fear of genuine disruption in the form of substantially interfering with school operations." The court opined that "where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association." The court concluded that the reactions of some based on the perceived association of a presidential candidate with views with which they disagree was not a valid reason to prohibit passive political speech.

PRACTICAL ADVICE

A general fear or apprehension of disturbance is not enough to overcome the right to freedom of expression in the school setting, even in the current climate of considerable political divisiveness. Those restrictions upon student speech that have been affirmed by courts (such as the racial tension arising from the display of the Confederate flag) have been justified by evidence of demonstrable disruptive effects.

The First Amendment would have little meaning if schools could justify prohibition of speech that may offend others simply because the recipients disagree with the political views advocated or the political candidate supported. Instead, school officials considering restrictions on messages displayed on students' attire must be able to identify particular and concrete bases for concluding that such expression has or will cause genuine disruption that interferes with school operations or the rights of others.

OFFICIAL ACTION TAKEN ON ADDED AGENDA ITEMS WITHOUT THE OPPORTUNITY FOR PUBLIC COMMENT VIOLATED THE SUNSHINE ACT

Mid-Mon Valley Publishing Company, LLC, d/b/a Mon Valley Independent and Tina O'Dell v. City of Monessen, a Third-Class City, and Matt Shorraw, as Mayor, No. 581 of 2020 (Westmoreland County Common Pleas Court, December 11, 2020). Action taken by a city council on items added to a meeting agenda without providing the opportunity for prior public comment violated the Sunshine Act, but was not invalidated due to ratification at a subsequent public meeting.

BACKGROUND

Suit was brought by the Mon Valley Independent newspaper and a resident of the City of Monessen in Westmoreland County Common Pleas Court against both the City and its Mayor for actions taken at a reorganization meeting held on January 6, 2020. The Agenda provided for public comment during the meeting on Agenda items only, with comment on non-Agenda items allowed only immediately prior to adjournment. Following public comment at the beginning of the meeting, the Mayor, who is also a voting member of Council under the Third-Class City Code, moved to fire the City Solicitor. The Motion was promptly seconded and passed. The majority of Council then passed a Motion to hire a replacement. Council went

on to remove the City Administrator and appoint a replacement, as well as to pass Motions limiting access to City cameras and rescinding an appointment to the City Sewage Authority and advertising for potential appointees. None of these items had been listed on the Agenda, and no public comment on them was received prior to these official actions. All of these decisions were ratified at a subsequent public voting meeting, in which public comment was offered on each item.

DISCUSSION

The Court determined that all of the actions taken at the January 6, 2020 Reorganization Meeting were prima facie violations of Pennsylvania Sunshine Act. Although public comment was permitted at the beginning of the meeting on the Agenda, the subjects of these Motions were not listed. Therefore, the required opportunity for public comment was not allowed. To the contrary, the Court noted the Motions were "brought up abruptly and voted upon immediately with…absolutely no opportunity for public comment prior to the official action of voting." The Sunshine Act permits a Court to enter an Order prohibiting challenged actions from taking effect until a judicial determination of legality is made. It also empowers a Court to exercise its discretion to invalidate actions that violate the Sunshine Act, 65 Pa. C.S.A. §713. In this case, the Court decided not to rescind the actions taken by Council, because they were properly ratified following appropriate opportunities for public comment at a subsequent meeting. Nevertheless, the Court entered Judgment in favor of the newspaper and the resident, holding that the Council had acted illegally at the Reorganization Meeting on January 6, 2020 because the public was not afforded any opportunity to comment on any of the Motions concerning the Solicitor, Administrator, access to City cameras or rescission of the appointment to the Sewage Authority vacancy. The Court also ordered the Mayor, as well as all of the members to Council, to undergo training on the Sunshine Act by the Pennsylvania Office of Open Records within thirty (30) days of the Court's Order, even though the members of Council were not individual Defendants in the case.

The Sunshine Act permits a Court to award reasonable attorneys' fees and costs of litigation when officials "willfully or with wanton disregard" violate the Sunshine Act. 65 Pa. C.S.A. §714.1. Fortunately for the Defendants, the Court attributed their violations to a "mere lack of knowledge or ignorance," so the City and Mayor did not have to pay the newspaper and resident's attorneys' fees and costs. Similarly, the Sunshine Act permits a Court to impose fines on officials who act with the "intent and purpose" of violating the Act. Again, the Court determined that fines were not appropriate, because the violations were not intentional.

PRACTICAL ADVICE

1 Courts will enforce the mandate of the Sunshine Act to allow the public to comment **before** any official action. The best practice is for officials who anticipate debate or action on a matter that is not listed on the Agenda is to move to amend the Agenda, so that the public and officials are on notice that official action may take place and are given a full opportunity to comment.

2 Courts will generally not invalidate an action adopted in violation of the Sunshine Act, when that the action is ratified at a subsequent meeting that meets all of the requirements of the Sunshine Act. For this reason, when violations inadvertently occur, a sound course of action is to ratify any action in conformity with Sunshine Act requirements.

3 Although the Defendants, in this case were spared paying attorneys' fees, costs of litigation or fines, public officials must be vigilant to avoid violating the Sunshine Act. Other Courts might not be as understanding where important issues are raised and voted on without the requisite public input.

COURT DENIES INJUNCTION TO STUDENT CLAIMING DENIAL OF RIGHTS TO PARTICIPATE IN EXTRACURRICULAR ACTIVITY

T.W., a minor, through Waltman v. Southern Columbia Area School District (2020 WL 7027636) (M.D. Pa. 2020), Federal District Court for Middle District of Pennsylvania denies student's and parents' motion for preliminary injunction to lift suspension and allow student to participate in athletics for 2020-2021 school year.

BACKGROUND

A high school student, T.W., and his parents commenced a civil rights action against the Southern Columbia School District after the student was suspended from participating in all school athletic programs for the 2020-2021 school year for violating the School District's Code of Conduct. The District formalized its Code of Conduct in its High School Student Handbook. Indicating that participation in extracurricular activities is a privilege and not a right, Section VII of the Handbook set forth that those who participate in extracurricular activities were held to a higher standard than those who do not participate. Moreover, the Code stated that it would be enforced against students whether the offense occurred on or off school property. In particular, under a rule applicable only to those in extracurricular activities, students subject to the Handbook's Drug and Alcohol Policy were prohibited from attending any event in which underage drinking, smoking, or drug use was occurring. Actual consumption of alcohol or drugs was not required to establish a violation. The Handbook also set forth that when the student learns a violation has occurred, the principal/designee must give the student oral notice of the allegations and an opportunity to explain or defend his or her conduct.

T.W., a 17 year old student-athlete, had been suspended three times for violating the Drug and Alcohol Policy. First in November 2019, this student was arrested for driving under the influence and the District suspended the student for 25% of the games for the football season. Next in February 2020, T.W. attended a party in which underage drinking occurred, although he did not consume alcohol or drugs there. For this, the District suspended T.W. for the remainder of the school year and the first four football games for the 2020-2021 school year (the District eventually lifted the football game suspension). Third, on September 5, 2020, T.W. again attended a party where underage drinking occurred. This information was eventually conveyed to the high school principal.

The principal called the parents and scheduled a meeting with them and the student that day. At the meeting, after asking T.W. if he was in fact at the party, the stepfather directed T.W. not to answer any questions and demanded the principal present his evidence supporting the charges. The principal declined and the student and his family got up and left. T.W. did not contest that he was actually present at the party and he did not deny that he violated the Handbook's policy. Though the District sent a letter to the parents providing them an opportunity to seek an informal hearing with the District, the student's family never responded. Per the letter, T.W. was subsequently suspended from participating in athletics for a full calendar year.

DISCUSSION

The student and the parents filed suit against the School District in the Federal District Court for the Middle District of Pennsylvania challenging the constitutionality of the District's policy forbidding students from attending parties where underage drinking or drug use occurred. The plaintiffs brought equal protection, procedural due process, substantive due process and state law claims challenging the policy. They sought both a temporary restraining order and a preliminary injunction enjoining the District from enforcing this policy against T.W., thereby allowing him to participate in athletics for the remainder of the 2020-2021 school year.

In reviewing the request for an injunction, the trial court analyzed the student's equal protection claim based on the student's challenge of two aspects of the District Handbook. The student and family argued that the Drug and Alcohol Policy unconstitutionally discriminated against student-athletes both on its surface, and in operation, as it provided punishments that can only be applied to student-athletes.

The court found, though, that this discrimination claim was incorrect because Section VII as a whole did not distinguish between student-athletes and those participating in other extracurricular activities, as its language applied to all students. But even if T.W. could show that the Drug and Alcohol Policy on its face did discriminate against student-athletes, the plaintiffs failed to show why such discrimination was legally irrational. The District's Handbook stated that participation in interscholastic sports was to teach students positive qualities. According to the court, prohibiting student-athletes from attending parties where alcohol is present is rationally related to promoting these values. The court also found issue with the plaintiffs' argument that all students who participate in extracurricular activities must be treated exactly the same way: to accept the student's argument, every restriction that applies solely to student-athletes would be thrown into doubt.

The student's challenge to the Drug and Alcohol Policy as applied in operation also failed because there was no evidence demonstrating that the Policy was discriminatorily enforced against athletes. The court found this argument was premised entirely on the plaintiffs' subjective evaluation of the wisdom of the District's policy regulating those who participate in extracurricular activities. Instead, it was clearly rational for the District to condition the privilege of participating in extracurriculars on compliance with a heightened code of conduct. If a student did not want to be subject to these rules he or she could choose not to participate.

On the substantive due process claim, the court noted that under civil rights laws a plaintiff must prove a right or interest protected by the substantive due process clause of the federal constitution and that deprivation of that protected interest shocks the conscious. T.W.'s parents asserted that the substantive right at issue was their right as T.W.'s parents to direct and control their children's upbringing and education.

The parents, however, had not shown that the District infringed upon their right to control and direct the student's upbringing and education. The parents argued that the District's rule punishing students for attending parties where underage drinking or drug use occurred prohibits the parent from making decisions as to where and when it is acceptable for their children to socialize under what circumstances. But the court found that the parents do not show why "making these decisions as to where and when" should be considered a constitutional right. Even if it were such a right, the court found the District had a valid interest in discouraging and preventing alcohol and drug use among its students.

Turning to the plaintiffs' procedural due process claims, the court reiterated that students have a recognized property interest in education. This right, however, is in the "entire process of education" **not** numerous individual property rights as to various activities that combine to form a student's entire education. Generally, students do not have a recognized free-standing property interest in participating in athletic and extracurricular activities. However, such a property interest can be created by a state entity where it guarantees that it will provide students with due process.

Here the District had established a legal property interest in participating in extracurricular activities through the Handbook statement that all students subject to Section VII will be provided due process throughout disciplinary procedures. The District did provide T.W. with sufficient due process so long as it gave him oral or written notice of the charges against him, and if he denied the charges, an opportunity to present his side of the story. T.W. argued that he had not been provided due process because the principal did not to provide him with the evidence against him, and without the evidence the District could not possibly have given the student sufficient notice.

But the court held that this argument was without merit. The District was not required to provide names of witnesses or any explanation of the basis of its reasonable suspicion. The District would need to present its evidence to the student if he challenged the factual basis of these charges, but the fact that the T.W. did not challenge these charges essentially undermined this claim. The student could not now circumvent the procedure set forth by the District that the student decided not to follow.

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The court then looked at the remaining standards as to the issuance of a temporary restraining order. It was satisfied that the risk of harm from enjoining the District's ability to consistently enforce its disciplinary rules outweighed the risk that the student faced as a result of his suspension. As well as T.W. and his parents not proving a likelihood of success on their claims, the public had a strong interest in deterring underage drinking among students that would be harmed by enjoining the student's suspension. Taken together, the student and his parents did not meet their burden and the motion for injunction was denied.

PRACTICAL ADVICE

School districts that wish to require good behavior inside and outside of school as a condition for extracurricular behavior may do so, as long as thorough rules are established and punishments are proportional to conduct that is sought to be controlled. More important, though, schools must scrupulously follow due process procedures established so that parents and students who disagree with disciplinary outcomes cannot successfully turn to the courts to overturn disliked decisions.

IMAGES OF STUDENTS MUST BE REMOVED FROM SCHOOL BUS SURVEILLANCE VIDEO WHEN RESPONDING TO A REQUEST FOR RECORDS UNDER THE RIGHT-TO-KNOW LAW

Easton Area Sch. Dist. v. Miller, 232 A.3d 716 (Pa. 2020). Pennsylvania Supreme Court holds that images of students in a school bus surveillance video are "educational records" under FERPA and must be redacted before releasing the video in respond to a request for records under the RTKL.

BACKGROUND

Requester submitted a request for records under the Pennsylvania Right-to-Know Law ("RTKL") seeking a school bus surveillance video involving an elementary school teacher who, according to Requester, had roughly physically disciplined a child on a school bus outside of the school.

The school district denied the request on the basis that the recording was an educational record of the disciplined child under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and that if a record is exempt from public disclosure pursuant to FERPA, it is also exempt from public disclosure under the RTKL. 65 P.S. §§ 102, 305(a)(3).

The Commonwealth Court, however, concluded that the video was not an "education record" of the student within the meaning of FERPA, because, even though it captured individually identifiable images of students, it was not "directly related" to the students who were portrayed. Instead, the Commonwealth Court found that the footage was "directly related" to the teacher whose behavior was at issue. In the words of the Commonwealth Court: "[A] video…is only an educational record with respect to a student in the video for whom the video may have consequences." *Id*.

DISCUSSION

The Supreme Court reversed the Commonwealth Court and held that while the video itself is a public record subject to disclosure, the images the video contains depicting the personally identifiable information of students – i.e., the students' images on the video – are exempt from public disclosure pursuant to FERPA, and, therefore, also exempt from public disclosure under the RTKL. 65 P.S. §§ 102, 305(a)(3).

In reaching this decision, the Court cited to, and relied upon, the Unites States Department of Education's online FAQs on Photos and Videos under FERPA ("Guidance") which sets forth factors that should be considered in determining whether a photo or video is "directly related" to a student:

- The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);

- The photo or video contains a depiction of an activity:
  - — that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);...
  - — that shows a student getting injured, attacked, victimized, ill, or having a health emergency; ...or
- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.

The Guidance further provides that "[a] photo or video should not be considered directly related to a student in the absence of these factors and if the student's image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual."

The Guidance also provides a list of examples of videos considered education records, specifically stating that a: "school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting." The Court noted that the Department has also advised, in separate guidance, that a school surveillance video depicting a hazing incident is an education record directly related to both the perpetrators and the victims.

In light of the Guidance, the Court rejected the Commonwealth Court's conclusion that the recorded interaction involving a teacher's conduct directly relates solely to the teacher and was only "tangentially related" to the student. To the contrary, the Court found that because the student is the subject of some interaction with a teacher that warranted preservation of the video for an official purpose (whether the student is being disciplined or is the victim of misconduct or is in an innocuous interaction that was nevertheless part of an official inquiry), the video was as "directly related" to the student as much as it was related to the teacher.

Accordingly, the Court concluded that a school district must not release the students' personally identifiable information – that is, the students' images on the video to the extent the students are reasonably identifiable – to anyone other than the parent or eligible student, absent one of the conditions listed under FERPA § 1232g(b)(1) (which do not include release of information to the press or to a public records requester), without proper consent, or a judicial order or subpoena.

While the Court held that the images of the students must be redacted, it held that the redacted video had to be provided. Under the RTKL, where a record contains information which is subject to access along with information which is not subject to access and the two cannot be physically separated, "the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access." 65 P.S. § 67.706. Accordingly, the Court concluded that the video itself was not exempt from disclosure and, to the extent the students' images can be redacted to remove their personally identifiably information, the video must be disclosed. *See* 65 P.S. §§ 67.102, 67.305(a)(3).

PRACTICAL ADVICE

With the *Miller* decision, the Pennsylvania Supreme Court has established that school surveillance videos, whether recording the interior of a school bus or school grounds, are public records, but that images of students are not subject to disclosure under FERPA (and, potentially, the constitutional right to informational privacy). Accordingly, when receiving a request, the Court has instructed school districts to redact students' images by, for example, blurring or darkening portions of the video revealing the students' identities, and to subsequently provide access to the redacted video. While this decision provides some clarity for school districts when dealing with requests for videos depicting students, school districts should consult with their solicitor prior to responding to such a request.

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Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

The Tri-State Area School Study Council at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact Dr. Diane Kirk, Director, 412.648.1716.